Appeal number
FTC/35/2010

Value Added Tax – input tax - MTIC fraud – admissibility of evidence – whether excluded by section 9(2) Crime (International Co-operation) Act 2003 – whether to be excluded as unreliable – whether to be excluded for non-compliance with direction

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

MEGANTIC SERVICES LIMITED **Appellant**

- and –

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

Tribunal: The Hon Mr Justice Arnold

Sitting in public in London on 15 and 16 December 2010

Andrew Trollope QC, Eleni Mitrophanous and Iain MacWhannell, instructed by Bark & Co, for the Appellant

John Black QC and Nicholas Chapman, instructed by HMRC Solicitors Office, for the Respondents

MR JUSTICE ARNOLD:

Introduction

1. This is an appeal by Megantic Services Ltd ("Megantic") from a decision of Judge Roger Berner sitting in the First-Tier Tribunal (Tax Chamber) ("the Tribunal") dated 31 December 2009 granting the Respondents ("HMRC") permission to rely upon a witness statement of Michael Downer dated 14 July 2009 as evidence in a pending appeal by Megantic to the Tribunal against a decision by HMRC dated 21 May 2007 to disallow claims by Megantic to recover input tax in respect of the months ended 31 May 2006 and 30 June 2006. On 8 March 2010 the judge granted Megantic permission to appeal against his decision. The main ground of appeal concerns the effect of section 9(2) of the Crime (International Co-operation) Act 2003 ("the 2003 Act"), which Megantic contends prevents HMRC from using the evidence in question for the purposes of Megantic's appeal. In addition Megantic relies on two other grounds of appeal.

Background

2. The basis for HMRC's decision to disallow Megantic's claims was that, they assert, the relevant transactions in respect of which the input tax was claimed to be recoverable were connected with so-called Missing Trader Intra-Community ("MTIC") fraud and that Megantic knew, or should have known, that the transactions were connected with the fraudulent evasion of VAT.

3. MTIC fraud typically operates as follows. A supplier on the continent sells wholesale to an importer at a zero rate of VAT. The importer then sells the goods, which typically are high value, low volume items such as mobile telephones, to a first line buffer company. This transaction has full rate VAT charged upon it. As the importer has acquired the goods with 0% VAT and sold them on with 17.5% VAT, it owes HMRC a substantial sum as VAT output tax. The importer then goes missing or simply defaults on its VAT liabilities. The first line buffer company then sells on the goods for a nominal mark up to a further buffer company which does the same. Although VAT is charged at a full rate on these onward transactions, the buffers are in an essentially VAT neutral position as they only have to account to HMRC for the VAT on the very small difference between their buying and selling price. The final buffer company sells on to an exporter (frequently referred to as the repayment trader or broker) who buys the goods with full rate VAT charged upon them but sells them to a purchaser on the continent (which is sometimes the same company that supplied the goods to the importer in the first place) zero-rated. As the exporter has paid full rate VAT on its acquisition but a zero rate on its supply, it claims a substantial credit from HMRC in respect of its input tax.

4. Mr Downer is a Higher Officer of HMRC. From April 2002 to August 2004 and from August 2005 to the date of his statement, he was a member of HMRC's MTIC Team. In his statement, Mr Downer analyses documents relating to 37 chains of transactions in which Megantic was involved. By way of example, the first chain relates to Megantic's sales invoice 882 dated 10

May 2006 in respect of 2,300 Nokia 9300i mobile telephones. According to Mr Downer's analysis, the chain of transactions concerning these telephones began and ended with the same company, SM Systems International Ltd, a BVI company based in Dubai. During the course of the chain money passed through a number of companies with shared addresses and/or the same director in a very short time period. Mr Downer expresses the view that the chain appears to be contrived and indicative of a carousel. He goes on to analyse, and expresses similar views about, 36 other chains of transactions. Finally, he draws some overall conclusions.

5. Mr Downer exhibits to his statements copies of a large number of documents which he has analysed. It is these documents which are at the heart of this appeal. As was explained in another statement served on behalf of HMRC, that of Andrew Letherby dated 1 June 2009, these documents were obtained by HMRC from a copy of the hard disk of a server belonging to First Curacao International Bank NV ("FCIB").

6. FCIB was a bank established in the Netherlands Antilles. On 6 September 2006 the Investigation Service of the Tax and Customs Administration ("FIOD") in the Netherlands took action against FCIB. Two persons were arrested, a number of premises were searched and some 2300 GB of digital information were seized, including the contents of the hard disk of the FCIB server located in premises at Berg en Dal in the Netherlands. The hard disk contains records stored by two software systems, BankMaster Plus and DataStore. The former include FCIB's account transaction records and the latter its digital archive records.

7. In January 2007 the Dutch Public Prosecutor agreed in principle to provide a copy of the contents of the FCIB server to HMRC on receipt of a letter of request from the Revenue & Customs Prosecutions Office ("RCPO"). On 17 December 2007 the RCPO submitted a letter of request to the FIOD ("the Request"). I shall have to consider the terms of Request below, but I note at this stage that it referred to 20 separate investigations by HMRC into MTIC fraud involving a considerable number of individuals and companies.

8. The Request was executed on 28 March 2008 when the FIOD supplied the RCPO with an external hard disk drive containing images of the hard disk of the FCIB server. Between 1 April 2008 and 23 June 2008 Mr Letherby commissioned, designed and built a replica of the FCIB server. He then loaded the data obtained from the FCIB server onto the replica server. The data was encrypted. The suppliers of the software in question made the data available in a readable format between 25 and 30 June 2008 (BankMaster) and 15 and 17 July 2008 (DataStore). Between then and 19 September 2008 Mr Letherby tested the system to ensure that the data had not been damaged or altered.

9. Mr Downer explains that he inspected a first tranche of records from the replica server relating to transactions involving Megantic in October 2008 and a second tranche in February 2009 in order to prepare his statement. His statement was served on 21 July 2009.

10. Although Megantic's objection is directed at Mr Downer's witness statement, it is plain that Megantic would raise the same objections to any attempt by HMRC to rely upon the documents which he exhibits themselves. I shall refer to Mr Downer's statement and the exhibited documents collectively as "the FCIB evidence".

The Tribunal Rules

11. The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) include the following provisions:

"**Case management powers**

5.(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—

(a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;

…

(d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;

…

Evidence and submissions

15.(1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Tribunal may give directions as to—

(a) issues on which it requires evidence or submissions;

(b) the nature of the evidence or submissions it requires;

(c) whether the parties are permitted or required to provide expert evidence, and if so whether the parties must jointly appoint a single expert to provide such evidence;

(d) any limit on the number of witnesses whose evidence a party may put forward, whether in relation to a particular issue or generally;

(e) the manner in which any evidence or submissions are to be provided, which may include a direction for them to be given—

(i) orally at a hearing; or

(ii) by written submissions or witness statement; and

(f) the time at which any evidence or submissions are to be provided.

(2) The Tribunal may—

(a) admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom; or

(b) exclude evidence that would otherwise be admissible where—

(i) the evidence was not provided within the time allowed by a direction or a practice direction;

(ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or

(iii) it would otherwise be unfair to admit the evidence.

(3) The Tribunal may consent to a witness giving, or require any witness to give, evidence on oath, and may administer an oath for that purpose."

The judge's decision

12. In his decision the judge decided that section 9(2) of the 2003 Act did not prevent HMRC from using the FCIB evidence for the purposes of Megantic's appeal to the Tribunal. In this connection he held that it was sufficient that HMRC had confirmed that they had the consent of the Dutch authorities to the use of information from the FCIB server, and he refused an application by Megantic for an order that HMRC disclose the terms of that consent. He also decided that the FCIB evidence should not be excluded on the grounds that it was unreliable or that its admission was barred by earlier directions of the Tribunal. In this connection he held that the evidence was relevant, that Megantic's objections to it went to the weight to be attached to it rather than to its admissibility, that it was not barred by the earlier directions and that HMRC's delay in producing it did not justify its exclusion.

Principles applicable to appeals from case management decisions of the Tribunal

13. Section 11(1) of the Tribunals, Courts and Enforcement Act 2007 provides for a right of appeal to the Upper Tribunal "on any point of law arising from a decision made by the first tier tribunal other than an excluded decision". Section 12(1) and (2) provide:

> "(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal–
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
>
> (b) if it does, must either–
>
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
>
> (ii) re-make the decision."

14. The decision which is the subject of the present appeal was a case management decision. In *Goldman Sachs International v Revenue and Customs Commissioners* [2009] UKUT 290 (TCC), [2010] STC 763 Norris J held:

> "22. On this appeal, the questions which I therefore have to address are whether in the first tier tribunal there is an error of law in its decision; secondly, whether that error vitiates the decision or undermines it to such a degree that in pursuance of the overriding objective it ought to be set aside; thirdly, to decide whether to remit or to remake any such decision. Without seeking to gloss what are the plain words of the statute, because these are early days in the relationship between the first tier and the upper tribunal I should perhaps emphasise two principles which I have endeavoured to adopt in approaching the appeal.
>
> 23. First, I think the Upper Tribunal should exercise extreme caution in entertaining appeals on case management issues. Mr Gammie QC for HMRC drew my attention to the decision of the Court of Appeal in *Fattal v Walbrook Trustee (Jersey) Ltd* [2008] EWCA Civ 427, [2008] All ER (D) 109 (May) not as establishing any novel proposition but as containing in [33] the following convenient statement from the judgment of Lawrence Collins LJ:
>
> > 'I do not need to cite authority for the obvious proposition that an appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge.'

24. I am clear that that principle applies with at least as great, if not greater, force in the tribunals' jurisdiction as it does in the court system.

25. The second observation I would make is that I do not consider that there is any substantial difference between 'reviewing' the decision and 'remaking' the decision of the first tier. That is because, in remaking the decision, the decision of the judge of the first tier tribunal is to be accorded respect. That judge was a judge appointed for his specialist knowledge; that judge was one who daily deals with cases of the type under appeal and who, in making an assessment, can draw upon a depth of practical experience in the conduct of such cases…"

First ground of appeal: the FCIB evidence is inadmissible by virtue of section 9(2) of the 2003 Act

15. Megantic's first ground of appeal is that the FCIB evidence is inadmissible by virtue of section 9(2) of the 2003 Act and that the judge made an error of law in deciding otherwise. In order to explain the issues which arise in relation to this ground of appeal, it is first necessary to set out the legal framework.

The 1959 Convention

16. The European Convention on Mutual Assistance in Criminal Matters agreed at Strasbourg on 20 April 1959 ("the 1959 Convention") is a convention concluded under the auspices of the Council of Europe. Under the Convention the Contracting Parties undertook to afford each other mutual assistance with regard to criminal investigations and proceedings. An Additional Protocol was agreed at Strasbourg on 17 March 1978 concerning fiscal offences. It is not necessary for present purposes to refer to the details of either of these agreements.

The 1990 Act

17. The Criminal Justice (International Co-operation) Act 1990 ("the 1990 Act") was passed, in the words of the long title, "to enable the United Kingdom to co-operate with other countries in criminal proceedings and investigations", among other purposes. Its passage enabled the United Kingdom to ratify the 1959 Convention.

18. Part I of the 1990 Act was entitled "Criminal Proceedings and Investigations". It included the following provisions:

"Service of overseas process in United Kingdom

1.(1) This section has effect where the Secretary of State receives from the government of, or other authority in, a country outside the United Kingdom -

(a) a summons or other process requiring a person to appear as defendant or attend as a witness in criminal proceedings; or

(b) a document issued by a court exercising criminal jurisdiction in that country or territory and recording a decision of the court made in the exercised of that jurisdiction,

together with a request for it to be served on a person in the United Kingdom.

(2) The Secretary of State may cause the process or document to be served by post or, if the request is for personal service, direct the chief officer of police for the area in which that person appears to be to cause it to be personally served on him.

…

Overseas evidence for use in United Kingdom

3.(1) Where on an application made in accordance with subsection (2) below it appears to a justice of the peace or a judge or, in Scoland, to a sheriff or a judge–

(a) that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed, and

(b) that proceedings in respect of the offence have been instituted or that the offence is being investigated,

he may issue a letter ('a letter of request') requesting assistance in obtaining outside the United Kingdom such evidence as is specified in the letter for use in the proceedings or investigation.

(2) An application under subsection (1) above may be made by a prosecuting authority or, if proceedings have been instituted, by the person charged in those proceedings.

(3) A prosecuting authority which is for the time being designated for the purposes of this section by an order made by the Secretary of State by statutory instrument may itself issue a letter of request if–

(a) it is satisfied as to the matters mentioned in subsection (1)(a) above, and

(b) the offence in question is being investigated by the authority or the authority has instituted proceedings in respect of it.

(4) Subject to subsection (5) below, a letter of request shall be sent to the Secretary of State for transmission either-

(a) to a court or tribunal specified in the letter and exercising jurisdiction in the place where the evidence is to be obtained; or

(b) to any authority recognised by the government of the country or territory in question as the appropriate authority for receiving requests for assistance of the kind to which this section applies.

(5) In cases of urgency a letter of request may be sent direct to such a court or tribunal as is mentioned in subsection (4)(a) above.

(6) In this section 'evidence' includes documents and other articles.

(7) Evidence obtained by virtue of a letter of request shall not without the consent of such an authority as is mentioned in subsection (4)(b) above be used for any purpose other than that specified in the letter; and when any document or article obtained pursuant to a letter of request is no longer required for that purpose (or for any other purpose for which such consent has been obtained), it shall be returned to such an authority unless that authority indicates that the document or article need not be returned.

…."

The BOC *case*

19. In *BOC Ltd v Instrument Technology Ltd* [2001] EWCA Civ 854, [2002] QB 537 the Court of Appeal held section 3(7) of the 1990 Act did not prevent the use of evidence obtained by means of letters of request in civil proceedings without the consent of the foreign authority. In that case the claimants commenced proceedings against the defendants alleging that the defendants had been involved in fraud and bribery and obtained a freezing order. One of the defendants was later charged with criminal offences. The police sent a letter of request to Switzerland for evidence to be obtained for the criminal investigation and prosecution. The evidence obtained pursuant to the request revealed three bank accounts controlled by two of the defendants, the existence of which they had not disclosed in response to the freezing order. This evidence was disclosed to the claimants who applied for a further freezing order covering the three bank accounts. The claimants had not sought or obtained the consent of the Swiss authorities to this use of the evidence. The defendants appealed against the continuation of the further freezing order on the ground that it was based on evidence the use of which was prohibited by section 3(7). The Court of Appeal dismissed the appeal.

20. The main judgment was given by Mummery LJ. Having set out section 3(7), he made three points:

"12. First, the provisions in this Part of the 1990 Act are confined to mutual assistance in criminal proceedings and in the investigation of criminal offences. There is no reference at all to mutual assistance in civil proceedings or to the use of evidence in civil proceedings.

13. Secondly, the sections do not expressly provide that the evidence requested and supplied shall be inadmissible as evidence in civil

> proceedings or that its use in such proceedings would be a contempt of court. No penalty, sanction or other consequence of any kind is expressly attached to contravention of the prohibition in section 3(7). This is in contrast to the provisions in section 18 in Part I of the Criminal Procedure and Investigations Act 1996 to the effect that it is a contempt of court for a person knowingly to use or disclose an object or information recorded in it if the use or disclosure is in contravention of an obligation of confidentiality imposed by section 17 (see section 18(1)) and that information is inadmissible as evidence in civil proceedings if to adduce it would, in the opinion of the court, be likely to constitute a contempt (see section 18(9)).
>
> 14. Thirdly, section 3(7) does not expressly identify the person or persons who are prohibited from using the evidence for a purpose different from that specified in the letter of request. It does not expressly refer to the use of derivative evidence by a third person i.e. by one who has been supplied with the information by the person who has obtained it pursuant to a letter of request."

21. He went on to construe section 3(7) as follows:

> "32. As to section 3(7) the principal difficulty with the contention that it prohibits the claimants from using the evidence in their civil proceedings for fraud is that the relevant provisions of the 1990 Act are only concerned with the investigation and prosecution of criminal proceedings. Section 3 is not directed at obtaining evidence for use in civil proceedings; so, it may be asked, why should there be any prohibition of its use in such proceedings?
>
> 33. The scope of the prohibition must be coloured by the context of the relevant provisions of the 1990 Act. In my view, the width of the prohibition is implicitly restricted to the use of information by the prosecuting authority or the defendant in criminal investigations and proceedings. The provisions are aimed at collaboration in criminal proceedings. It is not therefore surprising to find that the provisions of the 1990 Act are silent on both (a) the use of documents and information in civil proceedings and (b) the use of documents and information by someone other than the person making a letter of request in the context of the investigation and prosecution of crime."

22. Kay LJ concurred at [35]:

> "I agree with the judgment of Mummery LJ and I would only wish to add one other consideration. If section 3(7) of the 1990 Act was held to provide the blanket prohibition in both criminal and civil proceedings contended for by Mr Ralls, then I can see no logical reason why it would not continue to apply even after the evidence has been made public at a criminal trial. Mr Ralls recognised that in respect of civil proceedings once the evidence is in the public forum, it would be impossible to exclude that evidence for example, in proceedings by the victim seeking to recover his loss. In criminal

proceedings the fact that the evidence had been given publicly in other criminal proceedings would not permit the court to hear that evidence if its use had not been sanctioned by the foreign authority either by the inclusion of such matters in the letter of request or by subsequent consent. If it were otherwise it would defeat the very object of the legislation. Hence if the concession made by Mr Ralls is right, as I consider it plainly is, a distinction between the applicability of section 3(7) to criminal proceedings and civil proceedings is inevitable. The only sensible distinction is that the subsection applies to criminal proceedings but not to civil proceedings. This is the conclusion to which Mummery LJ has come in his judgment. I too would dismiss the appeal."

The 2000 Convention

23. By act dated 29 May 2000 the Council of the European Union established in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union ("the 2000 Convention"). The 2000 Convention includes the following provisions:

"*Article 1*

Relationship to other conventions on mutual assistance

1. The purpose of this Convention is to supplement the provisions and facilitate the application between the Member States of the European Union, of:

(a) the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, hereinafter referred to as the 'European Mutual Assistance Convention';

(b) the Additional Protocol of 17 March 1978 to the European Mutual Assistance Convention;

(c) the provisions on mutual assistance in criminal matters of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders (hereinafter referred to as the 'Schengen Implementation Convention') which are not repealed pursuant to Article 2(2);

…

Article 3

Proceedings in connection with which mutual assistance is also to be afforded

1. Mutual assistance shall also be afforded in proceedings brought by the administrative authorities in respect of acts which are punishable under

the national law of the requesting or the requested Member State, or both, by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters.

2. Mutual assistance shall also be afforded in connection with criminal proceedings and proceedings as referred to in paragraph 1 which relate to offences or infringements for which a legal person may be held liable in the requesting Member State."

The 2001 Protocol

24. By act dated 16 October 2001 the Council of the European Union established in accordance with Article 34 of the Treaty on European Union the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union ("the 2001 Protocol"). The 2001 Convention includes the following provisions:

"*Article 1*

Request for information on bank accounts

1. Each Member State shall, under the conditions set out in this Article, take the measures necessary to determine, in answer to a request sent by another Member State, whether a natural or legal person that is the subject of a criminal investigation holds or controls one or more accounts, of whatever nature, in any bank located in its territory and, if so, provide all the details of the identified accounts. The information shall also, if requested and to the extent that it can be provided within a reasonable time, include accounts for which the person that is the subject of the proceedings has powers of attorney.

2. The obligation set out in this Article shall apply only to the extent that the information is in the possession of the bank keeping the account.

3. The obligation set out in this Article shall apply only if the investigation concerns:

- an offence punishable by a penalty involving deprivation of liberty or a detention order of a maximum period of at least four years in the requesting State and at least two years in the requested State, or

- an offence referred to in Article 2 of the 1995 Convention on the Establishment of a European Police Office (Europol Convention), or in the Annex to that Convention, as amended, or

- to the extent that it may not be covered by the Europol Convention, an offence referred to in the 1995 Convention on the Protection of the European Communities' Financial

Interests, the 1996 Protocol thereto, or the 1997 Second Protocol thereto.

4. The authority making the request shall, in the request:

- state why it considers that the requested information is likely to be of substantial value for the purpose of the investigation into the offence,

- state on what grounds it presumes that banks in the requested Member State hold the account and, to the extent available, which banks may be involved,

- include any information available which may facilitate the execution of the request.

…

Article 2

Requests for information on banking transactions

1. On request by the requesting State, the requested State shall provide the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more accounts specified in the request, including the particulars of any sending or recipient account.

2. The obligation set out in this Article shall apply only to the extent that the information is in the possession of the bank holding the account.

3. The requesting Member State shall in its request indicate why it considers the requested information relevant for the purpose of the investigation into the offence.

…

Article 3

Requests for the monitoring of banking transactions

1. Each Member State shall undertake to ensure that, at the request of another Member State, it is able to monitor, during a specified period, the banking operations that are being carried out through one or more accounts specified in the request and communicate the results thereof to the requesting Member State.

2. The requesting Member State shall in its request indicate why it considers the requested information relevant for the purpose of the investigation into the offence.

3. The decision to monitor shall be taken in each individual case by the competent authorities of the requested Member State, with due regard for the national law of that Member State.

..."

25. It can be seen that, in broad terms, Article 1 enables the requesting State to ask the requested State whether the suspect holds or controls bank accounts at any bank located in the latter's territory; Article 2 enables the requesting State to ask the requested State for details of past transactions involving specified accounts; and Article 3 enables the requesting State to ask the requested State to monitor future transactions involving specified accounts.

The 2003 Act

26. The 1990 Act was largely repealed and replaced by the 2003 Act. According to its long title, the 2003 makes provision "for further co-operation with other countries in respect of criminal proceedings and investigations", among other things. Part 1 of the 2003 Act is entitled "Mutual assistance in criminal matters". It implements *inter alia* the mutual legal assistance provisions of the Convention Implementing the Schengen Agreement of 14 June 1985, the 2000 Convention and the 2001 Protocol.

27. Chapter 1 of Part 1 is entitled "Mutual service of process etc". It includes the following provisions:

"**Service of overseas process**

1.(1) The power conferred by subsection (3) is exercisable where the Secretary of State receives any process or other document to which this section applies from the government of, or other authority in, a country outside the United Kingdom, together with a request for the process or document to be served on a person in the United Kingdom.

(2) This section applies–

(a) to any process issued or made in that country for the purposes of criminal proceedings,

(b) to any document issued or made by an administrative authority in that country in administrative proceedings,

(c) to any process issued or made for the purposes of any proceedings on an appeal before a court in that country against a decision in administrative proceedings,

(d) to any document issued or made by an authority in that country for the purposes of clemency proceedings.

(3) The Secretary of State may cause the process or document to be served by post or, if the request is for personal service, direct the chief officer

of police for the area in which that person appears to be to cause it to be personally served on him.

…"

28. Chapter 2 of Part 1 is entitled "Mutual provision of evidence". It includes the following provisions:

"*Assistance in obtaining evidence abroad*

Requests for assistance in obtaining evidence abroad

7.(1) If it appears to a judicial authority in the United Kingdom on an application made by a person mentioned in subsection (3)–

(a) that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed, and

(b) that proceedings in respect of the offence have been instituted or that the offence is being investigated,

the judicial authority may request assistance under this section.

(2) The assistance that may be requested under this section is assistance in obtaining outside the United Kingdom any evidence specified in the request for use in the proceedings or investigation.

(3) The application may be made–

(a) in relation to England and Wales and Northern Ireland, by a prosecuting authority,

(b) in relation to Scotland, by the Lord Advocate or a procurator fiscal,

(c) where proceedings have been instituted, by the person charged in those proceedings.

(4) The judicial authorities are–

(a) in relation to England and Wales, any judge or justice of the peace,

(b) in relation to Scotland, any judge of the High Court or sheriff,

(c) in relation to Northern Ireland, any judge or resident magistrate.

(5) In relation to England and Wales or Northern Ireland, a designated prosecuting authority may itself request assistance under this section if–

(a) it appears to the authority that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed, and

(b) the authority has instituted proceedings in respect of the offence in question or it is being investigated.

'Designated' means designated by an order made by the Secretary of State.

(6) In relation to Scotland, the Lord Advocate or a procurator fiscal may himself request assistance under this section if it appears to him–

(a) that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed, and

(b) that proceedings in respect of the offence have been instituted or that the offence is being investigated.

(7) If a request for assistance under this section is made in reliance on Article 2 of the 2001 Protocol (requests for information on banking transactions) in connection with the investigation of an offence, the request must state the grounds on which the person making the request considers the evidence specified in it to be relevant for the purposes of the investigation.

…

Use of evidence obtained

9.(1) This section applies to evidence obtained pursuant to a request for assistance under section 7.

(2) The evidence may not without the consent of the appropriate overseas authority be used for any purpose other than that specified in the request.

(3) When the evidence is no longer required for that purpose (or for any other purpose for which such consent has been obtained), it must be returned to the appropriate overseas authority, unless that authority indicates that it need not be returned.

…"

29. The RCPO is a designated prosecuting authority for the purposes of section 7(5) of the 2003 Act. It can be seen that the wording of section 9(2) of the 2003 Act is very similar to the wording of the first part of section 3(7) of the 1990 Act.

30. Chapter 4 of Part 1 of the 2003 Act is entitled "Information about banking transactions". It includes the following provisions:

"*Requests for information about banking transactions for use in UK*

Information about a person's bank account

43.(1) If it appears to a judicial authority in the United Kingdom, on an application made by a prosecuting authority, that–

(a) a person is subject to an investigation in the United Kingdom into serious criminal conduct,

(b) the person holds, or may hold, an account at a bank which is situated in a participating country, and

(c) the information which the applicant seeks to obtain is likely to be of substantial value for the purposes of the investigation,

the judicial authority may request assistance under this section.

(2) The judicial authorities are–

(a) in relation to England and Wales, any judge or justice of the peace,

(b) in relation to Scotland, any sheriff,

(c) in relation to Northern Ireland, any judge or resident magistrate.

(3) If it appears to a prosecuting authority mentioned in subsection (4) that paragraphs (a) to (c) of subsection (1) are met, the authority may itself request assistance under this section.

(4) The prosecuting authorities are–

(a) in relation to England and Wales and Northern Ireland, a prosecuting authority designated by an order made by the Secretary of State,

(b) in relation to Scotland, the Lord Advocate or a procurator fiscal.

(5) The assistance that may be requested under this section is any assistance in obtaining from a participating country one or more of the following–

(a) information as to whether the person in question holds any accounts at any banks situated in the participating country,

(b) details of any such accounts,

(c) details of transactions carried out in any period specified in the request in respect of any such accounts.

(6) A request for assistance under this section must–

(a) state the grounds on which the authority making the request thinks that the person in question may hold any account at a bank which is situated in a participating country and (if possible) specify the bank or banks in question,

(b) state the grounds on which the authority making the request considers that the information sought to be obtained is likely to be of substantial value for the purposes of the investigation, and

(c) include any information which may facilitate compliance with the request.

(7) For the purposes of this section, a person holds an account if–

(a) the account is in his name or is held for his benefit, or

(b) he has a power of attorney in respect of the account.

In relation to Scotland, a power of attorney includes a factory and commission.

Monitoring banking transactions

44.(1) If it appears to a judicial authority in the United Kingdom, on an application made by a prosecuting authority, that the information which the applicant seeks to obtain is relevant to an investigation in the United Kingdom into criminal conduct, the judicial authority may request assistance under this section.

(2) The judicial authorities are–

(a) in relation to England and Wales, any judge or justice of the peace,

(b) in relation to Scotland, any sheriff,

(c) in relation to Northern Ireland, any judge or resident magistrate.

(3) If it appears to a prosecuting authority mentioned in subsection (4) that the information which it seeks to obtain is relevant to an investigation into criminal conduct, the authority may itself request assistance under this section.

(4) The prosecuting authorities are–

(a) in relation to England and Wales and Northern Ireland, a prosecuting authority designated by an order made by the Secretary of State,

(b) in relation to Scotland, the Lord Advocate or a procurator fiscal.

(5) The assistance that may be requested under this section is any assistance in obtaining from a participating country details of transactions to be carried out in any period specified in the request in respect of any accounts at banks situated in that country."

31. Chapter 6 of Part 1 is entitled "Supplementary". It includes the following definitions in section 51(1):

> "In this Part–
>
> …
>
> 'the 2001 Protocol' means the Protocol to the Mutual Legal Assistance Convention, established by Council Act of 16th October 2001 (2001/C326/01),
>
> 'administrative proceedings' means proceedings outside the United Kingdom to which Article 3(1) of the Mutual Legal Assistance Convention applies (proceedings brought by administrative authorities in respect of administrative offences where a decision in the proceedings may be the subject of an appeal before a court),
>
> …
>
> 'clemency proceedings' means proceedings in a country outside the United Kingdom, not being proceedings before a court exercising criminal jurisdiction, for the removal or reduction of a penalty imposed on conviction of an offence,
>
> 'country' includes territory,
>
> 'court' includes a tribunal,
>
> 'criminal proceedings' include criminal proceedings outside the United Kingdom in which a civil order may be made,
>
> 'the Mutual Legal Assistance Convention' means the Convention on Mutual Assistance in Criminal Matters established by Council Act of 29th May 2000 (2000/C197/01),
>
> 'the Schengen Convention' means the Convention implementing the Schengen Agreement of 14th June 1985."

The XYZ *case*

32. In *XYZ v Her Majesty's Revenue and Customs* [2010] EWHC 1645 (Ch) XYZ had been appointed as the liquidator of ABC Ltd after ABC Ltd had been wound up on the petition of HMRC, which was the only creditor. ABC Ltd was alleged to have been party to a VAT fraud. (Although not specified in the

judgment, it appears that this was MTIC fraud.) The liquidator applied under section 236 of the Insolvency Act 1986 for the disclosure by HMRC of information obtained from the Netherlands under a letter of request dated 17 December 2007. (This is in fact the same as the Request which features in the present case.) The information requested consisted of data obtained by the Dutch authorities from the computer server of "a bank operating out of the Netherlands Antilles". (Although it is not identified in the judgment, the bank was FCIB and the server was the same server as features in the present case.) The liquidator wished to use the information to claim compensation from those responsible for the fraud. (Although this is not spelt out in the judgment, it seems likely that the liquidator was considering suing the directors of ABC Ltd for breach of fiduciary duty and possibly third parties involved in the transactions for dishonest assistance.) The Secretary of State for the Home Department was joined as a respondent to the application.

33. The application gave rise to three issues: (1) was the use of the evidence by the liquidator for that purpose without the consent of the Dutch authorities precluded by section 9(2) of the 2003 Act; (2) even if that use was not precluded by section 9(2), should the court refuse the application on the ground that the RCPO had assured the Dutch authorities in the Request that the evidence would not be used for purposes other than the criminal investigations and proceedings referred to in the Request without their consent; and (3) had the Dutch authorities consented to the use of the evidence?

34. The application came before Nicholas Strauss QC sitting as a Deputy High Court Judge. As he explained, it was accepted by all parties before him that the decision of the Court of Appeal in the *BOC* case was binding on him with regard to the interpretation of section 9(2) of the 2003 Act. As he recorded, however, counsel for the Secretary of State informed him that the Secretary of State considered that *BOC* was wrongly decided, and would so contend on appeal, if necessary to the Supreme Court.

35. In the event, Mr Strauss was satisfied in the light of a letter from the Head of the Department of International Legal Assistance in Criminal Matters of the Dutch Ministry of Justice dated 4 November 2009, part of which is quoted in his judgment at [19], that the Dutch authorities did consent to the use of the evidence by the liquidator for the purposes described above. Accordingly, upon the liquidator undertaking not to use the evidence for any other purpose without the consent of HMRC or the Secretary of State, he ordered the disclosure sought.

36. Mr Strauss nevertheless observed as follows:

> "22. This matter having been resolved in effect by agreement … it would not ordinarily have been necessary for me to write a detailed judgment, but I am doing so because of the doubts expressed on behalf of the Secretary of State about the correctness of the decision in *BOC*. Neither the Secretary of State nor any other public body was invited to make representations in that case, and the Court of Appeal decided that the apparently clear terms of the statute were subject to an implicit

restriction, the effect of which was to permit the use of the documents for the purposes of civil proceedings.

23. The Secretary of State's argument (again without doing full justice to it) is that there was no justification for the implication drawn by the Court of Appeal. The wording of the sub-section is clear and unequivocal. Its obvious purpose is to ensure that foreign prosecution authorities, which might otherwise have been willing and anxious to provide documents and information to assist in the fight against crime, should not be deterred by any risk that such documents or information might be used for other purposes. The concerns expressed in the correspondence in this case demonstrate that there might well be legal issues under national laws (for example relating to obligations of confidence) which would prevent the disclosure of documents and information for the purposes of a criminal investigation, if they might then be used for other purposes, including civil litigation. It is important that the authorities here should be in a position to give an assurance that this could not happen.

24. The Court of Appeal based its conclusion mainly on the simple point that the 1990 Act was concerned with criminal proceedings only, not with civil proceedings; therefore it cannot have been intended to affect civil proceedings (see per Mummery LJ at [32]). It does not appear from the judgment that the arguments summarised briefly above were advanced by the defendants, or considered by the Court of Appeal. I have therefore set out in this judgment the difficulties to which *BOC* gives rise. Without expressing a view as to whether it is rightly decided, I think that it is very desirable that it should be reconsidered at an appellate level and that, if the issue arises again in the course of ordinary civil litigation, the Secretary of State should be notified and given an opportunity to intervene."

37. I was informed that the Secretary of State has been notified of the present appeal, but he has not intervened.

The issues

38. Megantic's first ground of appeal gives rise to two issues. First, is the use of the FCIB evidence by HMRC for the purpose of resisting Megantic's appeal to the Tribunal precluded by section 9(2) of the 2003 Act unless the Dutch authorities have consented? Secondly, if so, have they consented?

Is consent required?

39. It was common ground between counsel that *BOC* was wrongly decided, but is nevertheless binding upon me unless it can be distinguished. Counsel for Megantic submitted that it could be distinguished, whereas counsel for HMRC submitted that it could not.

40. Counsel for Megantic sought to distinguish the present case from *BOC* on three grounds. First, he submitted that the cases were factually different. In

particular, he pointed out that in *BOC* it was a third party which sought to use the evidence, not the prosecuting authority itself. I cannot see, however, that this factor was material to the Court of Appeal's reasoning, which was squarely based upon its interpretation of the 1990 Act.

41. Secondly, counsel for Megantic submitted that, unlike Part I of the 1990 Act, Part 1 of the 2003 Act was not confined to criminal proceedings. On this basis, he argued that the reasoning of the Court of Appeal could not be applied to the 2003 Act. In support of this submission, he pointed out that, whereas section 1(1) of the 1990 Act only referred to "criminal proceedings" and "a court exercising criminal jurisdiction", section 1(2) also referred to "administrative proceedings". I do not accept this submission. Section 51(1) of the 2003 Act defines "administrative proceedings" as meaning "proceedings *outside the United Kingdom* to which Article 3(1) of the 2000 Convention applies [emphasis added]". This definition excludes domestic proceedings. Furthermore, it can be seen from Article 3(1) of the 2000 Convention that such proceedings are quasi-criminal in nature. They may be characterised by other legal systems as "administrative" because they involve administrative authorities, but nevertheless they involve "acts which are punishable under national law" and "may give rise to proceedings before a court having jurisdiction … in criminal matters". It follows that Part 1 of the 2003 Act, like Part I of the 1990 Act, is confined to proceedings which, so far as the United Kingdom is concerned, are criminal proceedings. This is particularly true with regard to the use of evidence obtained abroad in United Kingdom proceedings, which is what section 9(2) of the 2003 Act is concerned with.

42. Thirdly, counsel for Megantic relied on the fact that, unlike Part I of the 1990 Act, Part 1 of the 2003 Act implements the 2001 Protocol. He pointed out that Articles 1(3),(4) and 2(3) of the 2001 Protocol lay down specific requirements which must be satisfied by a request for details of bank accounts and banking transactions in order for the requested Member State to be obliged to provide the information. He submitted that it could not be correct to allow those requirements to be circumvented by permitting use of the information disclosed without the consent of the requested State.

43. Before addressing this submission, it is necessary to consider how Part 1 of the 2003 Act implements the 2001 Protocol in relation to requests to other Member States for information for use in the United Kingdom. As I read the various provisions, sections 43 and 44 of the 2003 Act implement Articles 1 and 3 of the 2001 Protocol respectively. As for Article 2 of the 2001 Protocol, this is implemented by section 7, hence the reference to Article 2 in section 7(7). Curiously, Chapter 4 of Part 1 appears not to include any counterpart to section 9(2) in Chapter 1. Counsel for Megantic submitted that sections 43 and 44 were supplementary to section 7 and hence that section 9(2) impliedly applied to requests under sections 43 and 44 as well as requests under section 7. I have some difficulty with this submission, since sections 43 and 44 appear to be drafted as free-standing provisions independent of section 7. It is not necessary for present purposes to come to a concluded view about this, however, since it is section 7 and Article 2 that appear to me to be relevant in the present case, rather than sections 43 and 44 and Articles 1 and 3. Whatever

may be the position in relation to sections 43 and 44, section 7 is expressly subject to section 9(2).

44. In any event, I cannot see that this point affects the reasoning of the Court of Appeal in *BOC*. The 2001 Protocol is confined to criminal investigations. It therefore does not detract from the proposition that section 9(2) is only concerned with use of the evidence in criminal investigations and proceedings, not with its use in civil proceedings.

45. In this connection, it should be borne in mind that it is a well-established principle of statutory interpretation that, where the courts have interpreted a statutory provision and Parliament subsequently uses the same words in the same or a similar context, Parliament is presumed to intend the words to bear the same meaning: see Bennion, *Statutory Interpretation* (5th ed, Lexis, 2008) at pages 599-604. It follows that Parliament is presumed when enacting section 9(2) of the 2003 Act to have intended that it be interpreted in the same manner as section 3(7) of the 1990 Act was interpreted in *BOC*. There is nothing in section 9(2) of the 2003 Act, or Part 1 of the 2003 Act more generally, or in the 2001 Protocol, to show that section 9(2) of the 2003 Act should be interpreted in a different manner to section 3(7) of the 2003 Act.

46. Accordingly, I conclude that the present case cannot be distinguished from *BOC*. It follows that, unless and until *BOC* is overruled, HMRC are not precluded by section 9(2) of the 2003 Act from using the FCIB evidence in civil proceedings such as Megantic's appeal to the Tribunal even if the Dutch authorities have not consented to that use.

47. Given that it is the contention of both parties before me that *BOC* was wrongly decided, however, it is right that I should nevertheless go on and decide whether, as HMRC contend, they do have the consent of the Dutch authorities.

Has there been consent?

48. I put the question in this way because the position has changed since the hearing before the judge in that HMRC have now disclosed the Request, the consent they rely upon and subsequent correspondence with the Dutch authorities which HMRC contend confirms the position.

49. *The Request*. The Request is contained in a letter from the Director of the RCPO, David Green QC, to the Department of International Legal Assistance of the Dutch Ministry of Justice. In the letter, the Director began by introducing himself and stating that he was empowered to make the request pursuant to section 7 of the 2003 Act. He went on to request assistance "in relation to a number of criminal investigations being conducted by Her Majesty's Revenue and Customs (HMRC) and criminal prosecutions being conducted by the Revenue and Customs Prosecutions Office (RCPO) for offences of fraudulent evasion of VAT/cheating the Public Revenue and/or money laundering".

50. Under the heading "Basis of the Request", the Director stated that he was making the request pursuant to *inter alia* the 1959 Convention with its Additional Protocol, the 2000 Convention and the 2001 Protocol.

51. Under the heading "Purpose of the Request", the Director stated that the RCPO was requesting an imaged copy of the FCIB server. He went on to explain why a conjoined Request was being made in respect of 20 different operations. In this context he stated (emphasis in the original):

> "As stated above, although core companies differ between the various operations, there is potential crossover with regards to the buffer companies. Submitting a conjoined LOR enables us to more easily see such linkages and to ascertain the full scope of FCIB account holdings within the various operations. This may lead to further enquiries and better understanding of common evidential links between each case. It will also enable a better appreciation of the full scale of FCIB activity in UK 'MTIC Fraud'.
>
> **Should there be a need to use the evidence obtained in support of investigations or prosecutions not named in this LOR then separate consent to do so will be requested from the Dutch investigating authorities**."

52. Under the heading "Background" the Director said that each of the operations related to an allegation of MTIC fraud. He explained briefly what MTIC fraud was and the use of FCIB accounts by many of those suspected of being involved.

53. Under the heading "Operations subject to this LOR" the Director gave details of 20 operations in the following format in each case: (1) suspects, (2) brief summary of the facts and (3) FCIB links. This section of the Request has been heavily redacted, but it can be seen that a considerable number of both individual suspects and companies were listed.

54. Under the heading "Assistance Requested", the Director listed forms of the assistance requested, starting with the supply of a copy of the FCIB server. This section of the Request includes the following paragraph (emphasis in the original):

> "As previously stated under the heading 'The individual operations' the FCIB has been a central factor in the majority of MTIC frauds. Holding an account with FCIB makes the mechanics of MTIC fraud and associated money laundering much easier. There are therefore reasonable grounds for believing that any person or company using the FCIB are knowing parties to MTIC and associated money laundering. I therefore wish to determine whether the server contains evidence of other MTIC fraud or money laundering outside of that detailed in this Letter of Request and I therefore seek your permission to do that. Unless we hear further we will assume such permission is granted once the server is obtained in execution of LOR.

> As stated under the heading 'The purpose of this LOR' should there be a need to use this evidence obtained in support of investigations or prosecutions **not** named in this LOR then separate consent to do so will be requested from the Dutch Investigating Authorities. This also applies to any fresh investigations commenced as a direct result of the material."

55. Under the heading "Consent to use the material for another purpose", the Director stated (emphasis added):

> "Under Domestic UK Law evidence obtained pursuant to a request for assistance may not, without the consent of the overseas authority, be used for any purpose other than that specified in the request. Consent is therefore sought for *all material obtained from the server provided to RCPO under this LOR (whether or not connected to the operations in this LOR)* to be used by HMRC for the purposes of establishing the assessment base or the collection or administrative control of tax.
>
> The information may also be used for the assessment of other levies, duties, and taxes and for the recovery of claims relating to certain levies, duties, taxes and other measures. In addition, it may be used in connection with judicial proceedings that may involve penalties, initiated as a result of infringements of tax law without prejudice to the general rules and legal provisions governing the rights of defendants and witnesses in such proceedings."

56. As Mr Strauss pointed out in *XYZ* at [9], this wording is based upon the language of Article 41(1) of Council Regulation 1798/2003/EC of 7 October 2003 on administrative cooperation in the field of value added tax. Neither side suggested that the Regulation was material to the issues in the present appeal, however.

57. The Request was sent with a covering letter from the RCPO's Letters of Request Administrator. This letter stated:

> "We note and understand that under Section 9(2) of the [2003 Act] the evidence so obtained cannot be used, without your consent, for any purpose other than that specified in the request."

58. *The Letter of Indemnity*. The consent relied upon by HMRC is contained in a Letter of Indemnity between the United Kingdom and the Kingdom of the Netherlands signed on 7 April 2008.

59. The Letter of Indemnity contains the following recitals:

> "The Netherlands and British authorities (FIOD ECD in the Netherlands and Her Majesty's Revenue and Customs (HMRC) in the United Kingdom) are investigating Missing Trader Intra Community (MTIC) fraud. The Dutch authorities have taken action against the First Curaçao International Bank (FCIB) which is believed to be involved in MTIC fraud. The United Kingdom are taking both

criminal and civil action against a number of traders who it is believed are involved in MTIC fraud. Substantial sums of money are involved in both the Netherlands and the United Kingdom.

HMRC have reason to believe that the FIOD has information - obtained through the Dutch criminal investigation into FCIB - that could be of use to both the criminal and civil investigations in United Kingdom. In relation to the criminal investigation a Letter of Request data 17 December 2007 has been submitted by the United Kingdom to the Netherlands requesting a copy of the banking servers for FCIB, the Request has been made under: [the 1959 Convention, 2000 Convention, 2001 Protocol and other international agreements].

In the Request the United Kingdom has asked the Netherlands for consent for HMRC to use the material:

- For the purposes of establishing the assessment base or the collection or administrative control of tax,
- For the assessment of other levies, duties, and taxes, for the recovery of claims relating to certain levies, duties, taxes and other measures,
- In connection with judicial proceedings that may involve penalties, initiated as a result of infringements of tax law.

At the advice of the Council of Attorneys-General, the office of the Netherlands Public Prosecutor has indicated that they will comply with their obligations under the Convention on Mutual Assistance and provide the material for use in United Kingdom's criminal investigations. The Request to use the material for civil purposes will be granted on condition that the British Government indemnifies the Netherlands Government from any consequences of successful compensation claims filed by the concerned parties for making information available in violation of statutory regulations."

60. The operative provisions of the Letter of Indemnity are as follows:

"1. The information will be provided to the United Kingdom for the civil purposes as set out above.

2. In respect of providing the material for use in United Kingdom civil proceedings, the United Kingdom hereby undertakes to indemnify The Netherlands for whatever The Netherlands may be found to be indebted to third parties by virtue of a judgment (which is no longer subject to appeal) rendered against The Netherlands by a competent Court of Law in respect of principle amount, interest and legal costs, in so far as these relate to damages that have occurred as a consequence of the possible unlawfulness of making this information available to the United Kingdom for use in civil proceedings.

3. The indemnity solely covers claims against The Netherlands unlawful disclosure of information to the United Kingdom for use in civil proceedings in the United Kingdom. The indemnity does not extend to cover claims against The Netherlands for the unlawful acquisition of the information.

4. As soon as The Netherlands authorities have knowledge of a (possible) claim against the Netherlands, which may be covered by the indemnity, The Netherlands authorities will duly notify the British authorities. The Netherlands will provide United Kingdom with all information relevant to the claim as well as all information possibly relevant to the defence against the claim. Furthermore, the United Kingdom will be entitled to take part in settlement negotiations, if any. No settlement will be concluded between The Netherlands and the third parties concerned without the prior written approval of the United Kingdom.

5. In the event a claim covered under the indemnity is instituted against The Netherlands in a Court of Law, the United Kingdom will have the opportunity to instruct their own counsel to review in advance all documents submitted to the court on behalf of The Netherlands. Should Dutch law allow, the United Kingdom may at its sole discretion, intervene in the proceedings or join in the proceedings as a co-defendant with The Netherlands.

6. This agreement shall be governed by the laws of England and Wales. The United Kingdom and The Netherlands submit to the jurisdiction of the competent Court of Law in England and Wales for any disputes or claims hereunder."

61. Counsel for Megantic complained that HMRC had not disclosed the correspondence leading to the Letter of Indemnity, and suggested that the Letter of Indemnity did not itself contain the consent of the Dutch authorities. I do not accept this suggestion. No doubt the Letter of Indemnity was preceded by correspondence, just as many written contracts are preceded by negotiating correspondence, but what matters is the final agreement. Paragraph 1 of the Letter of Indemnity plainly provides the consent of the Netherlands to the use of the information "for the civil purposes as set out above". Such consent is provided on terms that the United Kingdom indemnifies the Netherlands in accordance with paragraphs 2-5 of the Letter of Indemnity.

62. I note that it does not appear that the Letter of Indemnity was disclosed by HMRC in the *XYZ* case; but in my view the Letter of Indemnity provides a powerful illustration of the concerns expressed by the Secretary of State to Mr Strauss in that case regarding the decision in *BOC*.

63. *The issue as to the scope of the consent*. This is the second case in which the scope of the consent to use information from the FCIB server in civil proceedings granted by the Dutch authorities to HMRC pursuant to the Request and the Letter of Indemnity has been in issue. As indicated above, the first was the *XYZ* case. The issue in that case was whether the consent

extended to use of the information by a liquidator acting as HMRC's nominee as sole creditor to pursue claims with a view to recovering tax debts. As I have related, the Head of the Department of International Legal Assistance of the Dutch Ministry of Justice confirmed in a letter dated 4 November 2009 that this did fall within the scope of the consent which had been granted.

64. In the present case two issues as to the scope of the consent have been ventilated in correspondence between Megantic and HMRC and between HMRC and the Dutch authorities. The first is whether the consent extends to the use of information from the FCIB server by HMRC in defending appeals, such as the appeal by Megantic to the Tribunal, against tax assessments made by HMRC. The Dutch authorities have confirmed that this is the case, and Megantic does not now contend to the contrary.

65. The second issue is whether the consent extends to the use of the information in civil proceedings involving parties other than the individuals and companies named in the Request. Although the names of the individuals and companies in the Request have all been redacted, counsel for Megantic asserted that Megantic was not amongst those named and counsel for HMRC did not contradict that assertion. HMRC contends that the consent does extend to use of the information in civil proceedings of the kind specified in the Request involving other parties, while Megantic contends that it does not.

66. *Analysis*. In my judgment the correct starting point for the analysis is to consider the basis upon which the Dutch authorities consented to the use of information from the FCIB server by HMRC in civil proceedings. Counsel for HMRC submitted that the consent for use in civil proceedings which was requested by HMRC in the Request and granted by the Netherlands in the Letter of Indemnity was not requested or granted pursuant to the 1959 Convention, the 2000 Convention or the 2001 Protocol, all of which relate to assistance for the purpose of criminal investigations and proceedings. Rather, the consent was requested and granted as a matter of comity between nations: see Jones and Doobay, *Extradition and Mutual Assistance* (3rd ed, Sweet & Maxwell, 2004), pages 382-383. Counsel for Megantic disputed this, but advanced no coherent reason as to why it was incorrect. I therefore accept the submission made by counsel for HMRC.

67. The next stage is to determine the scope of the consent granted in the Letter of Indemnity. The effect of paragraph 1 of the Letter of Indemnity is that the Netherlands consents to the use of the information "for the civil purposes as set out above". This refers back to the paragraph in the recitals starting "In the Request". This paragraph is clearly intended to reiterate the request for use in civil proceedings which had been made in the Request. Accordingly, it is necessary to go back to the Request to see the scope of that request.

68. Counsel for Megantic relied upon the second paragraph under the heading "Purpose of the Request" quoted in paragraph 51 above and the second paragraph under the heading "Assistance Requested" quoted in paragraph 54 above as showing that HMRC had undertaken to the Dutch authorities to obtain separate consent for use of the information in relation to persons not named in the Request. In my judgment it is clear from the context and wording

of those paragraphs that they are confined to use of the information in criminal investigations and prosecutions.

69. Counsel for HMRC relied upon the section headed "Consent to use the material for another purpose" quoted in paragraph 55 above, and in particular on the words I have italicised. Those words make it clear that HMRC was requesting the consent of the Dutch authorities to the use of "all material obtained from the server … whether or not connected to the operations in [the Request]" for the purposes of tax assessment, tax collection and tax proceedings. Counsel for Megantic submitted that those words extended to use of the material for the purposes of different operations to those specified in the Request, but not use against different persons. I do not accept that submission. In my judgment consent was being requested to use of the material in any tax assessments, tax collections or tax proceedings to which the material might be relevant. That includes assessments, collections and proceedings involving persons other than those named in the Request. By the Letter of Indemnity the Netherlands gave that consent.

70. Counsel for Megantic submitted that it would be perverse to interpret the Request, and hence the Letter of Indemnity, as requiring further consent from the Dutch authorities to the use of information from the FCIB server for the purpose of criminal investigations and prosecutions directed against persons not named in the Request, but not for the purpose of civil proceedings against such persons. I disagree. In my judgment, it is perfectly rational for further consent to be required for criminal investigations and prosecutions, but not civil proceedings. Criminal investigations and prosecutions generally have more serious consequences for defendants than civil proceedings, and accordingly the procedural safeguards for defendants applying to the former are often more stringent than those applying to the latter.

71. Counsel for Megantic also relied upon the reference in the last paragraph of the recitals in the Letter of Indemnity to claims filed by "the concerned parties". In my judgment that does not assist Megantic. In context, it refers to any parties which allege that they have suffered damage as a result of alleged unlawful disclosure of the information by the Netherlands to the United Kingdom.

72. Furthermore, I consider that my interpretation of the Request and of the Letter of Indemnity is confirmed both by the letter from the Head of the Department of International Legal Assistance in Criminal Matters of the Dutch Ministry of Justice dated 4 November 2009 quoted by Mr Strauss in *XYZ* and by more recent correspondence disclosed by HMRC. So far as the former is concerned, the Dutch authorities evidently considered that the use of the information to pursue those responsible for the fraud, i.e. ABC Ltd's directors and possibly third parties, was within the scope of the consent.

73. As to the latter, in a letter dated 11 November 2010 and an email dated 18 November 2010 from HMRC to the Dutch Ministry of Justice, HMRC asked for confirmation as to the scope of the consent. The question posed in the letter dated 11 November 2010 was rather too broadly phrased, but this was clarified in the email dated 18 November 2010 (emphasis in the original):

> "On 7 April 2008 the Netherlands authorities gave permission to the UK to use the FCIB server material for three things, which are set out in bullet points in the Indemnity Agreement (attached). The first bullet point refers to '… the purposes of establishing the assessment base or the collection or administrative control of tax'. Do you agree that this covers tax appeals brought by taxpayers against decisions of HMRC either (i) to refuse claims of input VAT repayments or (ii) to raise assessment for tax considered to be due? In other words, as well as being able to use the FCIB server material to make decisions about tax, HMRC can be also used the FCIB server material to defend tax appeal proceedings would challenge those decisions.
>
> …
>
> The indemnity refers to the Letter of Request (LOR) from the UK dated 17 December 2007 (attached). Unfortunately that document is very long, but I refer you to page 86 and the section entitled 'Consent to use the material for another purpose'. This section asks for permission to use the server material provided under the LOR for (amongst other things) 'the purpose of establishing the assessment base or the collection or administrative control of tax'. The paragraph in the LOR specifies that the permission is sought to use the material '*whether or not connected to the operations*' set out in the LOR. It is not limited to the companies or persons named in the LOR. By the Indemnity Agreement the Netherlands Authorities granted permission as requested and in return the UK gave the Netherlands an indemnity against claims as set out in paragraphs 2 and 3 of the Indemnity Agreement.
>
> However please be assured that the UK is not suggesting that the Indemnity Agreement or Mr Coffeng's letter of the 4 November 2009 permits HMRC to disclose FCIB server material to third parties or their solicitors in any other case. Rather, we use the material only in proceedings in which HMRC is directly involved and which proceedings are appeals against our decisions to refuse to repay input tax or raise an assessment to input tax. However it is this limited use in tax proceedings is being challenged in case listed for hearing in December. It is being suggested that HMRC may use the material in making his decisions but not in defending its decisions in subsequent tax appeals. We fully understand that you have not given permission for HMRC to disclose material to third parties other than the very clearly limited permission set out in Mr Coffeng's letter of 4 November 2009 and we are not asking for an extension of that permission."

74. In a letter dated 23 November 2010 the Head of the Department of International Legal Assistance in Criminal Matters replied:

> "In your letter you ask us to confirm your understanding that our permission to use material contained within the FCIB Server includes use by HMRC of that material in any litigation in which HMRC is

> involved and that such litigation includes appeals by a taxpayer to an independent tribunal against a decision of HMRC to refuse a repayment of input VAT and any further appeals as well as litigation to recover a tax debt. From the emails [dated 18 November 2010] I understand that you do not intend to disclose the material to third parties other than mentioned in my letter of 4 November 2009. I understand that it was being suggested that HMRC may use the material to make its decisions only but not in defending its decisions in subsequent tax appeals.
>
> Herewith I can confirm that the permission as set out in my letter of 4th November 2009 includes the use of that material in the tax proceedings as mentioned in that letter in their entirety, i.e. in making decisions and subsequently in defending these decisions in subsequent tax appeals. The suggestion that the information can only be used by HMRC in making its decisions is unfounded."

75. Counsel for Megantic relied upon an interim response that had been given by the Dutch authorities in an email dated 17 November 2010, but in my judgment it is clear that that response was not merely an interim response but also was seeking clarification of the question posed in the letter dated 11 November 2010. That clarification was duly provided in the letter dated 18 November 2010.

76. Furthermore, I accept the explanation of counsel for HMRC that the query raised in the email dated 17 November 2010 related to the principle of speciality. This is the principle that, where a person is extradited for one offence, that person cannot subsequently be prosecuted for a different offence. This principle is reflected in English law in section 95 of the Extradition Act 2003. Translated into the context of the present case, this principle means that, as HMRC accept, they could not use information from the FCIB server for the purposes of civil proceedings for (say) sexual assault (even if that was within HMRC's remit, which it is not). That does not bear upon the present issue.

77. The definitive response of the Dutch authorities is contained in the letter dated 23 November 2010. Given the clear statement by HMRC in the email dated 18 November 2010 that it had sought permission to use the material "not limited to the companies or persons named" in the Request, I consider that the response shows that the Dutch authorities do consent to this.

Second ground of appeal: the FCIB evidence is unreliable

78. Megantic's second ground is that the FCIB evidence is unreliable and that the judge made an error in law in admitting it. Megantic contends that the FCIB evidence is unreliable for two reasons. First, because Mr Downer's evidence amounts to non-expert opinion. Secondly, because no positive evidence has been adduced by HMRC as to the authenticity, integrity or accuracy of the documents obtained from the FCIB server. On the contrary, Mr Letherby has stated in three witness statements in other proceedings (only one of which was shown to me) that some of the records are missing and others are damaged.

79. In my judgment there are two short answers to these contentions. First, the judge's decision to admit the evidence discloses no error of law. It was a case management decision which was well within the ambit of his discretion. I agree with the view expressed by Norris J in *Goldman Sachs* that this tribunal should exercise extreme caution before interfering with the Tribunal's case management decisions.

80. Secondly, rule 15(2)(a) of the Tribunal Rules allows the Tribunal to admit evidence whether or not the evidence would be admissible in a civil trial. It follows that the Tribunal is entitled to admit evidence which would not be admissible in a court and give it such weight, if any, as the Tribunal considers that it is worth. What weight should be given to the evidence is a matter for the Tribunal to decide in the light of all the evidence at the hearing. Even if Mr Downer is not qualified to give expert evidence, that would not prevent his opinion evidence being received by the Tribunal. As for the reliability of the FCIB evidence, Mr Letherby's statement in these proceedings does contain some evidence as to the reliability of the FCIB documents. Furthermore, I am quite unpersuaded that the other statement of Mr Letherby relied on by Megantic demonstrates beyond argument that the FCIB evidence is unreliable. It may well provide material for cross-examination of Mr Letherby in due course, but that is another matter.

81. I should mention for completeness that Megantic relied before the judge and in its notice of appeal and skeleton argument for the appeal on the absence of certification of the FCIB evidence under the Bankers' Books Evidence Act 1879, but counsel for Megantic did not in the end rely on this point in his oral submissions. In my judgment he was right not to do so for the reasons given in the skeleton argument of counsel for HMRC.

Third ground of appeal: admission of the evidence is precluded by an earlier direction of the Tribunal

82. Megantic's third ground of appeal is that the admission of the evidence was precluded by an earlier direction of the Tribunal and that the judge made an error of law in deciding to the contrary.

83. The earlier direction relied upon by Megantic is one given by Dr A.N. Brice dated 23 June 2008. By paragraph 3(a) of her directions of that date, Dr Brice directed that:

> "on or before 25 June 2008 the Respondents shall serve on the Appellant copies of the statements of all the witnesses and copies of all the documents upon which they intend to rely at the hearing of the appeal such statements and documents to be indexed and paginate and contained in serviceable ring binders; no further evidence except with the consent of the Tribunal".

84. Megantic's main complaint is that Mr Downer's statement was served over a year after the deadline specified in Dr Brice's direction in circumstances where, so Megantic contends, that direction was intended to give HMRC a

final chance to get its tackle in order. Again, there are two short answers to this complaint.

85. First, the judge's decision discloses no error of law. Once again, his decision was a case management decision with which this tribunal should be very slow to interfere.

86. Secondly, as the judge rightly pointed out in his decision, paragraph 3(a) of Dr Brice's direction itself provided for further evidence to be adduced by HMRC with the consent of the Tribunal and, even if it had not done so, paragraph 5(2) of the Tribunal Rules empowered the Tribunal to amend Dr Brice's directions. Either way, it was a matter for the judge to decide whether in all the circumstances it would be right to give HMRC permission to adduce the statement of Mr Downer out of time. He decided that it would. In this regard he attached importance to the facts that the FCIB evidence was clearly relevant to the issues and that the hearing of Megantic's appeal had not yet been fixed (an earlier hearing date having been vacated by Dr Brice) and thus Megantic would have time to respond to it. That reasoning seems to me to be unimpeachable.

87. Megantic also complains that the admission of the evidence places a heavy burden on it to analyse and reply to it. This was a factor that the judge took into account in reaching his decision. Furthermore, I consider that the right way for the Tribunal to deal with this is not to exclude the evidence altogether, but to make robust case management directions to keep the issues and the evidence within sensible bounds.

Conclusion

88. The appeal is dismissed.

Mr Justice Arnold

Release Date: 11 January 2011