[2101] UKUT 259 (TCC)
Appeal number: FTC/86/2011

VAT – MTIC – whether First-tier Tribunal misdirected itself on the meaning of the "only reasonable explanation" test and took too broad an approach– Kittel – Mobilx – whether trader should be prevented from relying on the legality of his transactions only to the extent that, had he conducted perfect due diligence on his suppliers, such due diligence would have indicated the fraud – Livewire considered - alleged reliance by trader on representations made by HMRC

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

NG INTERNATIONAL LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER
JUDGE TIMOTHY HERRINGTON

Sitting in public at 45 Bedford Square, London WC1 on 29 May 2012

Lawrence Power, instructed by JH Law Solicitors, for the Appellant

Philip Moser QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. NG International Limited ("NGI") appeals, with permission of this Tribunal, against the decision of the First-tier Tribunal ("FTT") (Judge Poole and Mr Holden) released on 3 September 2010 (TC00687; [2010] UKFTT (TC)), dismissing NGI's appeal.

2. The appeal concerns one of the now-familiar MTIC (missing trader intra-community) fraud cases. Essentially, NGI, a dealer in mobile phones, appealed to the FTT against the decision of HMRC to refuse VAT repayment claims in respect of the monthly accounting period ended 31 March 2006 and the three-monthly accounting period ended 30 June 2006. The repayment claims were in respect of 28 transactions and totalled £1,456,401.27. The case was one in which it was alleged that NGI's transactions traced directly back to defaulters; there was no allegation of "contra-trading".

3. Except in respect of a small amount of input tax that was not shown to have been attributable to the export sales of mobile phones, the FTT dismissed NGI's appeal. The FTT found that, firstly, there was fraudulent evasion of VAT connected to NGI's relevant transactions. The FTT went on to find that, although it considered that there were some strong indicators in some of the evidence from which it might be inferred that Mr Riyait, who was a shareholder of NGI and ran its business, was a knowing participant in the fraud, overall it did not consider that HMRC had satisfied the burden of proof in order to find actual knowledge. But the FTT concluded that the features of the transactions and the surrounding circumstances were such that NGI (through Mr Riyait) should have known that its purchases were connected to the fraudulent evasion of VAT.

4. It is from that latter finding of the Tribunal that NGI now appeals. It does so on a single ground permitted by Judge Wallace in this Tribunal. That ground is "that the FTT failed to direct itself properly as to the meaning of the only reasonable explanation for the circumstances being fraud and took too broad an approach".

Mobilx

5. The reference in the ground of appeal to the "only reasonable explanation" derives from the judgment of Moses LJ in the Court of Appeal in *Mobilx Ltd (in administration) v Revenue and Customs Commissioners and other appeals* [2010] STC 1436, with which Carnwath LJ and Sir John Chadwick agreed. That judgment was delivered on 12 May 2010, after the main hearing of this appeal in the FTT in March and April 2010. The FTT and the parties were aware of the *Mobilx* appeal, and the FTT accordingly deferred its own decision until after judgment in *Mobilx*, and following subsequent written submissions by the parties.

6. *Mobilx* (together with the joined appeals in *Blue Sphere Global Ltd* and *Calltel Telecom Ltd*) were the first MTIC cases to reach the Court of Appeal since the judgment of the European Court of Justice ("ECJ") in *Axel Kittel v Belgium; Belgium*

v Recolta Recycling SPRL (Joined cases C-439/04 and C-440/04) [2008] STC 1537. *Mobilx* remains the only Court of Appeal authority.

7. In what has come to be described as the Kittel principle, the ECJ set out in its judgment, at para 61, the circumstances in which the right to deduct VAT (and thus in the UK to recover input tax) as follows:

> "... where it is ascertained, having regard to objective factors, that the supply is to a taxable person who knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, it is for the national court to refuse that taxable person entitlement to the right to deduct."

8. In his judgment in *Mobilx* Moses LJ traced the history of the jurisprudence of the ECJ leading to *Kittel*. He concluded (at [41]) that *Kittel* represented a development of the law because it enlarged the category of participants to those who themselves had no intention of committing fraud but who, by virtue of the fact that they knew or should have known that the transaction was connected with fraud, were to be treated as participants.

9. In paragraphs [50] to [60] of his judgment, Moses LJ considered the meaning of "should have known". He first dealt with, and rejected, a submission that mere failure to take reasonable care should not lead to the conclusion that a trader is a participant in a fraud. He said (at [52]):

> "If a taxpayer has the means at his disposal of knowing that by his purchase he is participating in a transaction connected with fraudulent evasion of VAT he loses his right to deduct, not as a penalty for negligence, but because the objective criteria for the scope of that right are not met. It profits nothing to contend that, in domestic law, complicity in fraud denotes a more culpable state of mind than carelessness, in the light of the principle in *Kittel*. A trader who fails to deploy means of knowledge available to him does not satisfy the objective criteria which must be met before his right to deduct arises."

10. Lord Justice Moses then went on to consider the question of the extent of knowledge required for application of the Kittel principle. He was faced here with a challenge to a contention advanced by HMRC that the right to deduct may be denied if the trader merely knew or should have known that it was more likely than not that by his purchase he was participating in a transaction connected to fraudulent evasion of VAT. Essentially the contention was that it was sufficient to show that the trader should have known that he was running a risk that his purchase was connected with fraud.

11. Lord Justice Moses (at [55] – [56]) rejected that formulation as an infringement of the principle of legal certainty. It was not sufficient that a trader should have known that he was running a risk that by his purchase he *might* be taking part in a transaction connected with fraud. It must be established that the trader knew or should have known that by his purchase he *was* taking part in such a transaction. At [59] – [60] he said:

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

12. This analysis is instructive on two levels. First, it makes clear that the ambit of knowledge extends to all the circumstances that surround the transactions in question. Secondly, it draws a clear distinction between a test based on risk ("more likely than not"), which is rejected, and the simple *Kittel* test of "should have known". A trader should have known that his purchase was connected to fraudulent evasion of VAT if, viewed objectively, having regard to all the circumstances surrounding his transactions, he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion.

13. The test is thus clearly and simply defined. It is neither broad nor narrow. It is a test that must be applied by reference to all the relevant circumstances. As Moses LJ said (at [82]), having confirmed that the burden of proof is on HMRC:

> "But that is far from saying that the surrounding circumstances cannot establish sufficient knowledge to treat the trader as a participant. As I indicated in relation to the *BSG* appeal, tribunals should not unduly focus on the question whether a trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is that his transactions have been or will be connected to fraud. The danger in focussing on the question of due diligence is that it may deflect a tribunal from asking the essential question posed in *Kittel*, namely, whether the trader should have known that by his purchase he was taking part in a transaction connected with fraudulent evasion of VAT. The circumstances may well establish that he was."

14. In emphasising the requirement to consider all the surrounding circumstances, Moses LJ was echoing, and he specifically approved, the judgment of Christopher Clark J in *Red 12 Trading Ltd v Revenue and Customs Commissioners* [2010] STC 589 at [109] – [111]. Examining individual transactions on their merits does not require them to be regarded in isolation without regard to their attendant

circumstances or context. This includes circumstantial and "similar fact" evidence, looking at the totality of the deals effected by the trader and their characteristics, and at what the trader did or omitted to do, and what it could have done, together with the surrounding circumstances in respect of all of them.

NGI's appeal

15. NGI puts its ground of appeal as follows: The FTT failed to direct itself properly as to the meaning of the only reasonable explanation for the circumstances being fraud and took too broad an approach. NGI's case is that if there is more than one (reasonable) explanation which points towards legitimate trade then a trader cannot be said to have constructive knowledge of a fraud where in this case it was admitted by HMRC that 100% due diligence checks could not have detected the fraud and NGI relied on representations made by HMRC.

16. We had some difficulty discerning what elements of the FTT's approach were said to be too broad. We might have understood this if Mr Power had put his case on the basis that the FTT had taken account of irrelevant matters, but (rightly in our view) he did not. Instead, he submitted that in applying the test the tribunal must look at each of the individual facts and circumstances (Mr Power referred to issues – meaning those facts and circumstances that were in dispute), including each individual transaction, and then assess on the evidence whether there is a reasonable explanation for that fact, circumstance or transaction other than connection to fraud. When that individual assessment is made, the Tribunal should at that stage take a global view based on the individual conclusions.

17. We have no hesitation in rejecting that as an approach. In our view it is a meaningless gloss on the clear test as set out in *Kittel* and illuminated by Moses LJ in *Mobilx*. Just as the test in *Kittel* is simple and should not be over-refined, so too is the analysis in *Mobilx* of the test whether a trader should have known of the connection to fraud. It requires no further elaboration. The tribunal needs to consider all the relevant circumstances and then decide whether the trader should have known, by reference to those circumstances as a whole, whether the only reasonable explanation for them is that his transactions have been or will be connected to the fraudulent evasion of VAT.

Due diligence

18. The real basis of this appeal is in the submission by Mr Power that a person who has not taken all reasonable precautions is not automatically unable to rely on the legality of his own transactions. Rather, argues Mr Power, that person should only be prevented from doing so to the extent that, had it conducted perfect due diligence on its suppliers, such due diligence would have indicated the fraud by the missing traders.

19. This submission is founded upon the judgment of Lewison J (as he then was) in *Revenue and Customs Commissioners v Livewire Telecom Ltd* [2009] STC 643 where he said (at [87] and [88]:

> "[87] The taking of every reasonable precaution has sometimes been referred to as a 'positive duty'. This is, I think, potentially misleading. The taxable person does not owe a 'duty' to take precautions (unless it is a duty to himself). The taking of all reasonable precautions (and acting on the basis of what he discovers as a result of taking those precautions) provides him with an impenetrable shield against any attack by HMRC. The taking of every reasonable precaution is only a 'duty' in the sense that the so-called 'duty to mitigate' is a duty applicable to the recovery of damages.
>
> [88] At one stage, by reference to this supposed 'duty', Mr Anderson seemed to me to be submitting that if a taxable person failed to take every precaution that could reasonably be expected, he would automatically be deemed to be a participant in fraud and would forfeit his right to deduct input tax. This, he said, followed from the phraseology in para 56 of *Kittel* ('a person … must be regarded as a participant in the fraud'). However, as noted, an irrebuttable presumption imposing liability to VAT would fall foul of the principle of proportionality. In my judgment (as I think Mr Anderson in the end accepted) if a taxable person has not taken every precaution that could reasonably be expected of him, he will still not forfeit his right to deduct input tax in a case where he would not have discovered the connection with fraud even if he had taken those precautions."

20. In our view the reference in *Livewire* to every reasonable precaution cannot be equated solely with due diligence in the sense that this expression is commonly used in MTIC cases, namely the making of enquiries by a trader into his suppliers and customers. The taking of reasonable precautions includes the making of relevant enquiries, but it is not in any sense confined to those enquiries. It also includes reasonably having regard to all the relevant circumstances surrounding the trader's transactions.

21. No matter what due diligence a trader has undertaken, and no matter that the due diligence itself would not lead to a discovery of the fraud itself, if the trader should have concluded, by reference to all the surrounding circumstances, that there was no other reasonable explanation for those circumstances, taken as a whole, but that his transactions were connected to fraud, then he will not be entitled to deduct or recover the input tax on his purchase. All relevant circumstances must be taken into account, and all necessary inferences drawn. The question is whether the trader should have known of the connection to fraud having regard to all matters within the trader's knowledge and understanding at the relevant time, and what knowledge and understanding the trader ought reasonably, at the relevant time, to have obtained, either from making reasonable enquiries or from a reasonable analysis or appreciation of the implications of the surrounding circumstances.

22. On the other hand, the right to deduct input tax will not be forfeited even if reasonable precautions have not been taken, if the connection to fraud would not reasonably have been discovered if those precautions had been taken. In such a case the trader would not reasonably have been able to discern the connection to fraud from the surrounding circumstances known to him, and would not have been able to discover that connection from making reasonable enquiries, however extensive those

enquiries might have been. It could not in such a case be said that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with fraudulent evasion of VAT. There is in our judgment no difference in the approach adopted in this respect in *Livewire* from that in *Mobilx* or *Red 12*.

23. Mr Power referred us to a number of ECJ authorities, but in our view none of them can assist him. The reference in *Customs and Excise Commissioners and another v Federation of Technological Industries and others* (Case C-384/04) [2006] STC 1483 (a case concerning the power of the UK government to introduce the joint and several liability provisions of s 77A of the Value Added Tax Act 1994) to traders taking reasonable precautions to ensure they are trading in good faith (Advocate-General's opinion, para 28) is against the background of a duty to be imposed on traders to be vigilant and inform themselves as to the background of the goods in which they are trading. In any event, the reference to reasonable precautions in that case does not in any way confine those precautions to the carrying out of due diligence.

24. Mr Power also referred us to *Netto Supermarket GmbH & Co OHG v Finanzamt Malchin* (Case C-271/06) [2008] STC 3280, and in particular to the opinion of Advocate-General Mazák where, at para 45, he referred to a taxable person being expected to exercise all due diligence and care, and at para 46 to the taking of every reasonable precaution required. The Advocate-General also cites *Kittel* before concluding (at para 49) that a supplier who is unable even by exercising due commercial care to recognise (in that case) that the conditions for exemption were in reality not met, certainly meets the standards of acting in good faith and of diligence as envisaged by the ECJ case law. But there is nothing in these passages to suggest that merely following all reasonable due diligence procedures can be enough if the trader at the same time unreasonably fails to recognise that the only reasonable explanation for the surrounding circumstances is that the transactions are connected to fraud.

Extent of constructive knowledge required

25. We also reject Mr Power's argument that recovery of input tax can be denied only to the extent that, had the trader conducted perfect due diligence on its suppliers (or, as we have found, taken all reasonable precautions), the taking of such precautions would have indicated the fraud by the missing traders. We accept Mr Moser's argument in this respect that, following *Mobilx*, what needs to be demonstrated is that the trader should have known of the connection with fraud, and that it is not necessary to show constructive knowledge of the fraud by the missing traders as such.

26. In support of his submission, Mr Power again relied upon *Livewire*, this time on a passage of Lewison J's judgment commencing at [120]:

> "[120] In *Livewire*'s case the tribunal did not discuss the legal test of 'should have known'. There is no indication that it applied the wrong test. In its findings of fact it concluded (para 34):
>
> '34. …
>
> (8) We quite agree that the due diligence was flawed and we are surprised that the Appellant did not take this more seriously, particularly as they had already been victims of a fraud. We suspect that much of the due diligence was carried out because Customs asked to see it on their monthly visits, rather than because the Appellant thought it assisted them … It is worth pointing out that even if the Appellant had conducted perfect due diligence on its suppliers and customers it could not have indicated the fraud by the missing traders in the dirty chain …'
>
> [121] Mr Anderson criticised this conclusion because, he said, it concentrated too narrowly on the missing traders in the dirty chain. However, in the first place, on the basis of the tribunal's findings the only proven fraud was that of the missing traders in the dirty chain, so it was with that fraud that any connection was relevant. Second, Mr Anderson was unable to suggest any precautions that Livewire ought to have taken apart from investigating its own supply chain. Thus I cannot see that in reaching its conclusion in *Livewire'*s case, the tribunal was guilty of any legal error. The finding of fact by the tribunal in the third of the quoted sentences is, in my judgment, fatal to HMRC's appeal."

27. At first sight it might appear that Lewison J was suggesting that it would be necessary for it to be shown that due diligence could have indicated the actual fraud conducted by the missing traders themselves. But in our judgment the learned judge was not going that far. In this passage he was, in our respectful view, merely making the point that the tribunal had not made an error of law in itself referring to the missing traders in the dirty chain, because that was merely a description of the relevant fraud, which was the only proven fraud. Neither the tribunal, nor Lewison J, were suggesting that it is necessary to show that a trader should have known of the precise nature of the fraud; indeed that is plain from Lewison J's citation (at [103]) of the judgment of Millett J (as he then was) in *Agip (Africa) Ltd v Jackson* [1992] Ch 265 at [295] and his own reference to a trader "participating in a fraud, the precise details of which he does not and cannot know".

28. In the same way, as is apparent from the summary of the facts and findings in *Mobilx* given by Moses LJ at paras [77] to [80] of his judgment, in that case the identity of the missing traders and the precise nature of the fraud were not known to the trader. Mr Moser also referred us to two decisions of the Upper Tribunal, one of which, *Megtian Ltd (in administration) v Revenue and Customs Commissioners* [2010] STC 840, preceded *Mobilx* in the Court of Appeal, and the other, *POWA (Jersey) Ltd v Revenue and Customs Commissioners* [2012] UKUT 50 (TCC), which was post-*Mobilx*.

29. In *Megtian*, at [37] to [38], Briggs J said:

> "[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.
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> [38] Similarly, I consider that there are likely to be many cases in which facts about the transaction known to the broker are sufficient to enable it to be said that the broker ought to have known that his transaction was connected with a tax fraud, without it having to be, or even being possible for it to be, demonstrated precisely which aspects of a sophisticated multifaceted fraud he would have discovered, had he made reasonable inquiries. In my judgment, sophisticated frauds in the real world are not invariably susceptible, as a matter of law, to being carved up into self-contained boxes even though, on the facts of particular cases, including *Livewire*, that may be an appropriate basis for analysis."

30. In saying this, Briggs J was rejecting a submission on behalf of Megtian that the tribunal had made an error of law in taking an overall view of the transactions and not making a separate analysis of the fraudulent evasion of VAT by the missing trader and the dishonest cover-up of that fraud by the contra-trader, whilst acknowledging that this might, on the facts of a particular case, be an appropriate basis for analysis. But there is no suggestion in *Megtian* that *Livewire* went as far as to suggest that knowledge of the details of that fraud, including the identities of the participants, is a requirement.

31. That this is so is clearly expressed in *POWA*, where Roth J said (at [52]):

> "... I do not see that there is any requirement that PJL should reasonably have known the identity of the contra-trader. HMRC must establish that fraudulent evasion of VAT took place, and if the form of fraud involved was contra-trading then that is what they have to prove. But it is a misconception to consider that they must also establish that the party seeking to deduct input tax (i.e., here, PJL) should reasonably have known that its own transaction was connected to (or involved in) this particular form of missing trader fraud as opposed to another form."

32. It follows that we do not accept that the FTT made any error of law in these respects. Before the FTT Mr Power made a submission of no case to answer, based on his argument that if 100% due diligence could not identify the defaulting trader, there could be no case on constructive knowledge. In rejecting that argument the FTT referred to para [59] of *Mobilx*, and said:

> "It is clear from this passage that the scope of constructive knowledge is not limited to what the taxpayer could have found out about the particular fraud by making further enquiries; it is wider than that and

> encompasses the inferences that the taxpayer should have drawn from all the information at his disposal at the relevant time."

33. We agree. The FTT made no error of law.

Due diligence could not have detected the fraud

34. To the extent that Mr Power's argument was predicated on a submission that HMRC had admitted that "100% due diligence checks could not have detected the fraud" (and not could not have detected the defaulting trader), we reject that submission. The argument relied upon answers of HMRC officer Miss Bushby in cross-examination by Mr Power. The relevant part of the exchange was as follows:

> "Mr Power: Tell me what check I can do utilising the [VAT Notice] 726 that allows me to identify a defaulting trader three direct steps or four steps removed from my transaction.
>
> Miss Bushby: There isn't any ...
>
> Mr Power: ... So your answer was there isn't anything, any check that one can undertake in my position as a new broker to the market place that can give me 100% due diligence to identify a defaulting trader?
>
> Miss Bushby: No."

35. As Mr Moser submitted, these cross-examination questions and answers were wholly unremarkable. They do not support any broad assertion that it was admitted that "the fraud" was undetectable. On this basis the premise of NGI's ground of appeal cannot be made out.

36. Nor in any event, for the reasons we have given, could the ground of appeal have been sustained, even if it had been found that due diligence itself could not have uncovered the connection to fraud. Due diligence is not determinative. All the circumstances must be taken into account, including what could or could not be discovered by undertaking reasonable due diligence.

Reliance on HMRC

37. This element of the ground of appeal referred both to questions Mr Riyait had asked HMRC about the checks he was making, and the payment by HMRC of the VAT repayment claims for January and February 2006.

38. As we shall describe, there is no basis for this argument on the facts found by the FTT. But in any event, reliance on HMRC, even if it could be shown, would be only one factor amongst all the circumstances to be taken into account. There is, in our judgment, an important difference between the reason a trader might decide to enter into a particular transaction, or to continue trading generally, and the objective explanation for the circumstances surrounding the trader's transactions. The fact that a trader feels reassured by something said or done by HMRC, and as a result decides to enter into the trade or continue trading, is not determinative. It remains necessary to consider, objectively, whether the trader should have known that there was no

reasonable explanation for the circumstances surrounding the transaction other than it was connected to fraud.

39. The FTT made no finding of fact that Mr Riyait relied on representations made by HMRC. It found, at [114], that Mr Riyait's emphasis throughout was on satisfying HMRC rather than exercising his own independent judgment. He showed (see [116]) a "marked lack of curiosity" even about the slight information that was supplied to him. As regards the VAT repayments for January and February 2006, it was suggested to the FTT during the hearing that these had provided Mr Riyait with reassurance that it was appropriate to continue trading with one of its suppliers, G Comms. The FTT rejected that suggestion, instead making the finding of fact that the real reason for the recommencement of trading with G Comms was as set out in Mr Riyait's witness statement, namely that he did not want to miss the opportunity of more easy profits, and his minimal further due diligence (in the form of a credit report) did not provide any actual evidence of fraud at G Comms which would have prevented him from doing so (para [147]).

40. It is clear therefore that the FTT rejected any suggestion that NGI's reason for the relevant trades was its reliance upon representations made by HMRC. But, as we described above, even if NGI had taken comfort in this way, that would not have prevented the FTT from reaching the conclusion that NGI should have known of the connection to fraud. If any support for such an obvious conclusion is needed, the same observation was made by Floyd J in the High Court in *Mobilx* ([2009] STC 1107, at [79] to [80]).

Did the FTT apply a "more likely than not" test?

41. In the course of his submissions, although this had not been raised as a ground of appeal, Mr Power submitted that the acceptance by the FTT of HMRC's submission to it that the evidence, along with inferences to be drawn from the evidence, made it "more likely than not" that NGI was a knowing participant in the fraud (see para [100] of the FTT decision) was itself an error of law. He argued that this was the wrong test, relying on what Moses LJ said in *Mobilx* at [60], which we have cited above, and at [77], namely that the question is not whether the trader should have known that its transactions were more likely than not to be connected with fraud, but whether the trader should have known that its transactions were connected to fraud.

42. No application was made for this separate ground of appeal to be admitted, and we would have been disposed to refuse permission had such an application been made. But we shall nevertheless deal with the point. It is entirely misconceived. The FTT was not here setting out the legal test for means of knowledge; it was stating the standard of proof it had to apply in evaluating the evidence. The question of the standard of proof had been the subject of extensive submissions by the parties, as appears from the immediately preceding discussion of the issue by the FTT at [93] and [94] of its decision. It is self-evident that at [100] the FTT was doing nothing more than repeating HMRC's submissions on the evidence, including on the standard of proof, and in the context of an allegation of actual knowledge. The expression

"more likely than not" is here used, therefore, in that sense, and not in the sense of applying that as the test of constructive knowledge. The FTT had made it very clear that it was aware that the test of constructive knowledge is that the trader should have known that by its purchase it was participating in a transaction that was connected with fraudulent evasion of VAT, applying *Kittel* and *Mobilx*. That was how the FTT directed itself at the outset (at [7]) and how it expressed its conclusion (at [186]).

Conduct of the appeal

43. In similar vein, although not advanced as a ground of appeal, and without any application being made for it to be admitted as such, Mr Power submitted that the fact that the hearing had taken place before the judgment in *Mobilx* in the Court of Appeal had been delivered meant that certain lines of questioning had not been advanced. Mr Power said that his approach to the witness evidence had therefore been based on *Kittel* and earlier authority, in particular *Livewire*, and had laid emphasis on due diligence.

44. We do not admit this as a ground of appeal. We cannot see how, where the parties were given the opportunity to make submissions after the hearing on the basis of the published judgment in *Mobilx*, such a circumstance could at this stage found a submission that the FTT decision was wrong in law. In any event, we do not consider that there is any basis for NGI's argument that *Mobilx* made a radical change to the evidence that might fall to be considered by a tribunal. It is perfectly clear, and expressly confirmed by the approval in *Mobilx* of what Christopher Clark J said in *Red 12*, that all the circumstances, including due diligence but with no undue weight attached to that aspect, have to be taken into account, and that the evidence required to be examined and tested on that basis. This complaint is therefore, in our judgment, without merit.

The decision of the FTT

45. As we have described, we reject NGI's submissions that the FTT applied the wrong test. In our judgment the FTT directed itself properly on the law. It then carried out a thorough evaluation of the evidence before it by reference to a number of particular issues which it conveniently summarised under separate headings (paras [102] to [184]). Those issues comprehensively covered the circumstances of the relevant trading transactions of NGI. They included both due diligence carried out on NGI's customers and suppliers, relevant features of NGI's trading activities and other relevant circumstances.

46. In its conclusions at [186] the FTT stated that it had built up an overall picture taking account of the various elements it had summarised, and that it had found that, based on the evidence presented, the case of actual knowledge had not been made out. But it found that the features of the transactions themselves and the surrounding circumstances were such that NGI should have known that its purchases were connected to the fraudulent evasion of VAT.

47. Mr Power criticised the FTT for not having developed and explained in its conclusions how it was applying the "no reasonable explanation" test in *Mobilx*. But it did not need to do so, having already, in rejecting NGI's submission of no case to answer, referred explicitly to the formulation of that test in *Mobilx* (FTT decision, para [98]). There can be no question but that the FTT applied the correct legal test, and its conclusions, based on the evidence that it received, are unimpeachable.

Decision

48. For the reasons we have given, we dismiss this appeal.

ROGER BERNER

UPPER TRIBUNAL JUDGE

TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE

RELEASE DATE: 24 JULY 2012