TC01993

Appeal number: TC/2009/10385

Procedure – application for stay pending determination of references to CJEU – whether First-tier Tribunal bound by Mobilx – yes – whether determination of references would materially assist determination of appeal – no – whether expedient to order a stay – no - tribunal required to find facts – whether Uk observations on referred cases should be disclosed – no – whether questions should be referred to the CJEU – no – applications dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

COAST TELECOM LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at 45 Bedford Square, London WC1 on 9 March 2012

Andrew Young, instructed by Dass, Solicitors, for the Appellant

Howard Watkinson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Coast Telecom Limited ("Coast") makes a number of applications:

(1) First, that proceedings in this appeal be stayed until judgments have been released by the Court of Justice of the European Communities ("CJEU") in five references to that Court: C-80/11, *Mahagében*; C-142/11, *Dávid*; C-285/11, *Bonik*; C-324/11, *Tóth*; and C-563/11, *SIA Forvards v.*

(2) Secondly, that HMRC either (a) provide disclosure of the written observations they have submitted to the CJEU in the *Bonik* reference together with the notes they have prepared on the oral observations which they intend to make in *Mahagében* and *Dávid*, or (b) provide an affidavit from a senior person within the organisation stating that, in these observations/notes, no submissions have been made regarding what HMRC consider to be the direct interpretation of the case of *Kittel v Belgium; Belgium v Recolta Recycling SPRL* (Joined cases C-493/04 and C-440/04) [2008] STC 1537.

(3) Thirdly, the Tribunal is invited to consider whether it should itself make a reference to the CJEU.

Background

2. This is one of the long line of cases commonly referred to as missing trader intra-community or MTIC fraud cases. The appeal is against a decision of HMRC to deny Coast its right to deduct input tax of £5,569,117.15 claimed in the VAT periods 02/06 and 05/06. The decision was made on the grounds, as alleged by HMRC, that Coast's transactions were connected with the fraudulent evasion of VAT and that Coast knew or should have known of that connection. HMRC rely on the ECJ's decision in *Kittel* for the legal basis of their decision.

3. HMRC say that this case is one of real factual complexity. The allegation is that 42 of Coast's transactions involving the sale of mobile telephones were part of an overall scheme to defraud the revenue. Amongst other things, HMRC say, the case involves an alleged contra trader and several allegedly fraudulent defaulting traders, issues arising from Coast's use of an account with the First Curacao International Bank ("FCIB"), alleged contrived features of the deal chains in which Coast was involved, consideration of the role of other traders in the chains of transactions, consideration of Coast's due diligence procedures and a determination of the facts as to Coast's state of knowledge regarding the transactions. HMRC say that the bulk of the Tribunal's task will be to make findings of fact upon the matters in issue from a complex evidential tapestry that will be put before it.

4. From a case management perspective, this appeal is now ready to be listed for the substantive hearing. Directions leading to the hearing were agreed by the parties and approved by the Tribunal on 24 June 2011. Those directions required the parties to provide dates to avoid and a time estimate for the final hearing by 30 September 2011. Those dates have been provided by HMRC. All the witness evidence is in, and

Coast have confirmed that all matters are in issue in the appeal (none have been conceded) and that all of HMRC's witnesses are required to attend for cross-examination.

Application for a stay

5. I start by reminding myself of the proper approach to be adopted in considering whether to grant a stay in the absence of agreement between the parties. Although neither party referred to it, I consider that the correct approach is to be derived from *Revenue and Customs Commissioners v RBS Deutschland Holdings GmbH* [2007] STC 814 where the Court of Session as the Court of Exchequer in Scotland held (at [22]) that a tribunal or court might sist, or stay, proceedings against the wish of a party if it considers that a decision in another court would be of material assistance (not necessarily determinative) in resolving the issues before the tribunal or court in question, and that it is expedient to do so.

6. Mr Young, for Coast, submitted that it would be an error of law for the Tribunal to consider itself bound by the judgment of the Court of Appeal in *Mobilx Ltd (in Administration) and others v Revenue and Customs Commissioners* [2010] EWCA Civ 517. The Tribunal should not thereby close its mind to consideration that a higher court's legal ruling (namely that of the CJEU in the references in question) could lead to it giving a judgment contrary to EU law.

7. In support of his submission Mr Young referred to s 2(1) of the European Communities Act 1972, regarding the direct legal effect to be given to EU treaties, and the ruling of the ECJ in *Simmental (No 2)* [1978] ECR 629 as to the duty of a national court to give effect to provisions of Community law, if necessary refusing of its own motion to apply conflicting provisions of national legislation. This extends to judicial interpretation of Community law: see *Rheinmuhlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33, a case concerning the discretion of a lower court to make a reference to the (then) ECJ. The binding nature of rulings of a superior national court does not deprive the inferior courts of their power to refer to the CJEU questions of interpretation of Community law in appropriate circumstances.

8. This theme has been restated by the ECJ on a number of occasions. Thus, more recently, in *Elchinov v Natsiona zdravnoosiguritelna kasa* [2010] All ER (D) 112, the ECJ held (at [32]) that EU law precludes a national court which is called upon to decide a case referred back to it by a higher court hearing an appeal from being bound, in accordance with national procedural law, by legal rulings of the higher court, if it considers, having regard to the interpretation which it has sought from the Court, that those rulings are inconsistent with EU law. At [30], the ECJ also said that the national court must, if necessary, disregard the rulings of the higher court if it considers, having regard to the interpretation of the provisions at issue by the ECJ, that they are not consistent with EU law.

9. Mr Young referred me to the decision of Judge Bishopp in the Upper Tribunal in *Mynt Ltd and others v Revenue and Customs Commissioners* (PTA/140/2011)

where, in the context of appeals to the Upper Tribunal against decisions of the First-tier Tribunal, the judge concluded that it would be inappropriate to refuse a stand over and require the appellants to argue their cases on the basis of what the Court of Appeal said in *Mobilx*, when the CJEU has accepted and is determining references which the judge was satisfied may provide answers of relevance to the outcome of the appeals.

10. Mr Young made submissions on the interpretation of the judgment of the ECJ in *Kittel*, focussing on the context of the questions raised in that case, which referred to "fraud committed by the seller". He argued that the context of the conclusion expressed by the ECJ in *Kittel* (at [56] – [59] makes it plain that the conclusion is not intended to apply more widely than to a "witting" counterparty to a fraudulent transaction. This is in contrast to the wider interpretation of the *Kittel* judgment in *Mobilx*.

11. Mr Young also referred me to the French text of the judgment in *Kittel*, and the use of the phrase "impliquée dans", translated in the English version as "connected with", fraudulent evasion of VAT. He argued, by reference to a later case, *Criminal proceedings against R, other parties: Generalbundesanwalt beim Bundgerichtshof and Finanzamt Karlsruhe-Durlach* (Case C-285/09) (judgment 7 December 2010), that the ECJ has had second thoughts about the accuracy of the way in which it rendered in English the phrase "il participait à une operation impliquée dans une fraude à la TVA" in *Kittel*. Instead, Mr Young argued, the translation of "impliquée dans une fraude à la TVA" in the *R case* has been translated as "participating in a transaction aimed at evading VAT".

12. Similar arguments to those put forward by Mr Young have recently been addressed by the Upper Tribunal (Newey J and Judge Walters) in *Revenue and Customs Commissioners v S&I Electronics plc* [2012] UKUT 87 (TCC), a decision that was released on 12 March 2012, very shortly after the hearing of these applications. There it was argued, on an appeal from a decision of the First-tier Tribunal in an MTIC case, that the approach adopted by the Court of Appeal in *Mobilx* was wrong and that the Upper Tribunal should not follow it. The Upper Tribunal rejected that argument, for broadly the same reasons as those given by Roth J in *POWA (Jersey) Ltd v Revenue and Customs Commissioners* [2012] UKUT 50 (TCC). At [39] of *POWA*, Roth J observed that:

> "the judgment of the Court of Appeal is clear authority, binding on the Upper Tribunal, that the fact that the trader claiming credit for input tax did not deal directly with a fraudulent trader but was more remote in the chain does not preclude his being denied repayment under the rationale of *Kittel*."

13. In *S&I* the Upper Tribunal referred to what Chadwick LJ (with whom Arden and Smith LJJ agreed) said in *Condé Nast Publications Ltd v Customs and Excise Commissioners* [2006] STC 1721 (at [44]). In particular, the circumstances where binding precedent might not apply would include a case where a judgment of the ECJ had been the subject of further consideration – and consequent interpretation, explanation or qualification – by the ECJ (or CJEU), but that this would not apply

where the CJEU had not had such an opportunity. A court might be persuaded that there are strong grounds for thinking that the earlier decision is wrong as a matter of EU law, and in those circumstances it may think it right to refer the point to the CJEU for a preliminary ruling. But it should not refuse to follow the earlier decision merely because, on the same material and the same arguments, it is satisfied that a different conclusion should have been reached.

14. Like Mr Young, counsel for *S&I* had made submissions on the basis of a number of ECJ cases, including *Elchinov*. The Upper Tribunal, however, concluded that those cases did not undermine what Chadwick LJ said in *Condé Nast*.

15. The issue of the correct translation of "impliquée dans" was also raised in both *POWA* and *S&I*. In both cases the argument that this confined *Kittel* to cases where the fraud was perpetrated by the immediate supplier to the trader claiming input tax recovery was rejected.

16. On this basis, I conclude that, unless and until the CJEU decides that the *Kittel* test must be interpreted in a way that is incompatible with the judgment of the Court of Appeal in *Mobilx*, this Tribunal, like the Upper Tribunal, is bound by *Mobilx*. This is unaffected by the references that have been made to the CJEU; the Upper Tribunal in both *POWA* and *S&I* came to that conclusion notwithstanding its awareness that a reference had been made in *Bonik* (see *POWA*, at [40] and *S&I*, at [59]).

17. The question remains whether, in the context of the references that have now been made to the CJEU, this appeal should be stayed pending the determination of those references.

18. Mr Watkinson, for HMRC, submitted that, beyond similarity at the high level of deduction of input tax, there is nothing from the facts or questions referred to the ECJ to suggest that the CJEU will call into question the interpretation of *Kittel* in *Mobilx*. The following summary is taken from the notice of objection filed by HMRC:

> (1) *Mahagében* concerns the denial of the right to deduct on the grounds of failure to comply with requirements imposed by the Hungarian authorities to the effect that a taxable person should hold documents over and above an invoice to prove a taxable supply, make enquiries of its supplier that has issued the invoice as to its VAT status and verify that its supplier has complied with the law.
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> (2) *Dávid* is a further reference concerning invoicing. It concerns the denial of the right to deduct on the basis of an invoice issuer being unable to guarantee that the sub-contractors involved in a transaction had complied with national invoicing requirements and whether such a denial must be based on the awareness of the taxable person claiming the right to deduct of unlawful behaviour in the sub-contracting chain.
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> (3) *Bonik* is a Bulgarian reference concerning the absence of actual supply and whether a taxable person who did not know and could not know about the fraudulent acts and intentions of other parties in a chain of transactions can be denied the right to deduct.

(4) *Tóth* is a further reference concerning invoicing. It concerns a situation in which a taxable person had claimed the right to deduct based on invoices issued by a company that, prior to full performance of a contract or the issuing of invoices, had its operating licence withdrawn by a municipal authority. The referring court also asks whether the addressee of an invoice is guilty of a "lack of care" where he does not verify information in relation to the issuer of the invoice and whether this can demonstrate that the addressee knew or ought to have known that he was participating in a transaction involving the fraudulent evasion of VAT.

(5) *SIA Forvards v* is a further reference concerning invoicing. It concerns a denial of the right to deduct input tax on the grounds that the details on the invoice relied upon by the taxpayer to enable it to exercise that right do not appear to relate to a supply which actually took place either factually or in law.

19. This summary, in particular, does not do justice to the terms of the reference in *Bonik*, which is the most relevant of the references to the circumstances of this appeal. *Bonik* has raised a number of questions, of which in the current context, Q5 is the most material:

> "Under the common system of value added tax and the provisions of Article 168 and 178 of Directive 2006/, is the right of the trader to recognition of VAT payments in respect of a given transaction
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> To be assessed solely in relation to the specific transaction to which the trader is a party, having regard to the trader's intention to be a party to the transaction, and/or
>
> To be assessed taking account of all transactions, including upstream and downstream transactions, which form a supply chain of which the transaction in question is part, having regard to the intentions of the other parties in the chain, which the trader does not know and/or about which he cannot find out, or to the acts and/or omissions of the issuer of the invoice and of other parties in the chain, namely his upstream suppliers, whom the person to whom the supply is made cannot control and of whom he cannot demand particular conduct, and/or
>
> To be assessed taking account of fraudulent acts and intentions of other parties in the chain, of whose participation the trader did not know and about whose acts and intentions it cannot be established whether he was able to find out, regardless of whether those acts or intentions date from before or after a given transaction?"

20. As Judge Bishopp found in *Mynt*, some of the questions raised in these references are of limited, if any, relevance to this appeal. But the question whether the right to input tax deduction or recovery is to be assessed by reference to the specific transaction to which the trader is party or to all transactions in a chain (the "privity of contract" issue) is clearly of relevance.

21. Judge Bishopp based his order for a stand over in *Mynt* partly on his finding that the CJEU had accepted and was determining references which, he was satisfied, may provide answers of relevance to the appeals in question. This seems to me, with respect, to put the test, as encapsulated in *RBS Deutschland*, a little too low. The

question is not whether the determination of another court might provide assistance, but whether it will provide material assistance. It is not for me to attempt to predict the outcome of the CJEU's consideration of the questions raised on the references before it. It is possible, of course, that the Court of Justice might arrive at an interpretation of the EU law that is inconsistent with that of the Court of Appeal in *Mobilx*, but it is equally possible that it will not. Were the question to have been an entirely open one, I can see the force of an argument that a judgment of the Court of Justice would provide material assistance, and that a proper course, subject to the question of expediency, would be to await such a decision. But here the question is not entirely open; this Tribunal is, unless and until the CJEU determines otherwise, bound to follow *Mobilx*.

22. There is a further significant difference between this case and that of *Mynt*. *Mynt* concerns an appeal to the Upper Tribunal on questions of law. The facts in *Mynt* and the joined cases have already been determined by the First-tier Tribunal. Where issues of law alone remain in dispute it can be seen that the imminent consideration of the position under EU law could justify a stay of the appeal proceedings. But the same does not hold good where the facts remain to be determined. Many of the questions raised in the references are themselves fact-specific. Accordingly, I do not consider that it would be expedient to order a stay in circumstances where the facts remain to be found by the first instance tribunal.

23. Mr Watkinson submitted that it would not be just and equitable to order a stay where a case involved consideration of a complex matrix of fact that concerned events as long ago as 2006. There was a risk of prejudice to witness evidence as memories faded. I agree. I also agree that this is a prejudice that affects both parties; Coast requires all HMRC's witnesses to attend for cross-examination, so the memories of HMRC witnesses, in particular those who dealt with Coast at the relevant time, will be a material factor. The memories of Coast's own witnesses will also be important. The ascertainment of the facts before recall becomes more difficult will assist both the parties and the Tribunal.

24. It follows that I am not satisfied that the determination by the CJEU of the references that have been made to it will materially assist this Tribunal in its own consideration of this appeal. Nor, even if I had been so satisfied, would I have considered it expedient for a fact-finding tribunal to order a stay in circumstances where very material findings of fact fall to be made.

25. For these reasons, I dismiss Coast's application for a stay.

Disclosure

26. Coast's application for disclosure is in order to ascertain the relevance of the references to this appeal. It says that, in circumstances where written observations have been made by HMRC in *Bonik*, and oral observations are to be made in *Mahagében* and *Dávid*, but HMRC refuse to disclose the observations or notes of them, Coast suspects that HMRC might be arguing something different before the Tribunal than has been put to the CJEU.

27. This application is, in my view, hopelessly misconceived. The observations made in one case by HMRC cannot have any relevance to the determination by the Tribunal of another case. That determination must be based on the arguments raised by the respective parties in that particular case, the merits of which can be assessed by the Tribunal. Nor, in any event, is there any sensible basis for Coast's suspicion; the arguments of HMRC as to the relevance of the references are clear, and I have been able to reach my own conclusion on the respective submissions made by the parties without recourse to any external material such as observations made in respect of the references.

28. I dismiss Coast's application for disclosure.

Reference to the CJEU

29. That leaves the question of a possible reference at this stage of questions to the CJEU in relation to this appeal. At the hearing I indicated that I would not be prepared to make such a reference. I can explain my reasons quite shortly.

30. In each of *POWA* and *S&I* the Upper Tribunal was urged to make a reference in circumstances where it was not prepared to depart from *Mobilx*. In each case it declined to do so. I intend to adopt the same course. As the Upper Tribunal said in *S&I* (at [60]), in the absence at least of further guidance from the CJEU, the Upper Tribunal should take the law to be as explained in *Mobilx*. This Tribunal should do likewise.

31. Furthermore, it would not in my view be appropriate for a reference to be made in circumstances where findings of fact, particularly as to knowledge and means of knowledge, require to be made. In *H P Bulmer Ltd and Showerings Ltd v J Bollinger SA and Champagne Lanson père et fils* [1974] EWCA Civ 14, Lord Denning MR set out the guidelines to be followed. In relation to the jurisdiction of the CJEU, and before it the ECJ, the language of what is now Article 267 of the EU Treaty was the same in Article 177 of the Treaty before the Court in *Bulmer*, namely that a national court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling.

32. As Lord Denning made plain, the test is one of necessity, not desirability or convenience. As he said, there are cases where the point, if decided one way, would shorten the trial greatly. But if decided the other way, it would mean that the trial would have to go its full length. It would not in those circumstances be "necessary" for a preliminary ruling to be sought. When the facts are investigated, it might turn out to have been quite unnecessary. For this reason, Lord Denning concluded that as a rule it is only after the facts are ascertained that a determination can be made that a reference is necessary. Accordingly, it is generally the case that the facts should first be found.

33. Those principles are as relevant today as they were in 1974. This appeal requires determination of the facts from what will clearly be a complex evidential matrix. The Tribunal may find, on those facts, that Coast's transactions were not

connected to the fraudulent evasion of VAT, or that Coast did not know of that connection, nor should Coast have known. Either way, the case would then be decided on its facts, without recourse to the legal questions for which a reference may be sought.

34. In my judgment, it would not be appropriate for a reference to be made in this appeal to the CJEU. I therefore decline to exercise my discretion to make a reference.

Application for permission to appeal

35. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ROGER BERNER

TRIBUNAL JUDGE
RELEASE DATE: 11 April 2012