AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

02TACD2023

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") by [redacted] ("the Appellant") pursuant to section 119 of the Value Added Tax Consolidation Act 2010 ("VATCA 2010") against assessments raised by the Revenue Commissioners ("the Respondent") for Value-Added Tax ("VAT") in the total amount of €159,372 for the years 2011, 2012 and 2013. The assessments were raised on the basis that the Appellant knew or ought to have known that it was participating in transactions connected with the fraudulent evasion of VAT.

2. The appeal proceeded by way of a hearing on 27 September 2022.

Background

3. On 23 October 2014 the Respondent notified the Appellant that it had been selected for an audit concerning *inter alia* VAT. On 12 May 2015, the Respondent raised a Notice of Assessment to VAT for the years 2011 to 2014. The assessment in respect of 2014 was subsequently withdrawn. Therefore, the relevant assessments are as follows:

    - Notice of assessment to VAT in respect of 2011: €46,279.

- Notice of assessment to VAT in respect of 2012: €37,058.
- Notice of assessment to VAT in respect of 2013: €76,035.

4. The Respondent contended that the Appellant had imported 32 cars from a motor dealer in the UK that it (i.e. the Appellant) had treated as margin scheme vehicles, but that had been treated as intra-Community supplies by the UK dealer, and that the Appellant knew or ought to have known this. Consequently, the Respondent contended that the Appellant should have accounted for VAT on the full sales price of the vehicles, rather than on the margin between the sales price and purchase price.

5. On 29 May 2015, the Appellant notified the Respondent that it wished to appeal the Notice of Assessment to the predecessor of the Commission, and following establishment of the Commission in 2016 the appeal was subsequently transferred to it. The appeal proceeded by way of a remote hearing on 27 September 2022.

Legislation and Case Law

6. Section 87 of the VATCA 2010 provides *inter alia* that:

> *"(1)… "*margin scheme goods*" means any works of art, collectors' items, antiques or second-hand goods supplied within the Community to a taxable dealer—*
>
> *[…]*
>
> *(b) by a person in another Member State who was not entitled to deduct, under the provisions implementing Articles 167, 173, 176 and 177 of the VAT Directive, in that Member State, any value-added tax referred to in that Directive in respect of that person's purchase, intra-Community acquisition or importation of those goods…*
>
> *(2) Subject to and in accordance with this section, a taxable dealer may apply the margin scheme to a supply of margin scheme goods.*
>
> *[…]*
>
> *(3) Where the margin scheme is applied to a supply of goods, the amount on which tax is chargeable on the supply in accordance with section 3(a) or (c) is, notwithstanding Chapter 1 of Part 5, the profit margin less the amount of tax included in the profit margin.*
>
> *[…]*

(9) Notwithstanding Chapter 2 of Part 9, a taxable dealer shall not, in relation to any supply to which the margin scheme has been applied, indicate separately the amount of tax chargeable in respect of the supply on any invoice or other document in lieu thereof issued in accordance with that Chapter."

7. In *C-439/04 and C-440/04 Axel Kittel and Recolta Recycling SPRL*, the Court of Justice of the European Union ("CJEU") stated *inter alia* that:

"*51… it is apparent that traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud, be it the fraudulent evasion of VAT or other fraud, must be able to rely on the legality of those transactions without the risk of losing their right to deduct the input VAT…*

56. In the same way, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.

57. That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice…

59. Therefore, it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and to do so even where the transaction in question meets the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity'.

60. It follows from the foregoing that the answer to the questions must be that where a recipient of a supply of goods is a taxable person who did not and could not know that the transaction concerned was connected with a fraud committed by the seller, Article 17 of the Sixth Directive must be interpreted as meaning that it precludes a rule of national law under which the fact that the contract of sale is void – by reason of a civil law provision which renders that contract incurably void as contrary to public policy for unlawful basis of the contract attributable to the seller – causes that taxable person to lose the right to deduct the VAT he has paid. It is irrelevant in this respect whether the fact that the contract is void is due to fraudulent evasion of VAT or to other fraud.

61. By contrast, 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 *Mobilx Limited (in administration) v Revenue and Customs Commissioners* [2010] STC 1476, the English Court of Appeal stated *inter alia* that:

"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…*

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…*

82. 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."

Evidence and Submissions

9. Evidence was heard on behalf of the Appellant and the Respondent, and written and oral submissions were provided by counsel for the parties.

Appellant's Evidence ([redacted])

10. [redacted] was 99% shareholder of the Appellant for the audit period, as well as a director of the Appellant for [redacted]. However, he was not actively involved in the company; he stated that he travelled to the UK in around [redacted] to avail of bankruptcy there, and during the relevant period worked for [redacted] as workshop manager, in charge of repairs. He returned to Ireland in [redacted]

11. The Appellant was involved in the business of buying and selling second-hand cars. The Appellant sought to source cars from [redacted] stated that he told [redacted] that the Appellant only wanted to source margin scheme cars, and had no interest in intra-Community supplies. He stated that the Appellant carried out due diligence on [redacted] in advance of entering into the business relationship with it, but that the Appellant was dependent on [redacted] to honour the request for margin scheme cars. He stated that everything appeared to be "*above board and done the correct way*" so he never doubted the reputability of [redacted] He stated that the only mechanism for the Appellant to ascertain whether a particularly vehicle had been treated as a margin scheme supply by [redacted] was the invoice.

12. [redacted] stated that his role was limited to telling the relevant individual(s) in [redacted] that the Appellant wanted a particular car. He stated he had no other involvement in the transactions, including in preparation of invoices. The transactions were managed for the Appellant by [redacted] had subsequently retired and was not available to give evidence.

13. [redacted] accepted that he was stated to be the salesperson for [redacted] on many of the invoices for the transactions with the Appellant, but stated that this was not a true reflection of his involvement, which was limited to passing on the Appellant's request for vehicles. He stated that he did not have access to the relevant software package in [redacted] that would allow him to access the sales invoices. He accepted that there were differences in some of the invoices retained by [redacted] as compared with those provided to the Appellant, but that he had no knowledge during the relevant time period that invoices had been amended or 'doctored'.

14. On cross examination, he accepted that the invoices received by the Appellant showed that [redacted] had zero-rated the cars, which indicated that [redacted] had treated them as intra-Community supplies rather than margin scheme goods as requested by the Appellant. However, as he was not working for the Appellant at the time he could not explain why the Appellant had treated them as margin scheme cars notwithstanding the invoices; [redacted] had organised everything for the Appellant. In response to the suggestion that [redacted] began correctly categorising vehicles provided to the Appellant as intra-Community supplies after he returned to the Appellant in [redacted] stated that the relationship between the Appellant and [redacted] changed after he stopped working for the latter.

15. It was put to [redacted] that [redacted] had previously told the Respondent that he (i.e. [redacted]) had provided [redacted] with an invoice when requested to do so, so it was not true that he had no access to them in [redacted] did not deny that he had sent the invoice to [redacted] but stated that he had "*absolutely no input at all*" into the preparation of the sales invoices. He accepted that, on invoices where he was stated to be the salesman, his Irish mobile telephone number was provided as the contact number. He accepted that, in respect of the invoices where he was not named as the salesperson but the owner of [redacted] was, the contact number appeared to be a [redacted] number. The Appellant is located in [redacted]

16. In response to questioning from the Commissioner, [redacted] stated that there were about fifteen people working for [redacted] when he was there. He accepted that he would have had some interactions with the salespeople but that he wouldn't have "*much time to be sitting around chatting*".

Appellant's Submissions

17. Counsel for the Appellant accepted that [redacted] had engaged in VAT fraud in how it categorised the 32 cars. However, the Appellant had treated the cars as margin scheme vehicles in good faith and therefore should not be held liable for the additional VAT. The Appellant had carried out sufficient due diligence on [redacted] including receiving a copy of its VAT number validation, a trade reference from [redacted], and meeting the supplier on numerous occasions.

18. [redacted] did not have any grounds for suspecting the *bona fides* of [redacted] Invoices were faxed by the financial controller of [redacted] to the Appellant, and the Appellant relied on them in good faith. The Appellant was not in a position to explain why different versions of some invoices, stating that [redacted] were entitled to input credits, were retained by [redacted] in respect of some of the cars in question.

19. The Appellant made an average profit of €750 on each of the 32 cars in question. This was a modest sum and indicative that the Appellant genuinely believed that they were margin scheme cars. If the Appellant had been transacting with [redacted] on the basis that it would receive intra-Community supply cars, the business would have been unviable for the Appellant. The only company that stood to benefit from the zero-rating was [redacted]

20. There was no independent mechanism open to an Irish importer such as the Appellant to verify the VAT status of cars sourced from the UK, and therefore the Appellant had to rely on the assurances provided by [redacted] The Appellant was an unwilling victim of fraud and therefore pursuant to the CJEU's judgment in *Kittel* it should not be held liable for the unpaid VAT.

Respondent's Evidence ([redacted])

21. [redacted] was a retired audit officer with the Respondent. He stated that the Appellant was selected for audit as the Respondent could see that there was an issue with the correct amount of VAT not being remitted. He stated that he met [redacted] of the Appellant and submitted a Mutual Assistance Request ("MAR") to HMRC in the UK.

22. He stated that [redacted] treated the vehicles as qualifying for input credits. If the Appellant had also treated the cars in this manner, the Irish exchequer would have received the correct amount of VAT. Alternatively, if [redacted] had treated the vehicles as margin scheme goods, the correct amount of VAT would have been remitted to the UK exchequer. The problem arose because the vehicles were treated as qualifying vehicles in the UK, and as margin scheme vehicles in Ireland, and consequently neither jurisdiction received the correct amount of VAT. Given that [redacted] had treated the cars as qualifying for input credits, the Appellant should have treated them as intra-Community supplies rather than margin scheme cars.

23. [redacted] stated that if the full amount of VAT was not accounted for, then either someone retains it or the ultimate customer benefits by way of a reduced sales price. However the Respondent was not alleging that the Appellant had retained the foregone VAT; the Respondent did not know where it had gone.

24. He stated that if an invoice stated that [redacted] was entitled to the VAT input, then that meant the vehicle was being treated as an intra-Community supply. He also stated that the Appellant should have been put on inquiry regarding the VAT status of the vehicles from the invoices received from [redacted] "*If it quotes a VAT number and there is zero VAT on it, you know, that's, they're, they're the prerequisites for a qualifying, for an invoice for a qualifying vehicle.*" He stated that there was a risk inherent in dealing in margin scheme

goods, and that if the Appellant had wanted to ensure that there was no risk it could have treated the cars as intra-Community supplies and paid VAT on the full sale price.

25. [redacted] stated that [redacted] provided an invoice attached to an email from 1 January 2014. The email had been sent to [redacted] by [redacted]. He also stated that the response of HMRC to the MAR noted that there were "*some email communications between* [redacted] [i.e. the financial controller of [redacted] *and* [redacted] *but this was regarding which cars they needed invoices for rather than the type of car.*"

26. On cross examination, [redacted] accepted that if the Appellant had treated the cars as intra-Community supplies rather than margin scheme vehicles it would have suffered a loss on the transactions. He confirmed that a trader such as the Appellant could not access the VAT Information Exchange System.

Respondent's Submissions

27. Counsel stated that the Appellant's focus on the average profit per car was misplaced, as if it could sell more cars at a cheaper price than its rivals it could make more profit overall. However, this case was not about profit but about liability to VAT. He stated that the Appellant had not provided any direct evidence of what it did to ensure that it was not involved in fraudulent transactions. [redacted] evidence was that [redacted] handled the transactions for the Appellant, but [redacted] had not given any evidence. As a result, the Appellant had not met the burden of proof as set out by the High Court in *Mennolly Homes.*

28. There were a number of red flags that should have alerted the Appellant that [redacted] had not properly accounted for VAT. The invoices had the Appellant's VAT number stated on them, which was in contravention of section 87(9) of the VATCA 2010. The sales agent was stated to be [redacted] on many of the invoices, and he was principal shareholder and a director of the Appellant for much of the time in question, so it could not be said that these were arm-length transactions. In one instance, it appeared that [redacted] had sent an invoice directly to [redacted]. Most pertinently, the invoices showed that [redacted] had zero-rated the cars, which was consistent with them being treated as intra-Community supplies rather than margin scheme goods.

29. Consequently, there was an onus on the Appellant to enquire further into the transactions to satisfy itself that they were genuine margin scheme supplies. It was not sufficient to say that [redacted] had asked [redacted] to provide margin scheme cars; the Appellant had an obligation to pay VAT at the correct amount, but had paid at the margin scheme rate when not entitled to do so.

Material Facts

30. Having read the documentation submitted, and having listened to the oral evidence and submissions at the hearing, the Commissioner makes the following findings of material fact:

30.1 Each of the 32 vehicles in issue were treated as intra-Community supplies by [redacted] and as margin scheme goods by the Appellant.

30.2 The invoices for the 32 vehicles in issue provided by [redacted] to the Appellant demonstrated that [redacted] had zero-rated the vehicles.

30.3 [redacted] was 99% shareholder of the Appellant during the relevant time period and also a director of the Appellant during [redacted]. During the relevant time period he worked in [redacted] and was stated to be the salesperson on a number of the relevant invoices. Therefore, there was not an arms-length relationship between the Appellant and [redacted] during the relevant time period.

30.4 On the invoices that did not name [redacted] as the salesperson, the contact telephone number appeared to be a [redacted] number. The Appellant was located in [redacted]

30.5 Given [redacted] role in [redacted] during the relevant time period, it would have been possible for him to make efforts to verify whether or not [redacted] was treating the 32 vehicles in issue as margin scheme supplies or not, but it did not appear that he had done so.

Analysis

31. In the High Court case of *Menolly Homes Ltd v Appeal Commissioners* [2010] IEHC 49, Charleton J. stated at paragraph 22: "*The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable*."

32. The margin scheme, as set out in section 87 of the VATCA 2010, operates by allowing dealers in certain second-hand goods, including motor cars, to pay VAT on the difference between the sale price and the purchase price of the goods. According to the Respondent's Tax and Duty Manual – "Supplies of second-hand goods":

> *"An invoice issued by an accountable dealer in respect of a supply under the margin scheme must not show VAT separately. Any such invoice should be clearly endorsed 'Margin Scheme' – this invoice does not give the right to an input credit of VAT'...*

This means that an accountable person is not entitled to deductibility in respect of any VAT included in the purchase price of goods sold to him or her under the margin scheme."

33. In this instance, it was accepted by the Appellant that [redacted] had treated the 32 cars in issue as intra-Community supplies rather than as margin scheme vehicles. However, the Appellant argued that it had requested margin scheme vehicles only and that it had acted *bona fide* in its dealings with [redacted] such that it should be entitled to rely on the principles enunciated by the CJEU in *Kittel* to prevent the Respondent from recovering the additional VAT.

34. In *Kittel*, the CJEU set out the following test for ascertaining whether or not a party such as the Appellant should be held liable for VAT fraud:

"…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." (emphasis added).

Consequently, it can be seen that the test is whether the Appellant knew or should have known that it was participating in transactions with [redacted] that were connected with the fraudulent evasion of VAT.

35. In *Mobilx Limited*, the English Court of Appeal considered *Kittel* and held that

"*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…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."*

36. Regarding whether carrying out due diligence is sufficient to meet the test in Kittel, the court in *Mobilx Limited* stated that "*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*."

37. The Commissioner considers that there were a number of factors that should have given rise to concern on the part of the Appellant that it was engaged in transactions connected with the fraudulent evasion of VAT. [redacted] evidence was that he had asked [redacted] to

provide margin scheme vehicles only. However, the invoices provided by [redacted] to the Appellant demonstrated that [redacted] had zero-rated the vehicles, which indicated that [redacted] had treated them as intra-Community supplies rather than margin scheme goods.

38. Furthermore, [redacted] worked in [redacted] at the time and was named as the salesperson on a number of the invoices for the cars in question, with his mobile telephone number given as the contact number. [redacted] stated that he had no involvement in the transactions between [redacted] and the Appellant and that he did not have any access to [redacted] sales software such as would allow him to view the sales invoices. However, the Commissioner does not find his evidence credible in this regard. The Commissioner considers that [redacted] did not adequately explain why he was stated to be the salesman on a number of the invoices, or why a [redacted] telephone number was given as the contact number on other invoices. The Commissioner notes that [redacted] was a relatively small organisation (approximately 15 employees according to [redacted]), and he considers it unlikely that [redacted] would not have been able to access information about the relevant transactions, including invoices. In this regard, the Commissioner notes the Respondent's evidence that [redacted] provided an email from [redacted] to him attaching an invoice, which suggests that [redacted] did indeed have access to the sales invoices.

39. Consequently, the Commissioner accepts the Respondent's submission that these were not arms-length transactions between the Appellant and [redacted] The Commissioner considers that [redacted] could and should have identified that [redacted] were treating the cars as intra-Community supplies rather than margin scheme goods, and in turn could and should have notified the Appellant, in his capacity as *inter alia* its 99% shareholder, of the correct position. In this regard, the Commissioner is cognisant of the court's *dictum* in *Mobilx Limited* that "*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."* The Commissioner considers that, on the balance of probabilities, there was a means of knowledge available to the Appellant to ascertain the correct position regarding [redacted] VAT treatment of the 32 cars, which it did not deploy.

40. Furthermore, the Commissioner notes that there was evidence before him to suggest that at least some of the invoices were amended by [redacted] For example, invoice number [redacted] dated 11 February 2013, for the sale of a [redacted], states on the copy provided by the Appellant that "This invoice is for a second hand margin scheme supply." However, the copy invoice procured from [redacted] through the MAR stated instead of the above that "This vehicle is a qualifying car within the meaning of The VAT Input Tax Order 1992." The Commissioner notes that [redacted] is named as the salesperson on this invoice, and

considers, on the balance of probabilities, that he would have been in a position to identify this serious discrepancy and notify the Appellant accordingly, but he did not do so.

41. While [redacted] acknowledged the existence of doctored invoices, he was not in a position to explain how they had occurred. He said he had spoken to [redacted], the owner of [redacted] who had accepted that the invoices had been amended: "*Well, as I said, both invoices were produced by* [redacted]*. That's the only explanation I can give, that's all I can offer*." The Commissioner would have expected that [redacted], in his position on behalf of the Appellant, would have made greater effort to ascertain what had transpired.

42. The Commissioner considers that there was no evidence before him of the steps taken by the Appellant, if any, to satisfy itself that [redacted] were treating the vehicles supplied as margin scheme goods. While he notes the Appellant's submission that it was not in a position to ascertain the VAT status of the cars, he considers that the invoices clearly showed that [redacted] had zero-rated the cars, which indicated that they had been treated as intra-Community supplies and not margin scheme goods. Consequently, the Commissioner considers that the Appellant was effectively on notice that the cars had not been treated as margin scheme goods by [redacted] but proceeded in any event to treat them as such, with a consequent loss of VAT to the exchequer.

43. In his cross-examination of [redacted], counsel for the Appellant made reference to an invoice from 2013 that stated the car had been zero-rated, but that the Respondent had subsequently accepted had been treated as a margin scheme supply by [redacted] However, the Commissioner does not accept that the fact that the Appellant could point to one such invoice is sufficient to allow it to disregard all the other invoices showing that the relevant cars had been zero-rated and had been treated by [redacted] as intra-Community supplies.

44. As a result, the Commissioner is satisfied that the Appellant knew or should have known that it was participating in transactions connected with the fraudulent evasion of tax, and that the only reasonable explanation for the transactions was that they were connected to the fraudulent evasion of VAT.

45. Furthermore, the Commissioner notes that the Appellant was unable to provide any direct evidence of what steps, if any, it took to satisfy itself that the transactions with [redacted] were not connected with VAT fraud, outside of the general due diligence it stated it carried out, and consequently the Commissioner is satisfied that the Appellant has not met the burden of proof on it, as set out in *Mennolly Homes*, to demonstrate that the notices of assessment should be set aside.

Determination

46. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the Respondent was correct in raising assessments to VAT against the Appellant in the total amount of €159,372 for the years 2011, 2012 and 2013. Therefore, those assessments stand.

47. The appeal is hereby determined in accordance with section 949AK of the Taxes Consolidation Act 1997, as amended ("the TCA 1997"). This determination contains full findings of fact and reason for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 21 days of receipt in accordance with the provisions set out in the TCA 1997.

Simon Noone
Appeal Commissioner
07/10/2022