68TACD2020

BETWEEN/

[NAME REDACTED]

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

This is an appeal against assessments to value-added tax (VAT) in the total sum of €451,770. The details of the assessments are as follows;

- Notice of assessment to VAT in respect of 2010, in the sum of €12,432.
- Notice of assessment to VAT in respect of 2011, in the sum of €190,356.
- Notice of assessment to VAT in respect of 2012, in the sum of €248,982.

The question which arises for consideration in this appeal is whether the Appellant is entitled to VAT deductions in accordance with section 59 VATCA 2010 and Council Directive 2006/112/EC.

The Respondent in raising the assessments has disallowed VAT deductions in respect of VAT periods of assessment falling within the years 2010, 2011 and 2012 in the total sum of €451,770 on the basis that the Appellant knew or should have known that he was participating in a transaction connected with the fraudulent evasion of VAT. The Appellant duly appealed.

Background

The Appellant is an individual sole trader involved in the resale of petrol and diesel in conjunction with the operation of two convenience stores and service stations in County [redacted]. The Appellant commenced in the filling station business in 2000 at [location redacted]. He later opened a shop and in 2005 he opened a second service station at [location redacted].

The Appellant was the subject of a Revenue audit in which the records of the business were examined in respect of the years 2010, 2011 and 2012. Following the Revenue audit, the Respondents sought to disallow VAT input credits on invoices from Trader A in 2010, Trader B in respect of 2011 and Trader C in respect of 2012.

Submissions

The Respondent in raising the assessments, has disallowed VAT deductions pursuant to section 59 VATCA 2010 in relation to 2010, 2011 and 2012 on the basis that the Appellant knew or should have known that he was participating in a transaction connected with the fraudulent evasion of VAT.

The Appellant claimed he was entitled to input VAT recovery in accordance with section 59 VATCA 2010 in respect of 2010, 2011 and 2012 and that he was not aware nor could he have known that he was participating in a transaction connected with the fraudulent evasion of VAT.

Legislation

The relevant legislation in this appeal is:

- section 59 VATCA 2010 (Deduction for tax borne or paid)
- section 66 VATCA 2010 (Invoicing)
- section 20 of the Value Added Tax Regulations 2010

EVIDENCE

Evidence on behalf of the Appellant was provided by the Appellant and Witness X. Evidence on behalf of the Respondent was provided by Revenue officers Witness Y and Witness W. Documentation furnished in evidence included a list of the Appellant's suppliers, an independent laboratory report dated 15 December 2010, relevant invoices and a schedule of invoices on which VAT input credits were claimed.

The Appellant

The Appellant is a sole trader involved in the retail sale of petrol and diesel together with the operation of two convenience stores and service stations in County [redacted]. The Appellant commenced his business in 2000 with one shop and expanded his business to include a second shop in 2005.

The Appellant stated that he used a number of suppliers and that he was not tied to any one agreement. He stated that representatives would call to his premises from different companies and that agreements would be made for the supply of fuel in this manner.

He stated that in 2010, a representative, LM, called to his premises representing himself as an employee and agent of Trader B. The representative indicated that they had an agreement with Trader C and could obtain lower prices. The agent stated that invoices would come from Trader B but that the Appellant would make payments directly to Trader C. The Appellant stated that he was aware of Trader C which was part of a well-established large fuel company. He stated he had not heard of Trader B previously.

During cross-examination the Appellant accepted that this triangular arrangement was an unusual arrangement. In this regard, the following exchange occurred between Senior Counsel for the Respondent and the Appellant;

> *'Q:… But paying* [Trader C] *directly wasn't a normal thing, was it, to be paying the principal directly rather than paying the distributor. That was unusual, wasn't it?*
>
> *A: It would have been, yes.*
>
> *Q: Right. But you didn't think to check on that?*

A: I didn't but I did in 2012 insist that I was receiving invoices from [Trader C]…'

When Senior Counsel for the Respondent suggested that the triangular payment arrangement to Trader C was a red flag, the Appellant disagreed and stated;

> *'But it's hardly…is it so irregular that it shouldn't happen or is it just an arrangement between two companies that that's the way they want their business done?'*

In accordance with the agreement, the Appellant confirmed that he received VAT invoices from Trader B and made payments to Trader C. The Appellant stated that he paid Trader C by bank draft.

He stated that in 2012 he decided it would be better if the invoices were from Trader C because he was making payments to Trader C. He stated that he requested this of the representative, LM, who agreed and that the invoices were headed Trader C from that point forward.

The Appellant stated that he arranged for some of the diesel from Trader B to be scientifically tested. He stated; *'Well, at the time there was a lot of media in relation to laundered fuel being sold, so just to have my own mind at ease that the product was correct I got it tested and it was proved fine.'*

He stated that he ceased trading with Trader B when he got better credit terms from another supplier.

In terms of procedures, during cross-examination the Appellant was asked what procedures he had for checking new suppliers. The Appellant stated that in respect of Trader B; '*the procedure was, in our discussion he made it clear to me that they were acting as agents for* [Trader C]. *I was familiar with* [Trader C] *and that was the only issue.'*

When asked whether he checked with LM who Trader B was, he stated *"No, I did not, no."*

He stated that in 2012 he requested a change of arrangement and insisted on receiving invoices from the main distributor, Trader C as he was paying Trader C.

The Appellant stated that he never had reason to contact either Trader B or Trader C. He confirmed that there was never an invoice nor a delivery he queried with them. He stated that he dealt with the representative at all times.

He accepted, when it was put to him by Senior Counsel for the Respondent, that Trader C and Trader B confirmed that neither of them had any dealings with the Appellant.

The Appellant confirmed that he purchased oil from other suppliers through the agency of LM namely, Trader D. He stated that he also purchased consignments from retailer and distributor Retailer E. He stated that JK from Retailer E put him in touch with Trader F and that he accepted consignments from Trader F. He stated that he would contact JK from Retailer E to purchase fuel from Trader F. He stated that in relation to another supplier, Trader G, this supplier came through Retailer E as an associate of Retailer E. The Appellant confirmed that he did not test fuel from any other suppliers. He stated that he dealt with JK in Retailer E fuels in relation to supplies purchased from Trader A. He stated that he did not recall dealing with any individuals from Trader A. He stated that he made payments to JK in respect of these supplies.

The Appellant stated that Trader D might have been a once-off but Retailer E, Trader F, Trader G and Trader A delivered on multiple occasions. The Appellant stated that he used online banking to make payments in relation to these suppliers.

In relation to Trader A, Senior Counsel for the Respondent put it to the Appellant that he negotiated on price with the person who delivered the fuel as there were manuscript amendments in relation to price contained on the invoices. On seeing a settlement discount on the invoice, the Appellant was asked how this would have arisen. The Appellant stated;

> *'Obviously, again from memory, the price was agreed with the rep and obviously the price that came with the delivery was different, okay. So, the price was amended.'*

Further on he stated;

> *'Well I assume, as I said, either it was a negotiated discount of the price ….. or else it was an incorrect, an incorrect price per litre from the original, from the actual invoice.'*

The Appellant admitted that this meant that he would have been negotiating or renegotiating with Trader A. However, he then stated;

> *'well I would have said that perhaps it was me dealing with the rep when the delivery came and if it was not amended at the office it was amended at our end.'*

Further, he stated;

'No, no. I would have been dealing with the rep only.'

When asked whether he had a recollection of actually dealing with anybody from Trader A, the Appellant stated that *'it was a guy in Tullamore who was a rep for this company, from memory…..* [name redacted] *was his first name and he was an ex* [company redacted] *representative'.*

The Appellant accepted that he knew '*in a general sense from the media'* that fuel laundering was an issue and he stated that he could see agents of the Respondent testing outside his and other forecourts in the area.

The Appellant denied that he was aware that some of his suppliers were involved in fraud.

The Appellant was questioned on whether he was alive to the different way that regular suppliers conducted business as opposed to irregular traders, and specifically the triangular payment arrangement between Trader B and Trader C and the Appellant stated: *'Well obviously that was the agreement, that was their agreement between the two parties'.*

Senior Counsel for the Respondent then put it to the Appellant that there were a number of red flags which should have alerted him in relation to his suppliers which included the triangular payment arrangement between Trader B and Trader C, the lower prices offered and that vehicles were regularly not liveried.

In addition, the Respondent stated that it was unusual that the Appellant was content to deal with people presenting themselves as having authority to bind somebody else and that the Appellant did not contact the supplier to check or confirm this arrangement

Further, the Respondent stated that it was unusual that long periods went by during which suppliers were never contacted and during which the Appellant dealt only with unnamed or partially named representatives

The Appellant did not accept the above propositions put to him by Senior Counsel.

Witness X.

Witness X, chartered accountant, gave evidence on behalf of the Appellant.

Witness X stated that during the period when Trader B invoices were received, the bank drafts were made payable to Trader C and during the period when Trader C invoices were received, payments were made electronically by bank transfer to an account held in Ulster Bank, under the name Trader C.

Witness X stated that he had printed out a copy of the certificate of incorporation for Trader C and confirmed that the registered office was [address redacted] which was the address contained on the invoices.

Under cross-examination, Witness X stated that he was appointed after the assessments had been raised and that in carrying out his work for the Appellant, he relied on information provided to him by the Appellant.

The position of the Respondent was that the drafts paid to Trader C were lodged to an account which was operated as if it were Trader C but which was not the legitimate Trader C. Senior Counsel for the Respondent asked Witness X whether he was in a position to dispute the suggestion that drafts were lodged to a bank branch in [County redacted]. Witness X stated that the bank was unable to provide him with this information on the basis that it would constitute a data protection breach.

Witness X confirmed that he did not contact any of the Appellant's suppliers, that he did not visit premises and that he relied on information and documentation provided to him by the Appellant.

Witness Y

[To the extent that [Witness Y's] *evidence in relation to whether he had formulated a view that persons not parties to this appeal and not present to give evidence in this appeal were or were not involved in fraudulent activity, and/or to the extent that that evidence contained hearsay, the evidence has been excluded from consideration in this determination.]*

Witness Y, a Revenue Officer of approximately thirty-six years' experience stated that since 2010 he had been involved in investigations in the oil sector.

The evidence of Witness Y was that invoices from Trader C, from Trader B and from Trader A which appeared in the VAT records of the Appellant and in respect of which input credits were taken, were not accounted for by any person or body. Witness Y stated that fraud occurred in terms of the provision of invoices by persons who were not known to the Respondent, to a retailer who on foot of those invoices deducted input VAT, in circumstances where nobody accounted for that VAT to the Respondent.

Witness W

Witness W, Revenue official, confirmed that the 2010 assessment in the amount of €12,432 related to Trader A, namely, payments made by the Appellant to Trader A in 2010.

ANALYSIS

It is not in dispute as between the parties, that the invoices from Trader B and Trader C constitute, in terms of form, invoices in substantial compliance with the provisions of section 66(1) VATCA2010 and regulation 20 of the VAT regulations 2010. The Respondent took issue with the invoices to the extent that the Respondent's case against the Appellant was that he was being supplied by one person while paying a different person.

The question which arises for consideration and determination in this appeal is whether the Appellant is entitled to deduct input VAT in accordance with section 59 VATCA 2010.

The applicable legal test

The parties were in agreement on the legal test to be applied in respect of the issues arising in this appeal and in this regard the cases of *Kittel v Belgian State, Case C-439/04 and C-440/04*, *Mobilix Ltd. v HMRC* [2010] EWCA Civ 517 and *Optigen Ltd & Others v Customs & Excise Commissioners* [2006] 2 WLR 456 ECJ were cited and relied upon.

In *Kittel*, at paragraphs 55-59, the Court stated;

> *'Where the tax authorities find that the right to deduct has been exercised fraudulently, they are permitted to claim repayment of the deducted sums retroactively (see, inter alia, Case 268/83 Rompelman [1985] ECR 655, paragraph 24; Case C-110/94 INZO [1996] ECR I-857, paragraph 24; and Gabalfrisa, paragraph 46). It is a matter for the national court to refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent ends.*
>
> *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.*
>
> *That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.*
>
> *In addition, such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them.*
>
> *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'.*

Thus in *Kittel*, the test is whether or not the taxpayer knew or should have known that, by his purchase, he was taking part in a transaction connected with the fraudulent evasion of VAT.

In this appeal there was no evidence that the Appellant had actual knowledge of the fraud. Therefore, the relevant consideration in accordance with the legal tests applicable is whether he *should have known* that he was taking part in a transaction connected with fraudulent evasion of VAT. In this regard, Counsel on behalf of the Appellant opened the UK Court of Appeal decision in *Mobilix Ltd. v HMRC* which considers the meaning of this test.

Paragraph 4 of the judgment summarised the questions before the court as follows;

> *'Two essentially questions arise; firstly what the ECJ meant by 'should have known' and secondly, as to the extent of the knowledge which it must be established that the taxpayer had or ought to have had: is it sufficient that the taxpayer knew or should have known that it was more likely than not that his purchase was connected to fraud or must it be established that he knew or should have known that the transactions in which he was involved were connected to fraud?.'*

Paragraphs 59 and 60 of *Mobilix* provide;

> *'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.*
>
> *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.'*

Thus, the question is, should the Appellant have known that the only reasonable explanation for the purchase is that it was a transaction connected to the fraudulent evasion of VAT. It is not enough that it was more likely than not that his transaction was connected with fraudulent evasion.

The case of *Optigen Ltd & Others v Customs & Excise Commissioners*, a case which predates *Kittel* was opened as authority for the proposition that one does not view the chain of transactions as a whole but rather, each transaction in the chain must be examined. On the authority of *Optigen*, the only relevant transactions are those involving the Appellant.

The Appellant also relied on *Mahagében* as authority for the proposition that a taxpayer is not expected to engage in detailed due diligence in determining whether there may be a VAT fraud somewhere in his chain of supply. The relevant paragraphs, paragraphs 60-62 provide;

> *'It is true that, when there are indications pointing to an infringement or fraud, a reasonable trader could, depending on the circumstances of the case, be obliged to make enquiries about another trader from whom he intends to purchase goods or services in order to ascertain the latter's trustworthiness.*
>
> *However, the tax authority cannot, as a general rule, require the taxable person wishing to exercise the right to deduct VAT, first, to ensure that the issuer of the invoice relating to the goods and services in respect of which the exercise of that right to deduct is sought has the capacity of a taxable person, that he was in possession of the goods at issue and was in a position to supply them and that he has satisfied his obligations as regards declaration and payment of VAT, in order to be satisfied that there are no irregularities or fraud at the level of the traders operating at an earlier stage of the transaction or, second, to be in possession of documents in that regard.*
>
> *It is, in principle, for the tax authorities to carry out the necessary inspections of taxable persons in order to detect VAT irregularities and fraud as well as to impose penalties on the taxable person who has committed those irregularities or fraud.'*

The evidence of Witness Y was that invoices from Trader C, from Trader B and from Trader A which appeared in the VAT records of the Appellant and in respect of which input credits were taken, were not accounted for by any person or body. He stated that the fraud occurred in terms of the provision of invoices by persons who were not known to the Respondent, to a retailer who, on foot of those invoices, deducted input VAT in circumstances where nobody accounted for that VAT to the Respondent.

Application of the legal tests

In accordance with *Kittel*, 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.

In applying the legal test in *Kittel* as considered in *Mobilix* namely, whether the Appellant should have known that the only reasonable explanation for the purchases was that the purchases were connected to the fraudulent evasion of VAT, I attach weight to the following objective factors and the following evidence;

- The triangular payment arrangement between Trader B and Trader C was accepted by the Appellant without question even though it was not a conventional business arrangement. During cross-examination the Appellant accepted that it was an unusual arrangement but suggested that in his view, that was how the companies wanted their business done.

- In evidence the Appellant admitted that he did not question LM (the Trader B representative) about the payment arrangement and yet the Appellant accepted also that it was unusual to be paying the principal rather than the distributor. Further, the Appellant requested a change of arrangement in 2012 and insisted on receiving invoices from Trader C.

- The Appellant in his dealings with Trader B and LM demonstrated a lack of curiosity about the unconventional triangular arrangement. At the time of entry into the transactions, the Appellant did not carry out any checks on Trader B or Trader C. In fact, the Appellant never contacted the supplier of either company directly. The Appellant placed absolute trust and reliance in unnamed or partially named representatives who regularly delivered from unliveried trucks. The Appellant stated that he never had reason to contact Trader C or Trader B and that if there was any query on an invoice or delivery, he would contact LM. In response to the question of why he never contacted suppliers directly but dealt with unnamed or partially named representatives, the Appellant stated;

  'No, because I would deal with reps. Personally, I would just deal with the rep at the road.'

  And further:

  'Well I was comfortable once I was making the payments to [Trader C] *I didn't raise any issues.'*

- The Appellant's rational for not contacting the supplier directly and ordering product from the supplier was that he would not get the same deal and that he would be required by Trader C to make a payment upfront for a container of €40,000-45,000 litres. However, other than stating that he dealt with the representative, LM, in relation to queries that arose, he did not adequately explain why there was no contact whatsoever between himself and his suppliers over the course of these contractual arrangements.

- The evidence of the Appellant was uncorroborated by any of the representatives or the suppliers he dealt with.

- The Appellant never contacted Trader C to ask why the triangular arrangement was in place or to simply ask whether it was all okay. He never called to the premises of Trader A, Trader B or Trader C. The Appellant could have taken some basic steps to safeguard his own position and that of his business, but he opted not to do so.

- The Appellant stated that when he first started dealing with Trader B he sent a sample of their diesel for testing. He stated that the sample was validated and there was no marker present. A report was furnished in support thereof. He stated that he took this step because at the time there was a lot of media coverage in relation to laundered fuel being sold. However, sending the fuel for scientific testing is not a means of ascertaining whether the Appellant was participating in a transaction connected with the fraudulent evasion of VAT.

- The Appellant in his written submissions stated; *'All of the pertinent transactions were properly recorded by the Appellant and the Appellant had very clear procedures in place to check suppliers with whom he did business at all relevant times.'* However, in evidence, the Appellant suggested that this statement meant that he checked the quantities of fuel that were being delivered to him but clearly, that is not the import of the statement. The statement plainly provides that there were procedures in place '*to check suppliers with whom he did business at all relevant times*'. However, that is not the evidence which the Appellant provided at hearing. The evidence given by the Appellant was of unusually structured transactions driven by margins with a below-standard approach to checking out the suppliers with whom the Appellant did business.

- During cross-examination, the Appellant was asked what procedures he had for checking new suppliers. The Appellant stated that in respect of Trader B;

  'the procedure was, in our discussion he made it clear to me that they were acting as agents for [Trader C]. *I was familiar with* [Trader C] *and that was the only issue.'*

- When asked whether he checked with LM who Trader B was he stated *"No, I did not, no."*

- Thus, on the evidence of the Appellant, the procedure was to accept what he was told by the representative without carrying out any checking or verification in relation to same. This approach was taken notwithstanding the evidence the Appellant gave in direct examination of his awareness in relation to the problem of fuel laundering. He stated that he knew that fuel laundering was an issue '*in a general sense from the media'* and that he could see the Respondent's officers testing outside his and other forecourts in his area.

- The Appellant provided evidence that other suppliers interposed themselves into the supply chain. It was not clear whether these other suppliers were acting as agents for Trader B, agents for Trader C or whether they were acting in some other capacity. The Appellant was unclear in his evidence in relation to these suppliers and he struggled to recollect data in respect of these transactions.

I am satisfied that the cumulative effect of each of the objective factors set out above, together with the evidence, leads to the conclusion that the only reasonable explanation for the purchases was that the purchases were connected to the fraudulent evasion of VAT.

Determination

In accordance with *Kittel*, it is for the referring court or tribunal 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 the fraudulent evasion of VAT.

I am satisfied, based on the evidence and the objective factors set out above that the Appellant should have known that he was participating in a transaction connected with the fraudulent evasion of VAT and that the only reasonable explanation for the purchases was that the purchases were connected to the fraudulent evasion of VAT.

I determine that each of the notices of assessment to VAT in respect of 2010, 2011 and 2012 in the respective amounts of €12,432, €190,356 and €248,982 (together totalling €451,770) shall stand.

This appeal is hereby determined in accordance with section 949AK TCA 1997.

COMMISSIONER LORNA GALLAGHER

31st day of December 2019

This determination has been the subject of a request for appeal to the High Court by way of case stated in accordance with section 949AQ TCA 1997.