**[2017] UKUT 99 (TCC)**

**Appeal number: UT/2014/0023**

***VAT – MTIC fraud – FTT decision that appellant should have known that its transactions were connected to the fraudulent evasion of VAT – adequacy of reasons for the FTT's decision – whether decision should be set aside – s 12, Tribunals, Courts and Enforcement Act 2007 - nature of the power to set aside – whether to re-make the decision or remit to the FTT – remittal to original or new panel***

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

**SYNECTIV LIMITED** **Appellant**

**- and -**

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

**TRIBUNAL: MRS JUSTICE WHIPPLE**
**JUDGE ROGER BERNER**

**Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 27 – 28 February 2017**

**Simon Farrell QC, instructed by jTk Associates LLP, for the Appellant**

**Christopher Kerr and James Onalaja, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

1. We have reached the conclusion in this appeal that the First-tier Tribunal (Judge John Brooks and Mrs Elizabeth Bridge) ("FTT") erred in law in failing to give adequate reasons for its decision to dismiss the appeal of the appellant, Synectiv Limited ("Synectiv"), against the denial by HMRC of its claim for a deduction of input VAT on the basis of a finding that Synectiv should have known that the relevant transactions were connected to the fraudulent evasion of VAT.

2. We set out in this decision our reasons for reaching that conclusion, and for our decision that in consequence the FTT's decision in that respect should be set aside and that it should be remitted to a fresh panel of the First-tier Tribunal with consequential directions.

**Background**

3. The appeal before the FTT concerned nine transactions carried out by Synectiv in mobile phones in two VAT periods, the period ended 30 April 2006 (04/06) and the period ended 30 June 2006 (06/06). HMRC denied Synectiv input tax recovery on the basis, in circumstances which have come to be termed missing trader intra-community, or MTIC, fraud, that the transactions were connected to the fraudulent evasion of VAT and that Synectiv knew, or alternatively should have known, of that connection.

4. Following an eight-day hearing in July 2013, written closing submissions and a final day of hearing on 1 October 2013, the FTT released its decision on 22 November 2013. Its decision was encapsulated at [144] as follows:

> "In the circumstances, and having regard to all the circumstances of the case, although we are not able to find that Mr Chandoo [Mr Asif Chandoo, the company secretary of Synectiv and its sole witness], and therefore Synectiv, knew that the transaction[s] were connected to fraud we find that he should have known that this was the only reasonable explanation for those transactions."

5. The FTT's decision runs to some 31 pages and 146 paragraphs. It set out the applicable law, principally derived from *Axel Kittel v Belgium; Belgium v Recolta Recycling SPRL* (Joined cases C-493/04 and C-440/04) [2006] ECR I-6161 and *Mobilx Ltd (in administration) v Revenue and Customs Commissioners* [2010] STC 1436, in a manner which is not challenged on appeal. It referred in particular to [59] and [60] of the judgment of Moses LJ in *Mobilx*, where he summarised the *Kittel* principle as including not only those who knew of the connection to fraud but also one who "should have known that the only reasonable explanation for the circumstances in which his purchase takes place was that it was a transaction connected with … fraudulent evasion".

6. The FTT dealt with certain procedural issues on admission of evidence and the weight to be accorded to it, particularly that of Mr Gary Taylor of

PricewaterhouseCoopers LLP, whose evidence related to an analysis of the grey market for UK-based mobile handset distributors in 2006 and included a commentary on an aspect of Mr Chandoo's witness statement in which he described the workings of the secondary market in mobile phones in particular by reference to one of the relevant transactions (described by the FTT as deal A10). In the event, as the FTT stated at [27], it derived little assistance from Mr Taylor's evidence.

7. Of thirteen HMRC officers who produced witness statements, the FTT heard live evidence from just two, Mr Smith and Mr Mendes. Synectiv produced one witness, Mr Asif Chandoo, and the FTT heard evidence from him, principally under cross-examination, over three days. Where we refer in this decision to Mr Chandoo we mean Mr Asif Chandoo, noting that he has a brother, Mr Arif Chandoo, who is also connected with the matters raised in this appeal (and whom we will identify separately).

8. The FTT set out the background history of Synectiv's establishment and its trading over a period prior to 2006. It considered evidence of the relationship between the company and HMRC, including warnings given by HMRC concerning the risk of MTIC fraud and advice as to transactions of the company that had been traced through to "missing traders" who had failed to account for VAT. In particular, the FTT referred to the arrest in 2001 and 2002, in the course of an operation described as Operation Venison, of certain former directors of Synectiv, including Mr Chandoo's brother, Mr Arif Chandoo, on charges of conspiring to cheat the revenue. The trial of Mr Arif Chandoo and the others had in due course been stayed on the ground of abuse of process, and the charges accordingly were not proceeded with.

9. The FTT summarised the turnover, and claims for recovery of input VAT, of Synectiv for certain periods prior to those in question in the appeal. It noted that Synectiv's accounts for the year ended 31 March 2006 showed that out of a total turnover of £41 million, wholesale sales outside the EU amounted to £20,203,000 (41%), wholesale sales to EU customers were £14,668,000 (35%), wholesale sales to UK customers were £5,635,000 (13% - the FTT's reference to 35% in this respect was clearly an error). Retail sales of £1,312,000 amounted to 3% of turnover.

10. The FTT described, in some detail, the chains of transactions which were accepted as having taken place in both 04/06 and 06/06. That included descriptions of the supplies of the goods through a number of traders, and the transactions of Synectiv whereby Synectiv bought phones from a UK trader and sold those phones to a trader based outside the UK. The FTT described, in each case, the basis on which the trading relationships between Mr Chandoo and the suppliers and customers had arisen, and the information that Mr Chandoo had obtained from those suppliers and customers. The FTT set out the evidence of the money movements that had taken place referable to each of the trades through the deal chains, including the banking arrangements.

11. Having rejected an argument for Synectiv that two transactions (deals A11 and J5) should not be accepted as being connected to the alleged missing trader in each of those cases (as to which there is no appeal), the FTT went on to consider the central

questions, namely whether, first, Synectiv, through Mr Chandoo, knew that its transactions were connected to the fraudulent evasion of VAT or, secondly, whether Synectiv, again through Mr Chandoo, should have known of that connection. It reminded itself of the need, emphasised in *Mobilx* at [83] by reference to ***Red 12 Trading Ltd v Revenue and Customs Commissioners*** [2010] STC 589, for the tribunal to look at the totality of the evidence.

12. The FTT found, at [131], that Mr Chandoo was aware of the prevalence of MTIC fraud at the time of Synectiv's relevant transactions. At [132], the FTT set out twelve factors relied upon by HMRC in particular as demonstrating that Synectiv knew or should have known of the connection to fraud:

> "(1) Its trading environment too good to be true;
>
> (2) It was able to match precisely the available supply to a demand in another Member State;
>
> (3) All sales took place in one day;
>
> (4) Synectiv added no value to goods;
>
> (5) Suppliers and customers repeatedly failed to identify a cheaper source of supply or higher demand;
>
> (6) Synectiv did not have to finance deals as it did not pay a supplier until paid by its customer;
>
> (7) It was able to ship goods out of UK using the same freight forwarder as its supplier before making payment;
>
> (8) The technical specification of the phones bought and sold indicated that goods had been imported and were not intended nor suitable for UK market;
>
> (9) All suppliers and customers operated sterling accounts with FCIB;
>
> (10) The necessary due diligence to protect its commercial interests was not taken;
>
> (11) The profit of all the participants added together equalled the VAT reclaimed; and
>
> (12) Without the monies receivable from repayment claims Synectiv was not able to fund the transactions."

13. The FTT recorded, at [133], the submissions for Synectiv, first, that it had been used by sophisticated fraudsters and was unknowingly inserted into a number of deal chains, and secondly that from the standpoint of Synectiv the deals appeared to be good and profitable business transactions and no different from previous trades it had undertaken.

14. Having referred, at [134], to the necessity, in considering the questions before it, of carefully assessing the credibility of the evidence of Mr Chandoo, the FTT found, at [135], that Mr Chandoo had given full and frank evidence. It found that he was clearly knowledgeable about the wholesale mobile phone industry. However, the

FTT formed the impression that Mr Chandoo was "a somewhat naïve businessman whose ambition was, above all else, to close deals and make a profit." The FTT did not regard Mr Chandoo as being concerned about "the improbable coincidence of chance meetings with suppliers and customers". The FTT regarded him as being "too ready to 'feel comfortable' with potential trading partners without the sort of further investigation into their credibility and ability to pay that could be expected of a prudent legitimate businessman".

15. To explain this judgment of Mr Chandoo, the FTT referred, at [136], by way of example, to the meeting of Mr Chandoo with Mr Hussein Awad, the director of Top Telecoms Limited, the supplier to Synectiv in two of the deals, A10 and A15, at the Willesden Mosque. The FTT referred to the fact that Mr Chandoo had obtained the certificate of incorporation of the company and had verified its VAT registration, but had not asked for proof of identification from Mr Awad or sought trade references. It referred also, at [137], to oral references on traders received from Interken Freighters (UK) Limited, the freight forwarder, and the reliance of Mr Chandoo on the fact that participants with Synectiv in the trades used Interken or had a supplier or customer in common with Synectiv. The FTT gave as an example the meeting of Mr Chandoo with Mr "Bobby" Sharma of Owl Limited (deals A14 and J2) when Mr Sharma had been unloading a vehicle.

16. The FTT referred, at [138], to its understanding that Mr Chandoo had relied upon the knowledge of his brother, Mr Arif Chandoo, in respect of Mr Sharma in order to begin trading with Owl, and that Mr Chandoo had likewise relied upon his brother to translate and explain certain French-language documents in relation to a French customer, URTB Sarl (deals A10, A11, A14, A15 and J3).

17. Mr Arif Chandoo had not only been arrested and charged (though those charges were not proceeded with) in relation to Operation Venison, which led the FTT to surmise that he would have been aware of the prevalence of MTIC fraud in the mobile phone wholesale sector, he was at the material time also the sole director of Synectiv. HMRC had invited the FTT to draw an adverse inference from the failure of Synectiv to call Mr Arif Chandoo as a witness. The FTT referred to the applicable principles from the judgment of Brooke LJ in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, and found, at [141], that Mr Arif Chandoo might have been expected to have been able to give material evidence on the central issues. At [143], the FTT rejected the explanation given by Mr Chandoo in evidence for Mr Arif Chandoo not being called to give evidence – essentially that Mr Arif Chandoo had taken no part in the trading element of the business since Operation Venison - as "simply not credible". The FTT described that explanation as having done "nothing to enhance Mr Chandoo's own evidence in relation to the transactions from which it is apparent that Arif had a part to play in the trading activities of Synectiv".

18. At [144], the FTT set out its conclusion that although it was not able to find that Mr Chandoo, and therefore Synectiv, knew that the transactions were connected to fraud, it found that he should have known that this was the only reasonable explanation for those transactions.

**Discussion**

19. Mr Farrell, appearing for Synectiv as he did below, made the primary submission that it was simply not possible to understand from the FTT's decision why it had decided that Mr Chandoo, and thus Synectiv, should have known that the only reasonable explanation for the circumstances in which Synectiv's transactions had taken place was that they were transactions connected with the fraudulent evasion of VAT.

20. We start, therefore, with the principles that should be applied. Those are well-established and set out in *English v Emery Reimbold & Strick Limited* [2002] 1 WLR 2409, where Lord Phillips MR, giving the judgment of the Court of Appeal, said (At [16] – [21]):

> "16 We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost.
>
> 17 As to the adequacy of reasons, as has been said many times, this depends on the nature of the case: see for example Flannery's case [2000] 1 WLR 377, 382. In *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119, 122 Griffiths LJ stated that there was no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case:
>
> "When dealing with an application in chambers to strike out for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties and, if need be, the Court of Appeal the basis on which he has acted… (see Sachs LJ in *Knight v Clifton* [1971] Ch 700, 721)"
>
> 18 In our judgment, these observations of Griffiths LJ apply to judgments of all descriptions. But when considering the extent to which reasons should be given it is necessary to have regard to the practical requirements of our appellate system. A judge cannot be said to have done his duty if it is only after permission to appeal has been given and the appeal has run its course that the court is able to conclude that the reasons for the decision are sufficiently apparent to enable the appeal court to uphold the judgment. An appeal is an expensive step in the judicial process and one that makes an exacting claim on judicial resources. For these reasons permission to appeal is now a nearly universal prerequisite to bringing an appeal. Permission to appeal will not normally be given unless the applicant can make out an arguable case that the judge was wrong. If the judgment does not make it clear why the judge has reached his decision, it may well be impossible within the summary procedure of an application for permission to appeal to form any view as to whether the judge was right or wrong. In that event permission to appeal may be given simply

> because justice requires that the decision be subjected to the full scrutiny of an appeal.
>
> 19 It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, in may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.
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> …
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> 21 When giving reasons a judge will often need to refer to a piece of evidence or to a submission which he has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question. The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the judge's decision."

21. At [26], the court provided guidance as to the proper approach to be adopted by an appellate court or tribunal in these circumstances. It is to review the judgment in the context of the material evidence and submissions at the hearing in order to determine whether, when all of these are considered, it is apparent why the lower tribunal reached the decision that it did.

22. For HMRC, Mr Kerr, who with Mr Onalaja also appeared before the FTT, referred us to the judgment of Lord Carnwath in the Supreme Court in *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] 2 AC 48, at [25]:

> "It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it."

23. We have described the evidential context in which the FTT reached its conclusion. We also have regard to the respective closing submissions of the parties which by direction of the FTT were provided in writing in advance of final oral submissions. For HMRC, those submissions ran to 64 pages and 143 paragraphs. Detailed submissions were made in relation to each of the factors relied upon by HMRC as indicating both actual and constructive knowledge. It was submitted that the trading environment was so unrealistically benign that it was inconsistent with commercial reality. In short it was too good to be true. That was supported by submissions on the alleged ease of the process by which Synectiv was able to match

supply and demand, the timing of the deals, the failure of suppliers to identify export customers for themselves, the financing arrangements and credit terms, the transfer of title, the volume of the deals and the fact that deals were available as soon as Synectiv received its VAT repayment for earlier transactions.

24. Submissions were also made concerning the profits realised by Synectiv from the transactions in question, and the predominance of the wholesale business in financial terms over the retail business. A comparison was made between the profit margins available to Synectiv on export transactions as contrasted with UK-UK deals, and submissions made as to the lack of commerciality in the acceptance by export customers of the higher mark up.

25. It was further submitted that the trading model, as it was apparent to Synectiv, was not rational in commercial terms. That submission was supported by argument on the knowledge Synectiv must have had as to the existence of a lengthy supply chain, of the import of the goods into the UK, of the trading down the supply chain without payment being made, and the retention of the goods with freight forwarders. Those freight forwarders were also being used by all four of Synectiv's suppliers, and all of the UK suppliers and EU customers were operating sterling accounts with the same offshore bank – First Curaçao International Bank NV ("FCIB"). It was argued that the pricing of the goods was not consistent with a genuine commercial market; very detailed arguments were made in support and the evidence of Mr Taylor was relied upon in this respect.

26. We need not describe all of HMRC's closing submissions. They were very extensive. The list set out by the FTT at [132] was not inaccurate, but it did not in our view adequately describe HMRC's case in those respects.

27. Synectiv produced an equally extensive set of written closing submissions, running to 75 pages and 254 paragraphs. The summary of those submissions which appears at [133] of the FTT's decision represents a single paragraph of Synectiv's submissions which appears in the section headed "Introduction". Each element of HMRC's case was subjected to detailed analysis and alternative propositions were advanced. Thus, for example, in relation to HMRC's case that Synectiv's business model was "too good to be true", Synectiv's analysis, over 44 paragraphs, addressed a number of relevant issues, including the questions of added value, consistency of mark ups, suspicious profitability, absence of losses, ease of deal making and prior importation into the UK. In a further section of the submissions, Synectiv addressed the question whether Synectiv's deals were extraordinary because of the trading partner, the price or the volume of goods, and included a critique of the evidence of Mr Taylor, and reliance on the account given by Mr Chandoo of the grey market opportunities available to Synectiv, and of Synectiv's trading.

28. None of these competing submissions is addressed by the FTT in its decision. The decision is notable only for the absence of any real analysis of the twelve factors summarised, briefly, in [132] or the arguments of Synectiv. It is only by considering the detailed submissions of the parties that, for example, it is possible to understand what was meant by the submission that Synectiv's trading environment was "too good

to be true". That short expression masks a wide-ranging set of competing submissions which ought to have been subjected to proper judicial scrutiny. Regrettably, there is nothing in the decision to show that it received such attention from the FTT.

29. Instead, having introduced the twelve factors by way of brief summary and having summarised Synectiv's argument in a single paragraph, the FTT moved directly to its impression of Mr Chandoo as a naïve businessman who had given full and frank evidence (at [135]). Examples of what the FTT considered were failings on the part of Mr Chandoo to investigate Synectiv's suppliers and customers were given at [136] – [138]. We infer that those were examples of the naïveté in business matters which the FTT had earlier identified. The FTT then considered the absence from the proceedings of Mr Arif Chandoo, and concluded, at [141], that he might well have been able to give material evidence on the "central issue", namely whether Synectiv knew or should have known that its transactions were connected with fraudulent evasion of VAT. The FTT did not state to which limb of the test Mr Arif Chandoo's evidence might have gone. It set out, at [142], Mr Chandoo's explanation for not calling his brother and rejected that application as untrue, which, so the FTT concluded at [143], did "nothing to enhance" Mr Chandoo's own evidence. The FTT did not explain what it meant by this nor, specifically, whether it remained of the view that Mr Chandoo's evidence had been full and frank (as the FTT had found it to be at [135]), or not. The FTT did not state whether it had drawn an adverse inference in relation to the failure to call Mr Arif Chandoo as a witness. If it did draw such an inference, then it did not state precisely what that inference was, nor how it had weighed that inference in the evidential balance. These are serious deficiencies in the FTT's reasoning which give rise to further uncertainty about the conclusion reached at [144].

30. There is, as the *English* case makes clear, no duty on a tribunal to deal with every argument. But sufficient reasons must be given. The losing party, in particular, must be able to understand why its case has been lost. Here there was no real reasoning at all. It is not sufficient, as Mr Kerr sought to argue, to infer that the factors identified by HMRC must have been accepted by the FTT simply because of its conclusion that Synectiv should have known that the connection with fraud was the only reasonable explanation for the transactions. That conclusion was essentially unreasoned. We do not consider that the FTT's decision enables the parties or this Tribunal to analyse the essential reasoning which led the FTT to conclude as it did. Exercising as much judicial restraint as we might, it is impossible for us to find other than that the FTT made an error of law in failing to give sufficient reasons for its decision.

*Consequences of a finding of error of law*

31. The jurisdiction of the Upper Tribunal is set out in s 12 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA"):

"**12 Proceedings on appeal to Upper Tribunal**

(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.

(2) The Upper Tribunal—

(a) may (but need not) set aside the decision of the First-tier Tribunal, and

(b) if it does, must either—

(i) remit the case to the First-tier Tribunal with directions for its reconsideration, or

(ii) re-make the decision.

(3) In acting under subsection (2)(b)(i), the Upper Tribunal may also—

(a) direct that the members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision that has been set aside;

(b) give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal.

(4) In acting under subsection (2)(b)(ii), the Upper Tribunal—

(a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and

(b) may make such findings of fact as it considers appropriate."

32. An error of law in a decision of the FTT will not necessarily lead to that decision being set aside. The Tribunal has a discretion in that respect. Mr Kerr urged us not to set aside the FTT's decision in this case. He argued that we should find that there was a sufficient basis in the primary facts to justify the conclusion that Synectiv should have known of the connection to fraud, and that the FTT would have been entitled to reach the conclusion that it did based on those primary facts.

33. In support of this submission, Mr Kerr referred us to two cases. Both were cases concerned with MTIC fraud. In the first, *Megtian Ltd (in administration) v Revenue and Customs Commissioners* [2010] STC 840, the VAT Tribunal had found that Megtian knew or should have known that the transactions in question were connected with fraud. Certain grounds of appeal, on pure questions of law, had been held over pending the Court of Appeal's consideration of *Mobilx*. The only grounds of appeal before the High Court therefore were ones relating to the tribunal's analysis of the facts and evidence.

34. All of Megtian's criticisms of the specific factors which the tribunal had taken into account in finding that Megtian had the requisite knowledge of fraud were rejected. The judge (Briggs J) went on to say, at [73]:

"If I had concluded that one or more of Mr Patchett-Joyce's criticisms of the specific factors which the tribunal took into account in concluding that Megtian had the requisite knowledge of fraud was made out, it might have been necessary for me to consider whether the

> remainder, taken together with those factors relied upon by the tribunal which were not challenged, none the less constituted a sufficient basis for its conclusion."

35. In the second case, *Annova Ltd v Revenue and Customs Commissioners* [2014] STC 1617, in this Tribunal, the appeal was against the conclusion of the First-tier Tribunal that, in relation to a particular transaction, Annova did not know of the connection to VAT fraud but should have known of such a connection. The challenge was made by reference to findings of the tribunal concerning Annova's knowledge of sales volumes of the phones that were the subject of the deal and the extension of credit to Annova by its supplier. The Tribunal (Arnold J) upheld the challenge with respect to the sales volumes, but rejected that in relation to the credit. Having reached that conclusion, the judge directed himself, at [33], that he had to consider whether the First-tier Tribunal would have been entitled to conclude that Annova should have known that the relevant deal was connected with fraudulent evasion of VAT absent the impugned finding with regard to knowledge of sales volumes.

36. The principles referred to in both *Megtian* and *Annova* are unexceptional, but those cases cannot assist in this appeal. In both of those cases the appellate court or tribunal was dealing with a fully-reasoned decision only certain elements of which were subject to challenge. It is axiomatic that in such circumstances, if any error of law were to be found in relation to individual aspects of the tribunal's decision it is a necessary next step to determine whether, absent the impugned findings, there is nonetheless sufficient basis for the tribunal's conclusion. That crucially depends upon the tribunal's reasoning, a point made clear by the reference by Arnold J in *Annova*, at [34], to his consideration of the tribunal's reasoning in relation to the other deals in that case, and its reasoning in relation to other factors pointing in the direction of a conclusion that the relevant deal was connected with VAT fraud.

37. In this case there is no such reasoning for this Tribunal to review. Essentially any review would have to be of the respective cases as put by each of the parties, a process which would be identical to this Tribunal re-making the decision. Mr Kerr's submissions as to the factors which he argues are sufficient for this Tribunal to decide that the FTT was entitled to conclude as it did, and the process of reasoning he puts forward to arrive at that conclusion, merely serve to emphasise the deficiencies in the FTT's own reasoning.

38. We conclude therefore that the decision of the FTT must be set aside.

*The nature of the Tribunal's power to set aside*

39. That gives rise to a question as to the extent to which the FTT's decision may, or should, be set aside. Left to ourselves, we are clear that it would be an injustice to Synectiv if the consequence of its successful appeal on one aspect of the FTT's decision was that the whole decision, including the finding in its favour that it did not know of the connection to fraud, were to be overturned. There was no appeal, whether by cross-appeal or in HMRC's formal response to Synectiv's appeal, against that finding of the FTT, and there cannot accordingly be any question of law in that respect within this Tribunal's jurisdiction. We would therefore set aside only that part

of the decision of the FTT which related to the finding that Synectiv should have known of the connection to fraud and leave untouched its unappealed finding with respect to actual knowledge.

40. Mr Kerr submitted that this course was not open to us under s 12 TCEA. He argued that s 12(2)(a) gives power only to set aside the whole, and not part of, the decision, which in this case was the FTT's decision to dismiss the Synectiv's appeal. Once that decision had been set aside, all aspects of the decision, including as to actual knowledge, would fall to be re-made, either by this Tribunal or after remittal to the FTT. Mr Farrell, for his part, argued that this Tribunal would either have power to set aside the relevant part of the FTT's decision or, if it was right that the whole decision must be set aside, power to confine the scope of the re-making of the decision by giving directions under s 12(2)(b)(i) or s 12(3)(b).

41. We doubt whether, if the Tribunal's discretion were to be confined in the way submitted by Mr Kerr, the power to make directions could enable the Tribunal in effect to limit the extent to which the FTT's decision would be set aside. That would, in any event, have application only where this Tribunal were to decide to remit the case to the FTT; it would have no application in a case where the decision was to be remade by this Tribunal. But it is not necessary in our view for any reliance to be placed on the power to make directions.

42. Section 12 TCEA falls to be construed in its context. That context includes the extent of the Tribunal's jurisdiction under s 11, which depends on there being a point of law arising from the decision of the FTT and the grant of permission to appeal in relation to that point of law. The power to set aside the decision of the FTT flows directly from a finding that the making of the FTT's decision involved the making of an error of law. Where that decision includes findings that are not the subject of appeal, or are unaffected by the error of law that has been identified, it cannot have been the purpose of s 12 to constrain the discretion of this Tribunal as to the extent to which the FTT's decision should be set aside.

43. The circumstances of *Annova* can be used to illustrate the point. In that case the First-tier Tribunal had been concerned with four transactions of Annova (Deals 1 – 4). In relation to Deals 3 and 4 there was a finding of actual knowledge; for Deals 1 and 2 the finding was of constructive knowledge ("should have known"). The appeal by Annova was in respect of Deal 1 alone. If the consequence of the appeal had been that the tribunal's finding of constructive knowledge in relation to Deal 1 could not stand, it could not, we consider, properly have been argued that the tribunal's unappealed decision in relation to Deals 2, 3 and 4 would have to have been set aside along with its decision in relation to Deal 1.

44. A purposive construction of s 12(2)(a) is that it enables this Tribunal to set aside all of the FTT's decision, or such part of it as is appropriate in the circumstances, having regard to the error of law identified by the Tribunal. The reference to "decision" in s 12(2)(a) should not be construed narrowly so as to limit the reference to the mere allowing or dismissing of the appeal by the FTT, a process that is consequential upon the underlying findings and conclusions of the FTT. It should

instead be construed to encompass the underlying decisions on which the allowing or dismissal of the appeal is based. That would include, in circumstances such as those in *Annova*, underlying decisions on discrete elements of the overall case, such as individual transactions, and in this case decisions on the individual, and alternative, questions required as a matter of law to be determined in the case.

45. On that basis, we conclude that we have the power to set aside that part of the FTT's decision which determined that Synectiv should have known that the transactions in question were connected with the fraudulent evasion of VAT. We leave undisturbed that part of the FTT's decision which determined that Synectiv did not have actual knowledge of that connection.

*Remake or remit?*

46. We have considered carefully, with the benefit of the parties' submissions, whether we are ourselves in a position to re-make the decision we have set aside. There are obvious disadvantages in terms of cost and further delay in remitting the case, but the real question is whether we are satisfied that it would be in the interests of justice for us to re-make the decision or whether justice would better be served by remitting the case.

47. It was urged upon us by Mr Farrell that the question to be determined required objective consideration of the circumstances of the various transactions as to which there was no material dispute as to the primary facts. The question was one of inference, which this Tribunal was equally placed to address as the FTT, especially if, as Mr Farrell submitted should in that event be the case, the matter was referred back not to the original FTT but to a new tribunal.

48. We regret that we cannot agree with Mr Farrell. We accept that the question to be addressed is an objective one, but it is nonetheless one that depends on an evaluation of the evidence, an important part of which was given orally, and which we have not heard. The credibility of the evidence of Mr Chandoo was, as the FTT itself acknowledged at [134], a necessary element of the required determination. A review of the closing submissions made by both parties shows that both of them seek support for aspects of their respective cases, in particular the issue whether the trading environment was, or the trades themselves were, "too good to be true", from the evidence given by the witnesses, in particular Mr Chandoo and Mr Taylor. We do not consider a proper evaluation of that evidence, or the submissions which are based on it, is possible without having heard the evidence.

49. We decide therefore that the case whether Synectiv should have known that its relevant transactions were connected to VAT fraud will be remitted to the First-tier Tribunal.

*Nature and scope of remittal*

50. Mr Kerr submitted that, if the case were to be referred back to the First-tier Tribunal, it should be referred back to the original FTT with directions to that tribunal

to give its reasons for the finding of constructive knowledge. We accept that such a course is open to this Tribunal, and that there are circumstances where such a course is appropriate to be adopted. The question, however, is whether that would be appropriate in this case.

51. In *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377, the Court of Appeal allowed an appeal on the sole ground that the judge had failed to give adequate reasons for his decision, and ordered a retrial. As the court in *English* observed, at [22], one suggestion that was made in *Flannery*, with a view to preventing unnecessary appeals on the ground of absence of reasons, was that the matter might be remitted to the trial judge with an invitation or requirement to give reasons. In *Flannery* itself this was not considered appropriate because more than a year had passed since the hearing. As *English* confirms, the delay between the hearing and appeal will normally be too long to make a remission for further reasons a desirable course. As Henry LJ said in *Flannery*, at p 383, after such a length of time it would not be realistic for the judge to reconstitute his reasons.

52. The FTT's decision in this case was released as long ago as November 2013. That is far too long a delay to make remittal to the FTT for it to give reasons for its conclusion a feasible proposition. In view of that we consider that the only proper course is for this case, to the extent of the constructive knowledge issue, to be remitted to the First-tier Tribunal to be considered afresh by a new panel the members of which are to be chosen by the President of the Tax Chamber.

53. We shall separately make consequential directions for the reconsideration of the case by the First-tier Tribunal, including procedural directions. We express the hope, which reflects submissions advanced by both parties before us, that it should be possible to agree many of the background facts before the next hearing. That will enable the new tribunal to focus on the single relevant issue of constructive knowledge.

**Decision**

54. For the reasons we have given:

(1) We allow the appeal of Synectiv.

(2) We set aside the decision of the FTT to the extent that it relates to the finding that Synectiv should have known that the transactions in question were connected with the fraudulent evasion of VAT.

(3) We remit the case to the First-tier Tribunal and direct that, to the extent we have set aside the decision of the FTT, it be reconsidered by a new panel of that tribunal the members of which are to be chosen by the President of the Tax Chamber of the First-tier Tribunal.

(4) Further directions are issued with this decision.

**MRS JUSTICE WHIPPLE**
**UPPER TRIBUNAL JUDGE ROGER BERNER**

**RELEASE DATE: 9 March 2017**

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