VALUE ADDED TAX — input tax — denial of right to deduct on grounds of knowledge of connection of appellant's transactions to fraud — whether First-tier Tribunal entitled to reach conclusion of knowledge or means of knowledge — yes — appeal dismissed

Appeal number: FTC/22/2013

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

EARTHSHINE LIMITED **Appellant**

- and -

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

Tribunal: Judge Colin Bishopp
Judge Edward Sadler

Sitting in public in London on 17, 18, 19, and 20 September 2013

Mr Patrick Green QC, Mr James Rivett and Ms Abigail Cohen, instructed by Maitland Walker, for the Appellant

Mr Ben Collins and Mr Jamie Sharma, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This an appeal against a decision of the First-tier Tribunal (Judge Barbara Mosedale and Mrs Lynneth Salisbury) ("the F-tT") released on 20 October 2011. The F-tT dismissed an appeal by the appellant, Earthshine Limited ("Earthshine"), against a decision of the respondents ("HMRC") to refuse credit for input tax of £303,646.35 incurred by Earthshine in July, October and November 2006. The grounds on which HMRC refused that credit were that Earthshine, through its directors, knew or ought to have known that the transactions in respect of which the input tax had been incurred were connected with fraud elsewhere in the chains of supply. It will be apparent from that short introduction that this was what is commonly referred to as an MTIC appeal.

2. Earthshine disputed the allegation of connection, and argued that even if a connection was established, its directors did not know and had no reason to think that Earthshine's transactions were so connected. The F-tT concluded that the connection was established, that one of the two directors of Earthshine knew of the connection to fraud, and that the other either knew, or chose to turn a blind eye to material available to him which should have made it plain, that there was such a connection. It accordingly dismissed the appeal in its entirety.

3. Permission to appeal to this tribunal was refused by the First-tier Tribunal and again, on paper, by this tribunal. The application was, however, renewed and at an oral hearing permission was granted on six out of the 18 grounds initially advanced by Earthshine. The grounds on which permission has been granted are, in summary, as follows:

(1) that the tribunal adopted an impermissibly selective approach to the evidence and its effect;

(2) that the tribunal fundamentally misunderstood a letter of 3 June 2004 written by HMRC to Earthshine;

(3) that the tribunal misdirected itself as to the relevance of line checks;

(4) that the tribunal misunderstood and in consequence reached impermissible conclusions from the evidence of HMRC's expert witness;

(5) that the tribunal, despite reciting the evidence it had heard and seen on a number of topics, failed to reach any conclusions about those topics;

(6) that the tribunal misunderstood Earthshine's position in respect of a document which had not previously been disclosed by HMRC.

4. We should record, for better understanding of what follows, that permission to appeal was refused on, among others, the grounds that it was not open to the F-tT to find orchestration without also finding that Earthshine was party to a conspiracy (a finding which would not have been open to the F-tT as conspiracy was not pleaded or put); that the F-tT applied the wrong standard of proof; and that it was not open to the F-tT to find that Earthshine's transactions were connected with fraud. The last of the permitted grounds we have set out does have

some relevance to connection, but the remaining five grounds on which permission has been granted, and the primary focus of this appeal, is on the question whether or not Earthshine, in the person of its officers, knew or ought to have known of the connection to fraud, and those five grounds are all directed in their differing ways to that question.

5. The F-tT's decision records that Earthshine was incorporated in 2001, when it registered for VAT and began trading in mobile phones and computer chips. The transactions with which the F-tT was concerned, however, were all in mobile phones. In every case, Earthshine bought the phones from a VAT-registered UK trader, thus incurring input tax, and sold the phones to a trader in another member State of the European Union. The sales were, correspondingly, zero-rated and Earthshine was left with a claim for credit or repayment of the input tax it had incurred, but no corresponding output tax liability. It was what is known in the jargon used in cases such as this as a "broker".

6. The F-tT heard evidence and submissions on 17 days in 2010 and 2011, and released an extremely detailed decision extending to 648 paragraphs over 112 pages, despite the fact that there were only seven transaction chains in issue. Four of the chains, if HMRC and the F-tT were right (and with the single exception to which we come later we must, of course, take it they were), could be traced back to defaulting traders, and the remaining three to what is commonly known as a contra-trader. After reaching those findings the F-tT turned its attention to the second limb of the test expounded by the Court of Justice of the European Union in what is universally accepted as the leading authority on the topic, *Kittel v Belgium, Belgium v Recolta Recycling SPRL* (Joined cases C-439/04 and C-440/04) [2008] STC 1537 ("*Kittel*"), as explained by the Court of Appeal in what is so far the leading domestic authority, *Mobilx Ltd (in administration) v Revenue and Customs* [2010] EWCA Civ 517, [2010] STC 1436 ("*Mobilx*"). The first limb is the fact of a connection to fraud; the second, the issue before us, whether the trader concerned, in this case Earthshine, knew or should have known of the connection.

7. The essence of the F-tT's conclusions is set out at [621] of its decision:

> "Earthshine by its officers were well aware of the risk of MTIC fraud in the market in which they say they traded; yet they continued to trade despite (we find):
>
> - knowing there was no rational commercial explanation for the market in which they were trading, and choosing not to investigate oddities such as why Continental companies wanted phones with 3 pin plugs nor taking any steps to increase their profits by cutting out the middlemen even though they knew the chain was long;
> - knowing they were able to make substantial profits for doing virtually nothing but issuing invoices, inspecting goods and having ready capital. Earthshine's officers were not able to explain to this Tribunal a commercial rationale for how a market might have arisen which allowed them to do this without taking commercial risk;
> - knowing at least in one deal that the goods were being imported from Continental Europe and then immediately re-exported;

- being of the opinion that their suppliers were dealing back to back and making too little profit to undertake inspections of the goods;
- knowing their customers had no real interest in the specification of the products they were purchasing. They offered no rational explanation of how this could happen in a genuine market."

8. The F-tT went on to add its finding that the trades were part of an orchestrated fraud, though without a finding that Earthshine had been instrumental in the orchestration; that Earthshine's share of the overall profit from the trades was substantial, and an indication that it knew that its transactions were driven by fraud; that the evidence of one of the directors, Mr Anthony Sharp, about the negotiation of the deals was unreliable, a factor which reinforced its conclusion that the specification of the products was a matter of no genuine interest; that Earthshine's due diligence was not seriously undertaken but was "window dressing"; and that although Earthshine had taken advice from HMRC, it had failed to follow it. It did find in Earthshine's favour that it carried out fairly thorough inspections of the goods, while also finding that it did so for the purpose of ensuring it could recover the input tax that it had incurred, rather than for any true commercial reason. It added that it made those findings on the balance of probabilities, which it considered (correctly) to be the appropriate standard, but would have reached the same conclusion to the criminal standard had that been the requirement.

9. We interpose at this stage, since it informs what follows, the essential test of knowledge or means of knowledge, as it was articulated by Moses LJ in *Mobilx* at [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*."

10. Earthshine was represented before us by Mr Patrick Green QC, leading Mr James Rivett and Ms Abigail Cohen, and HMRC by Mr Ben Collins leading Mr Jamie Sharma.

Ground 1 — selective approach to the evidence

Earthshine's submissions

11. The essence of Earthshine's complaint under this heading is that the F-tT consistently disregarded evidence which favoured Earthshine or undermined HMRC's case, but instead accepted HMRC's evidence where it favoured their case, and ignored inconsistencies or concessions made by HMRC's witnesses during the course of cross-examination, as well as assertions in their witness statements which were shown to be incorrect. That approach was also, Earthshine says, reflected in the F-tT's failure to engage with its extensive and detailed closing submissions. This approach, besides being partial and unfair, fatally

undermined the conclusions which the F-tT did reach because those conclusions, on proper analysis, were not supported by the evidence it heard and saw. This criticism, said Mr Green, is not a simple attack upon the findings of fact but one upon the F-tT's whole approach to the evidence. It misdirected itself on the matters it should consider, and in doing so committed an error of law.

12. Mr Green acknowledged that an appeal lies to this tribunal only on an issue of law but, he said, a specialist tribunal may, as Lord Carnwath JSC said in *Jones (by Caldwell) v First-tier Tribunal and Criminal Injuries Compensation Authority* [2013] 2 AC 48 at [46], "venture more freely into the 'grey area' separating fact from law, than might an ordinary appellate court." Thus respect for the F-tT, though itself a specialist tribunal, should not inhibit this tribunal from engaging in proper scrutiny of its findings of fact and, where appropriate, re-making them. Mr Green also took us to *Grupo Torras SA v Al-Sabah* [2000] CLC 221 in support of that proposition, though for our part we see little in that case to assist him.

13. The most egregious mistake, and the one which undermined the F-tT's whole approach, was that it failed to take into account the concessions made by HMRC's witnesses about the existence of a genuine grey market in mobile phones. At [188] the F-tT made it clear that it was addressing the question whether, on the one hand, Earthshine engaged in orchestrated transactions or, on the other, was trading in a genuine commercial market. That approach, said Mr Green, was quite inappropriate because it asked the wrong question; and when coupled with the F-tT's selective approach to the evidence, it had led it to a wholesale failure of perception. That failure was best characterised by the F-tT's observation at [257] that:

> "The Appellant's criticism boiled down to saying that Mr Fletcher's evidence [Mr Fletcher was HMRC's expert witness] must be wrong because in the Appellant's opinion it was trading on the secondary market. We do not agree."

14. Having rejected that opinion, the F-tT proceeded to assess the evidence upon the basis that if the transactions did not take place within a genuine grey, or secondary, market, they must have been orchestrated for fraudulent purposes. Mr Fletcher had, however, accepted that there was a genuine grey market in mobile phones and if the F-tT had approached the evidence while taking that acceptance properly into account it would or should have been driven to conclude that Earthshine was trading in that genuine grey market. If so, its directors could reasonably and properly have been satisfied that there was a true, commercial, purpose to the transactions in which Earthshine engaged. Even Mr Fletcher had accepted that connection to fraud was not the only plausible explanation for the transactions yet, contrary to that concession, the F-tT had concluded that Earthshine's directors had actual knowledge of fraud, in part because, as the F-tT stated at [621] (set out above) there was no rational commercial explanation for the market in which they were trading. If HMRC's own evidence did not support such a conclusion, it was not one which it was open to the F-tT to draw.

15. There were, said Mr Green, several examples of the F-tT's having ignored evidence which favoured Earthshine's case, and in doing so it made no reference to, and evidently also paid no heed to, the fact that several of the allegations pleaded by HMRC in their statement of case were not made out: they were not supported by the available evidence. HMRC had pleaded that Earthshine "knew

that its transactions could not fail". The F-tT accepted, however, that Earthshine would reject a transaction if it discovered that the IMEI number of any one of the phones in the consignment showed that it had already traded that phone in an earlier transaction. Yet, despite making that finding, the F-tT ignored its inconsistency with HMRC's pleaded case and instead turned the finding against Earthshine by going on to decide, on no evident grounds, that the deal was rejected, not for commercial reasons, but because (it said) that there would be prejudice to Earthshine's input tax claims if HMRC were to discover that it had traded the same phone twice.

16. In similar vein, HMRC alleged that Earthshine's inspection reports were "riddled with inconsistencies". The evidence showed that the allegation was greatly exaggerated. Mr Green identified one particular case in which a report recorded that an inspection had taken place at one freight forwarder's premises whereas in fact it had taken place at the premises of a different freight forwarder. The report had, however, been corrected once the error was noticed, and the F-tT expressly said that it did not "think anything can be read into this discrepancy". But in saying that it did not go far enough; it should have found not only that HMRC had failed to prove their case in this respect, but that the correction of the error demonstrated the thoroughness of Earthshine's due diligence. HMRC also relied upon the allegation that many of the traders involved in the relevant transactions banked with First Curaçao International Bank ("FCIB"), a fact which, HMRC argued, should have made Earthshine cautious about dealing with them because (they said) it was well known that traders engaged in suspect deals banked with FCIB. In fact, only one of Earthshine's suppliers banked with FCIB, but it also had an account with a UK clearing bank, and it was to that account that Earthshine made its payment. Thus this too was an allegation HMRC did not make good.

17. Moreover, although the F-tT acknowledged HMRC's failure to establish much of what they had alleged, it simply failed to engage with that fact and instead found that Earthshine's directors, men of previous good character, had actual knowledge of the connection with fraud.

18. An allegation which HMRC did not make, although they do so in other cases of this kind, was that Earthshine had received and disregarded so-called "veto letters", meaning letters to one trader advising that another trader, with which it is or may be proposing to deal, has been de-registered for VAT. Earthshine had in fact received no such letters during the relevant period but the F-tT, by circularity of argument, stated at [628] that the absence of veto letters "could not have reassured Earthshine that its transactions were not connected to fraud as it knew (via Mr Sharp) that they were so connected."

19. A further feature of the case was that at the relevant time Earthshine's directors were contemplating a flotation on the Alternative Investment Market. It was an important part of Earthshine's case that this was a factor rendering HMRC's case inherently implausible since, before floating, Earthshine and its trade would have been subject to intense scrutiny. Its having entered into transactions tainted with fraud, if that had been the case, would have been discovered in the course of such scrutiny, and even Mr Stephen Kenrick, one of HMRC's witnesses, had accepted that an intention to float was consistent with

Earthshine's being a legitimate business. The F-tT, however, simply dismissed this factor, out of hand, as a matter of relevance.

20. The F-tT also accepted that the numbers of phones traded by Earthshine were relatively modest, substantially lower than those commonly seen in MTIC cases. Mr Fletcher had accepted that volumes of the level traded by Earthshine were typical of the genuine grey market. This evidence, too, was rejected by the F-tT as a material factor. Additionally, the F-tT's approach to the evidence it heard about Earthshine's reaction to HMRC's Notice 726 was driven by hindsight, and the conclusions it drew were irrational. Notice 726, which sets out HMRC's approach to the reverse charge imposed by s 77A of the Value Added Tax Act 1994, and which contains suggested steps which might be taken by traders who are potentially subject to that section, is of only incidental relevance to Earthshine's position since it was not affected by s 77A. The F-tT elevated it, however, into a list of requirements with which Earthshine must comply and it criticised Earthshine for, in particular, not carrying out credit checks on its suppliers and customers. The F-tT simply ignored the fact that such credit checks were unnecessary, since Earthshine neither gave nor received credit; it did not release goods to its customers until they had paid for them, and it did not pay its suppliers until it had itself received payment. Against that background, credit checks would have served no useful purpose.

21. Elements of Earthshine's due diligence procedures which could not be criticised were also disregarded. In particular, the F-tT gave it no credit at all for the fact that it scanned and verified the IMEI number of every phone in which it dealt and in so doing followed the recommendation to that effect made in Notice 726. In that context the F-tT quite unfairly criticised Earthshine for the refusal of its inspection company to pool the information it had obtained by carrying out inspections for several clients, in particular their IMEI scan records, on the grounds that its doing so would breach those clients' confidentiality. That criticism was particularly unfair since HMRC sheltered behind confidentiality arguments when giving only very limited information to traders in veto letters.

22. The F-tT's approach to the presence or absence of commercial risk in Earthshine's transactions, too, was unfair, and lacking in impartiality. It was also inconsistent because although the F-tT concluded that there was no commercial risk, since Earthshine entered into deals only when it was certain to make a profit, it then went on to decide that it did take a risk by transporting goods from the UK to continental Europe before it had been paid, and when there remained a risk that its purchaser would not be able to pay, with the consequence that Earthshine would not only lose the costs it had already incurred but be put to the trouble and expense of transporting the goods back to the United Kingdom.

23. It was the F-tT's unfair and irrational approach to all of these issues which led it to the wrong conclusion that Earthshine's due diligence was mere window dressing and that its directors had no genuine desire to avoid being caught up in fraud. No tribunal, properly considering the evidence, could reasonably have come to the conclusions that the F-tT did.

24. There is, said Mr Green, an instructive contrast to be drawn between the F-tT's approach to HMRC's witnesses, and its approach to those who gave evidence for Earthshine. It had, for example, simply disregarded inconsistencies, omissions and failures to explain on the part of Mr Roderick Stone, the witness who gave

evidence of HMRC's strategy in relation to MTIC fraud, and it had accepted Mr Kenrick's evidence about the provenance of a spreadsheet (referred to in the decision and below as the "Santok spreadsheet") despite its having accepted that the evidence on which Mr Kenrick himself had relied was second hand; yet when it came to appraise the evidence of Earthshine's witnesses it was unforgiving in its approach, finding them to be untruthful when they were guilty of no more than an error of recollection, allowing them to be taken by surprise by the late production of documents which they had not previously seen, in criticising one witness, Mr Henry Agoh, Earthshine's company secretary, because he took care to understand questions which were put to him in English, which is not his first language, and in finding that the same witness had concealed information which, as HMRC conceded as the evidence was given, he had in fact disclosed.

25. The F-tT had also found that it would be a "remarkable coincidence" if one particular trader, Sunico, should feature in all of the chains of supply, at some point, in a genuine market. The F-tT simply assumed that this was an indication of fraud, without considering the possibility that it was indeed a genuine coincidence and without taking into account Mr Fletcher's evidence that it is normal and prudent practice for a trader to establish relationships with other traders, and having done so to trade with them repeatedly. This was merely one example of many of the F-tT's partial approach to the evidence.

HMRC's submissions

26. Mr Collins began by reminding us—in an argument he advanced in respect of several of the grounds on which Earthshine relies—that an appeal from the F-tT is limited by s 11(1) of the Tribunals, Courts and Enforcement Act 2007 to a point of law. In *Georgiou v Customs and Excise Commissioners* [1996] STC 463 at 476, after considering the seminal decision of the House of Lords in *Edwards v Bairstow* [1956] AC 14, Evans LJ observed, in relation to the earlier, corresponding, provision in s 11(1) of the Tribunals and Inquiries Act 1992, that:

> "… it is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure to the High Court to be abused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled.
>
> It follows, in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and, fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the

tribunal's conclusion was against the weight of the evidence and was therefore wrong."

27. The limitations which applied in the case of the 1992 Act are equally valid in relation to its successor (see *Euro Stock Shop Ltd v Revenue and Customs Commissioners* [2010] STC 2454 at [11], per Arnold J) and they have been considered, in the context of MTIC appeals, in that case and in others, in particular *Megtian Ltd (in administration) v Revenue and Customs Commissioners* [2010] STC 840 in which Briggs J observed:

> "[11] … The question is not whether the finding was right or wrong, whether it was against the weight of the evidence, or whether the appeal court would itself have come to a different view. An error of law may be disclosed by a finding based upon no evidence at all, a finding which, on the evidence, is not capable of being rationally or reasonably justified, a finding which is contradicted by all the evidence, or an inference which is not capable of being reasonably drawn from the findings of primary fact. …
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> [12] The restrictions imposed by an appeal limited to points of law are in addition to the well recognised difficulties facing any appellate court, such as not seeing the witnesses giving evidence, being confined to a review of evidence considered in much greater detail by the court below, and being unable to capture from the judgment (however meticulous) every nuance which played an important part of the evaluation of the court below…"

28. The observation of Lord Carnwath in *Jones v First-tier Tribunal* on which Earthshine sought to rely could not, in fact, assist it because, when it was properly considered in its context, the observation did not indicate that it was open to an appellate tribunal to embark on its own fact finding, and it could not be seen as any form of inroad into the *Edwards v Bairstow* principles. The issue in *Jones v First-tier Tribunal* was whether the interpretation of the term "crime of violence" was a question of fact or of law. At [41] Lord Carnwath explained the context in which he made his later remark:

> "Where, as here, the interpretation and application of a specialised statutory scheme has been entrusted by Parliament to the new tribunal system, an important function of the Upper Tribunal is to develop structured guidance on the use of expressions which are central to the scheme, and so as to reduce the risk of inconsistent results by different panels at the First-tier level."

29. This is not a case in which an issue of general principle arises; the only question relevant to ground 1 is whether the findings of fact made by the F-tT were findings it was entitled to make. It is, in short, a straightforward *Edwards v Bairstow* and *Georgiou* case.

30. Earthshine's first ground of appeal amounts to no more than a re-argument of the case it put to the F-tT. It does not, nor could it realistically, contend that there was no evidence from which the F-tT could draw its conclusions; nor is it possible to argue, realistically, that the F-tT failed to engage with Earthshine's case. This ground of appeal amounts, in reality, to a complaint that the F-tT preferred HMRC's witnesses to those called by Earthshine, and it proceeds by picking on isolated findings supposedly not supported by the evidence, without proper regard to their context. The F-tT applied the *Mobilx* test carefully and correctly to the facts as it found them, and its finding of actual knowledge could not be impugned.

31. Examination of its decision shows that the F-tT relied upon a number of factors which demonstrated that the chains of transactions in which Earthshine engaged were contrived. It heard the oral evidence of a large number of witnesses in the course of a lengthy trial and, having considered the evidence in its totality it concluded that Earthshine's witnesses lacked credibility. It was that lack of credibility which lay at the heart of the decision that they knew, or ought to have known, that Earthshine's transactions were connected to fraud. That conclusion was repeated several times, and on each occasion reasons were given.

32. It is quite clear from the authorities that in order to succeed on this ground Earthshine has to show that the F-tT was "plainly wrong": see *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577 at [12], per Clarke LJ. The honesty, or otherwise, of Earthshine's officers was a central issue throughout the hearing before the F-tT, and it is perfectly clear from its decision, in particular in its examination of the authorities offering guidance on the correct approach, that the F-tT knew that it was required to consider that issue carefully, and that it was mindful of the gravity of the accusation.

33. Mr Sharp was the most important of Earthshine's witnesses, and the narration of his evidence extended to more than 20 paragraphs of the F-tT's decision. It began, at [399] to [401], by explaining in some detail why it regarded Mr Sharp as an unsatisfactory witness, giving clear reasons. At [402] it embarked on an examination of Mr Sharp's engagement, on Earthshine's behalf, of a Mr Young, a private investigator. Mr Young was instructed to make enquiries of various government agencies, including HMRC, on a basis which, as the F-tT concluded, must have included some unlawful activities of which Mr Sharp cannot have been unaware. The F-tT also found that Mr Sharp had given untruthful evidence about the engagement of Mr Young, and it explained in detail why it had done so. This was merely one example of many reasons why the F-tT found Mr Sharp to be an unreliable and evasive witness. The conclusion was, therefore, not based on a single piece of evidence, but on a large number of individual factors which the F-tT examined in exhaustive detail. There was ample material from which such a conclusion could properly be drawn.

34. The finding that Mr Sharp was dishonest would probably have been enough to enable the F-tT to dismiss the appeal, but it also examined the evidence of Mr Knatchbull and Mr Agoh with great care, and found them, too, to be poor and unreliable witnesses, even if it did not condemn them so roundly as it condemned Mr Sharp. Again, there was ample material from which such findings might properly be made, and the F-tT gave clear and fully explained reasons why it did so. Most of those reasons, as with Mr Sharp, were derived from their own evidence, and from many features of it.

35. The F-tT expressed its conclusions in resounding terms. It is conspicuous that, even though it was unnecessary to do so, the F-tT said that had it been required to apply the criminal standard of proof it would have reached its conclusions to that standard. That, said Mr Collins, was a clear indication of the weight and strength of the evidence; it does not lead, as Earthshine suggests, to a conclusion that it approached the evidence in a one-sided manner; rather, it indicates that the F-tT found the evidence of knowledge thoroughly convincing. Earthshine's attack on the findings is made up of a series of criticisms of the conclusions drawn from individual, minor aspects of the evidence and without

regard to the "big picture". What it was seeking to persuade this tribunal to do was expressly disapproved by the Employment Appeal Tribunal in *ASLEF v Brady* [2006] IRLR at [55]:

> "The EAT must respect the factual findings of the Employment Tribunal … it should not 'use a fine-tooth comb' to subject the reasons of the Employment Tribunal to unrealistically detailed scrutiny so as to find artificial defects …."

36. Even if (which Mr Collins did not concede) a few of the individual findings of fact could be shown to be wrong, and wrong to the *Edwards v Bairstow* standard, Earthshine had in addition to demonstrate that the error was material, in that a different (correct) conclusion on that point would have made a difference to the outcome. Once one looked in this case at the "big picture", rather than at individual small details, it became clear that the supposed errors Earthshine identified were of too little significance to affect the outcome.

Ground 2 — fundamental misunderstanding of the letter of 3 June 2004

Earthshine's submissions

37. At [466] the F-tT recorded that on 3 June 2004 Mr Stone wrote to Earthshine and made it "very clear that HMRC would no longer carry out line checks". "Line checks" consisted of tracing a chain of transactions from details provided in advance by traders of their proposed purchases and sales, and the process was, for obvious reasons, dependent on the timely and accurate provision of those details by the traders. Similar observations, to the effect that Earthshine's officers knew that there would be no more line checks, were made elsewhere in the decision. The conclusion was not, however, one which the F-tT could legitimately draw from the letter itself, the text of which, conspicuously, the F-tT did not set out. So far as relevant for present purposes, it said:

> "Sometimes, for their own investigative purposes, Customs will attempt to verify the identity and validity of traders in a proposed transaction chain. This is not done for every proposed transaction, nor would it be possible or practicable to do so.
>
> If a missing or hi-jacked VAT registration is identified prior to a transaction taking place then Customs will inform other known parties to the transaction that the VAT number is not valid to help them reach their own decision as to whether to continue with the transaction."

38. The letter indicated, Mr Green said, not that HMRC would not undertake line checks at all in future, but that they would do so in some cases and, moreover, that they would notify traders they knew to be parties to the transaction of problems when they were found. It was quite impossible to say that the letter supported what the F-tT had said. The F-tT's failure to analyse the letter with care had led it into the serious error of rejecting Mr Sharp's evidence that he believed line checks would be made in the future, and of treating what he said on the point as a basis for finding him to be dishonest.

HMRC's submissions

39. This ground, said Mr Collins, represented a further attempt to re-open the F-tT's findings of fact, and it depended on a mis-characterisation of the text of the

letter and what it was the F-tT found. The real question was not whether HMRC conducted line checks at all but whether they conducted them for the benefit of traders, whether Earthshine knew that and what effect its knowledge had on its trading activities. On a fair reading the letter made it clear that traders could not rely on HMRC to undertake line checks. What the F-tT said at [467] was:

> "Earthshine (via Mr Sharp) complains that it was given mixed messages on line checks by HMRC. We find no evidence of this. The message from HMRC was, at least after 2004, clear: HMRC would not do line checks for the benefit of traders. Earthshine's witnesses were not entirely consistent over whether they understood HMRC would not carry out line checks. Mr Knatchbull accepted that they knew HMRC would not do line checks although he said he remained optimistic that they might one day do so. Mr Sharp and Mr Agoh were reluctant to accept in evidence at the hearing what was obvious to the Tribunal and we find was obvious to them in 2006 that HMRC would not do line checks. Earthshine's practice in 2006 was to notify HMRC of the details of the trade Earthshine was about to enter into, but then to proceed with the deal without waiting for a line check (unlike their practice in 2003). Indeed, they did not ask for a line check until after they had inspected the goods so they gave HMRC no time to reply. We find in 2006 Earthshine knew HMRC would not do line checks."

40. That, said Mr Collins, was a clear finding of fact based on the evidence the F-tT heard, and it could not be challenged in this tribunal by proceeding from what was plainly an inaccurate reading of the letter. The F-tT understood it correctly and made fully justified findings about it.

Ground 3 — the relevance of line checks

Earthshine's submissions

41. The F-tT failed not only to approach the evidence about Mr Sharp's knowledge of HMRC's continuing to undertake line checks correctly, it also failed to deal properly with Earthshine's case in relation to such checks. It incorrectly recorded at [455] that "it was the Appellant's view that HMRC was at fault for failing to carry out line checks in 2006". In fact it was Earthshine's case that it provided to HMRC details of the transactions in which it proposed to enter before it did so, as a means of ensuring that it avoided transactions which were connected with fraud. The F-tT's characterisation of the provision of such information as further window dressing was not supported by the evidence and was simply unfair. It was likewise unfair for it to find, in relation to this aspect of the evidence, that Mr Sharp and Mr Agoh were untruthful, whereas Mr Stone and Mr Kenrick were truthful. Had the F-tT properly understood the 3 June 2004 letter, it could not have reached such conclusions. There was ample evidence that HMRC had undertaken line checks and that, even if they did not check every chain, they were at least continuing to trace some chains and there was a purpose to Earthshine's continuing to provide information about the transactions in which it intended to enter even if it would not be protected in every case. In their oral evidence, both Mr Stone and Mr Kenrick accepted that line checks were still being undertaken even if not in all cases.

42. In another appeal, that of *Megtian Limited* ((2008) VAT Decision 20894, later upheld by Briggs J at [2010] STC 840, from which we have quoted above), Mr Stone had given evidence that, even as late as 2008, traders were expected by

HMRC to send in details of their proposed transactions, and that in HMRC's eyes a trader which did send in such details was less likely to be engaging in transactions connected with fraud than one which did not. Against that background the F-tT's labelling of Earthshine's having provided such details as "window dressing" was wholly unfair, as was its conclusion that Mr Stone was "a reliable witness who gave consistent and rational evidence" when it was perfectly plain from what the F-tT had seen and heard that he had given quite different evidence in the two appeals.

HMRC's submissions

43. Mr Collins pointed out that all Earthshine had done, in reality, was check the validity of its counterparties' VAT registrations, albeit its doing so did provide HMRC with information about its intended trades. His more substantial argument was that the F-tT did not treat line checks as a significant factor (indeed, at [472] it said the evidence about line checks to be "of very little assistance"), save that it informed its conclusion (set out above) that the evidence Mr Sharp, Mr Knatchbull and Mr Agoh gave on the topic was unreliable, and that they had in any event not waited for the result of line checks to be communicated to them before dealing. The F-tT's conclusions were right, as a matter of fact; but even if they were wrong they were clearly not determinative.

Ground 4 — the genuine market and Mr Fletcher's evidence

Earthshine's submissions

44. In the course of his evidence, Mr Green said, Mr Fletcher (as well as other witnesses called by HMRC) made a large number of concessions, all favourable to Earthshine's case. The most important were to the effect that there was a genuine grey market in mobile phones, and that there could be an explanation for Earthshine's transactions other than a connection to fraud. Earthshine's closing submissions identified the concessions and the conclusions which ought to be drawn from them, in considerable detail, yet the F-tT dismissed them in the short observation at [275] which we have already set out (see para 13 above). That brief statement shows that the F-tT failed to engage with Earthshine's case on this topic at all. As a result the F-tT simply discarded any criticism of Mr Fletcher and treated him as an honest witness.

45. The F-tT also failed to pay heed to the fact that he had not complied with the ordinary obligations of an expert witness, in that he had relied on information which he refused to disclose because he had obtained it on condition of confidentiality from a mobile phone manufacturer, Nokia. In *Excel RTI Solutions v Revenue and Customs Commissioners* [2010] UKFTT 519 (TC) the tribunal, quite rightly, had expressed doubts about whether Mr Fletcher truly was an expert; in a slightly later decision by a differently constituted tribunal, *H T Purser Limited v HMRC* [2011] UKFTT 860 (TC), the tribunal examined Mr Fletcher's position more carefully, and concluded that he was neither an expert nor independent, since he had a conflict of interest; in *JDI Trading v Revenue and Customs Commissioners* [2012] UKFTT 642 (TC) his evidence had been excluded altogether for similar reasons; and in *Chandanmal and others v Revenue and Customs Commissioners* [2012] UKFTT 188 (TC) Judge Mosedale, sitting alone, expressed considerable concern about Mr Fletcher's evidence.

46. Those cases show that Mr Fletcher's evidence should have been viewed more critically, if not disregarded altogether. But even if Mr Fletcher's evidence was properly admissible, the F-tT drew conclusions from it which were not justified. It accepted, for example, Mr Fletcher's evidence that the IMEI number attributed to each phone contained information which identified the make and model of the handset, which could be determined by someone other than the manufacturer, and also additional information which could be determined only by the manufacturer since it was contained in a database which was not publicly released. In doing so it rejected the evidence of Mr Agoh that the IMEI number could in fact be wholly decoded using a publicly accessible website, on no better grounds than that the F-tT thought it improbable.

47. The F-tT also based its reasoning, in part, upon its belief that the transaction chains did not feature any retailer, and in doing so disregarded the clear and unchallenged evidence that Sunico, which was Earthshine's customer in five of the seven chains in issue, had retail outlets. It also preferred Mr Fletcher's evidence that the terms "central European specification" and "standard European specification" were meaningless when applied to Nokia phones (in which Earthshine was dealing), without paying any heed to the evidence given on behalf of Earthshine that, in the market in which it traded, these were terms in common use and well understood by the traders in that market. When coupled with the handset codes, that is the manufacturer's designation of the phone, a trader could know exactly what was being offered.

48. Moreover, Earthshine did not rely on the manufacturer's code and its stated specification alone; it inspected 100% of the goods it bought before it accepted them. Mr Sharp gave evidence, which was unchallenged, that Earthshine had adopted this practice after it had been compelled to pay compensation to a German customer which complained that phones Earthshine had supplied did not match the required specification, and that it was accepted within the grey market that the handset codes coupled with the specification sufficiently identified the phones for the benefit of both supplier and customer. Earthshine did not, itself, need to rely on handset codes since it relied instead on its inspections. The F-tT simply failed to understand this evidence and as a result came to conclusions which could not be supported. This failing was of particular importance since the F-tT treated its findings in relation to handset codes as a critical factor when reaching its conclusion that Earthshine engaged in window dressing.

HMRC's submissions

49. Mr Collins' starting point was that Mr Fletcher's evidence was treated by the F-tT as corroborative, or supportive, of conclusions it had reached on other evidence, and it recognised the limitations on the evidence he could give. That is apparent from this passage of the decision:

> "[241] … We found Mr Fletcher to be a careful and reliable witness and expert in the area covered by his witness statement. He explained that although he had direct experience of the secondary market in mobile phones elsewhere in the world, he had no direct experience of it in the UK, which for the reasons he gave … is very small.
>
> [242] We found Mr Fletcher was able to reply convincingly to a very long cross examination. We found the answers he gave described consistent and rational market behaviour and for this reason was likely to be right. His

> overall conclusion that Earthshine was not trading on the secondary market we find is correct: it is corroborated by the entirely independent evidence set out … above."

50. The "independent evidence" to which the F-tT referred at [242] related to the characteristics of Earthshine's trading, and was not dependent on a comparison with the grey market. There were, in fact, no determinative findings which were dependent wholly on Mr Fletcher's evidence. The findings the F-tT made from that evidence (much of which was undisputed) were in any event justified; the F-tT heard and saw Mr Fletcher, like the other witnesses, and its findings from his evidence, unless they could be shown to be plainly wrong, were no more susceptible of challenge than any others.

51. Mr Green's complaint about the F-tT's findings in respect of the specifications used in the transaction documents did not accurately reflect what the F-tT actually found, which was not that they were not used by Nokia (as Mr Fletcher said was the case) but whether they meant anything to the traders, which it found they did not. That finding formed part of the F-tT's reasoning which led to the conclusion that the specification of the phones was, in reality, of little importance to the traders in the chain. Similarly, it had dealt with the contention that the full specification could be determined from analysis of the IMEI number, and the evidence of how an analysis might be undertaken by someone other than the manufacturer of a phone, with care, finding that Mr Knatchbull gave conflicting accounts and that there could be no confidence that a website discovered by Mr Agoh, long after the event, and which was not one authorised by Nokia, was accurate or complete. Those too were plainly findings it was open to the F-tT to make.

52. The argument advanced by Mr Green necessarily viewed Mr Fletcher's evidence without regard to the other evidence the F-tT heard, but it could not be viewed in that way; it must be considered together with the remaining evidence. That was what the F-tT had done; its analysis was thorough and its conclusions justified. Moreover, as the F-tT said in clear terms, it found Mr Fletcher to be a careful and honest witness whose evidence was consistent with other material, in contrast to Mr Sharp, Mr Knatchbull and Mr Agoh, whose evidence it found to be evasive, unreliable, inconsistent and in many respects untrue. There was nothing in the point that differently constituted tribunals had taken a different view of Mr Fletcher's standing as an expert witness; it was this tribunal's evaluation of his evidence which was in issue, and it could not properly be faulted.

Ground 5 — the failure to reach conclusions

Earthshine's submissions

53. Earthshine's grounds of appeal argued that at several points in its decision the F-tT described the evidence it had seen or heard, but reached no findings about it—that is, the F-tT failed to say whether the evidence was accepted or rejected, if accepted what weight was attached to it, and to what conclusion it led. They did not, however, provide any examples, and Mr Green did not identify any in oral argument. He also did not demonstrate that the F-tT reached a conclusion without first finding the facts on which the conclusion was based. Thus although permission to appeal was given on the ground as stated—"non-findings"—the argument was not pursued in that form.

54. The argument actually advanced was that the F-tT posed various rhetorical questions but failed to answer them. Even here, Mr Green offered only one example. It appears at [622] of the F-tT's decision:

> "We have found the trades were part of an orchestrated fraud and that Earthshine's profit was a significant percentage of the money that was the object of the fraud (between 20% and 33% but mostly around 33%) and this indicates to us that the orchestrators were prepared to share the proceeds to a significant extent with Earthshine and begs the question of why they would do this if Earthshine was not a knowing participant."

55. What the F-tT failed to do, said Mr Green, was answer the question it had posed itself. Had it done so, it would have found the answer in what it had already said at [211]:

> "… the orchestrator of the fraud would have a vested interest in protecting the position of the broker. This is because to make the fraud work … he needs brokers willing to enter into these sort of deals, and brokers (innocent or knowing) would soon cease to be willing if HMRC refused to refund the VAT from previous export deals."

56. That was a clear indication that the F-tT itself accepted that brokers might be innocent participants in chains of this kind. It had, however, simply disregarded that correct statement and had instead treated the fact that Earthshine made significant profits as evidence of its knowing participation. In doing so the F-tT had also ignored the fact that a cogent explanation of a broker's need for significant gross profit had been provided—that it needed to pay the cost of export, and was out of pocket for the VAT charged by its supplier until it was repaid by HMRC. The conclusion which the rhetorical question the F-tT asked at [622] implied was simply unjustified.

HMRC's submissions

57. Mr Collins' skeleton argument made submissions in respect of this ground as originally put but as it was not pursued we do not need to explore them. His argument in response to the ground as it was in fact put was that a failure to answer a rhetorical question does not lead to the conclusion that, had it been answered, it would have been decided in Earthshine's favour (or indeed that the question needed to be decided at all). In this case, what the tribunal put at [622] was not really a rhetorical question in any event; it was, rather, part of the F-tT's reasoning which led to its conclusion that Mr Sharp had actual knowledge of the connection to fraud. Moreover, [211] and [622] dealt with different topics—the former the length of the chains, the latter the sharing of profits. What was said in [211] had nothing to do with the supposed question in [622].

Ground 6 — erroneous understanding of Earthshine's position in respect of the Santok spreadsheet

Earthshine's submissions

58. One of the exhibits to Mr Kenrick's fourth witness statement, identified as SK10, was the Santok spreadsheet to which we have already referred. It was produced in order to demonstrate that in one of the relevant chains, identified as deal 3, the phones were sold by New Order Trading Ltd to Santok Enterprises Ltd, and then by Santok to London Mobile Communications Ltd. It was necessary for

HMRC to show that these purchases and sales had taken place in order that they could establish a connection between Earthshine's transactions and the fraud on which they relied. The spreadsheet was intended to make up for the fact that invoices supporting those purchases and sales had not been found.

59. When Mr Kenrick came to be cross-examined, it became apparent that SK10 did not in fact show a sale from Santok to London Mobile Communications. Mr Kenrick's explanation was that the copy of the spreadsheet exhibited as SK10 was incomplete. On the following morning (day 8 of the hearing) HMRC produced what was said to be a complete copy of the spreadsheet and blamed a photocopying error for the incomplete version which appeared as SK10. It was an A3 document which had not been fully unfolded before it was copied, and therefore some of the information on it had not appeared on the exhibited copy, which was of A4 size. It also transpired that Mr Kenrick had extracted the document from HMRC's electronic folder system, where it had been placed by another officer. Mr Green had pointed out in his closing submissions to the F-tT that, first, there was nothing on the document to show that it was in fact Santok rather than HMRC which had prepared it; second, it identified one of the traders which appeared on it as a "contra", a term most unlikely to have been used by Santok but one which might well have been used by HMRC; and, third, it resembled other spreadsheets produced by HMRC. The probability must be that the spreadsheet had been produced by HMRC rather than Santok.

60. At the hearing before the F-tT Mr Green initially accepted HMRC's assurance that although there was an error in the hearing bundles, the complete document had been disclosed at an earlier stage. It turned out that this was not, in fact, correct, and although he accepted that it was an unintentional error Mr Green protested, on day 12, about the late production of the complete document. That protest had been brushed aside by the F-tT on the ground that it should have been made much earlier, but in fact the protest was made immediately after it had been discovered that only an incomplete copy had been disclosed. The F-tT dealt in its decision with a supposed application by Earthshine for the exclusion of the document, and rejected it; but no such application had in fact been made. What Earthshine had argued was that the document could not be relied on as one from an independent source, and that it had little or no value. It was not supported by any invoices, purchase orders or similar documents and it was impossible to say on what material, if any, it was based. Thus in this particular transaction, deal 3, there was no credible evidence of a connection between the VAT fraud on which HMRC relied and Earthshine.

61. The F-tT should have considered, even in the absence of a specific application to that effect by Earthshine, whether or not to admit the document; but even if it did not do that it should have concluded that little, if any weight, could be attached to a document of such dubious provenance. Instead, the F-tT went on to conclude, at [145], that the spreadsheet was produced by Santok, that it was therefore likely to be reliable and that the necessary link was established. That, said Mr Green, was an unfair approach to the document, coloured by the F-tT's failure to understand Earthshine's position about it.

HMRC's submissions

62. Mr Collins relied, first, on the very fact that Earthshine had not sought to have the replacement document excluded—on the contrary, it had been produced

and Mr Kenrick had been recalled in order that he could be cross-examined on it. The complaint that it had been produced late was no more than a matter raised in the course of resisting HMRC's successful application to have some different material, relating to Mr Young, admitted.

63. In reality, the question whether the Santok spreadsheet should have been admitted (had such a question been raised), and the weight to be attached to it, were immaterial since the F-tT had reached its conclusion that there was a connection in respect of deal 3 without reliance on it. At [149] it said this:

> "We note that in any event that, even were we not satisfied that the chain was as alleged by HMRC, but that all we could be certain of was that Earthshine had bought from LMC [London Mobile Communications] and sold to TTW [Tele Trading Worldwide], we would have been satisfied that there was [a] connection to fraud. This is because (irrespective of the question of knowledge) Earthshine, LMC and TTW have all been shown to have entered into transaction chains engineered for the purpose of fraud (putting aside for the moment the question of knowledge) and none that weren't: see paragraphs 237-238 below in which it is our finding that all the deal chains were orchestrated. It was not suggested that there was anything different about deal chain 3 (eg that it was negotiated in a different fashion) and the profit margins appear similar to those of other, orchestrated deal chains. So if we had not accepted the Santok spreadsheet as originating with Santok we would have found on the balance of probabilities that nevertheless deal chain 3 was orchestrated for the purpose of fraud and that it connected back to a fraudulent VAT default as that is by far the most likely explanation of how the chain came into being even though the defaulter could not be identified."

64. Thus the F-tT dealt with the provenance of the spreadsheet and reached conclusions about it. But even if that conclusion was susceptible of challenge it was not necessary for the F-tT's further conclusion that the connection was established by other evidence. In other words, the outcome would have been the same even if the spreadsheet had been discarded.

Discussion

65. We begin with a reminder of the task before the F-tT. Although Mr Green has identified a large number of discrete, or apparently discrete, issues which together make up its decision, an analysis of what was said in *Kittel* and *Mobilx* shows that there are, in fundamental terms, only two questions: were Earthshine's seven relevant transactions connected to fraud?; and, if so, did its directors know, or should they have known, of that connection? The failure of Earthshine to secure permission to appeal in respect of the first of those issues means, as we have already said, that save in respect of the Santok spreadsheet the focus of this appeal is on the second issue alone. It is important too to bear in mind that the question we must resolve is not whether the F-tT was right or wrong, still less whether it was right or wrong in one of its findings of detail, but whether, as Evans LJ said in *Georgiou*, there was "evidence before the tribunal which was sufficient to support the finding which it made".

66. In approaching the *Georgiou* question we take into account that the F-tT heard oral evidence over some 14 days of the hearing. It heard several witnesses, including—importantly—both of Earthshine's directors and its company

secretary. As Briggs J pointed out in *Megtian*, an appellate court or tribunal does not hear or see the witnesses, thus it cannot capture the nuances and it cannot form its own view of the witnesses' credibility or of the weight which should be attached to their evidence. In other words, considerable deference is due to the findings of fact of a specialist tribunal which has had the advantage of hearing and seeing the witnesses and, as the authorities we have mentioned show, the burden which an appellant seeking to overturn such findings of fact must discharge is a heavy one. The conclusion we have reached is that Earthshine has not come even close to doing so.

67. Mr Green, as we see it, sought to identify a number of findings which, if he is right, were wrong, or unfair. In doing so he treated them as if each stood alone, and as if each was critical to the F-tT's overall conclusion. We agree, however, with Mr Collins that this is the approach which the EAT (presided over by Elias J, as he then was) condemned in *ASLEF v Brady*. We have already made the point that the F-tT's decision is lengthy and detailed. It would be remarkable if, in such a document, there was no example of a finding which a differently constituted panel might not have made in the same terms, or at all, or even of a finding, whether of primary fact or of inference, which was demonstrably wrong. But, as the authorities have repeatedly shown, that is not the correct approach.

68. Similarly, we are unimpressed with the argument that HMRC failed to make good some of their allegations, carrying with it the implicit contention that if one allegation is rejected, the whole edifice must collapse. The question before the F-tT was whether, on the totality of the evidence, it was satisfied of knowledge. It was not a case in which HMRC were required to make good every one of their allegations if they were to succeed. Mr Green was unable to identify any one allegation, or combination of allegations, which was critical to the outcome.

69. If one reads the decision as a whole it is perfectly clear, imperfections, infelicities and possible errors notwithstanding, why the F-tT came to the conclusion it did. The evidence of each witness is described in detail, usually in considerable detail. There is, in every case, a cogent explanation of the F-tT's acceptance or rejection of that evidence, and of the conclusions it drew from it. There was, as Mr Collins correctly said, a multitude of examples, most of which Mr Green did not mention, of what the F-tT found to be unreliable, evasive or untruthful evidence given by Mr Sharp, Mr Knatchbull and Mr Agoh, and reasons why the F-tT found that they were unsatisfactory witnesses were clearly stated, as were its reasons for accepting the evidence of Mr Kenrick and Mr Fletcher. Mr Agoh's competence in English was addressed by the F-tT, and a reasoned conclusion reached. Similarly, the documentary evidence was evaluated, and reasoned conclusions were set out. It is in our view impossible to say that the F-tT reached irrational or perverse conclusions, or that it failed to explain its conclusions.

70. We need, however, to mention (since Mr Green made something of them) two particular complaints. The first was the F-tT's dismissal of Earthshine's argument that its intention to float on AIM was an indication that it was engaged in a serious business conducted honestly. The point was dealt with fairly briefly, at [493] to [495], and we are prepared to accept that, in this instance, a rather more detailed description of the evidence, and a fuller explanation of the conclusion, might have been desirable. It is nevertheless clear from what the F-tT said that it

dismissed the claimed intention to float as a relevant factor because Mr Sharp produced a document which, he said, showed that Earthshine had survived extensive due diligence, but then gave significantly inconsistent oral evidence to the effect that Earthshine was advised that it would fail the pre-flotation due diligence process because of the MTIC enquiries to which it was then subject. In our judgment there is no discernible error in the conclusion, which was consistent with the evidence available to the F-tT, briefly described though it was.

71. The second was the statement at [628] that the absence of veto letters "could not have reassured Earthshine that its transactions were not connected to fraud as it knew (via Mr Sharp) that they were so connected." We do not see any error in this observation. It was explained in the F-tT's decision that Earthshine had received some veto letters at an earlier stage, that it had ceased trading when it became apparent that there were problems, and after an interval, referred to as a "firebreak", had resumed trading. It was after the resumption of trading that there had been an absence of further veto letters. We can accept that a trader genuinely seeking to avoid engaging in dishonest transactions would take some comfort from the lack of any adverse signs (while bearing in mind the adage that absence of evidence is not necessarily evidence of absence) but if he knew that the transactions were in fact dishonest the absence of veto letters could reassure him of no more than that HMRC had not yet discovered that to be the case.

72. In our judgment there is nothing in the argument that the F-tT misunderstood the significance of the letter of 3 June 2004. It is true that it did not say that HMRC would no longer carry out any line checks at all, and to that extent Mr Green is right. But what it unmistakeably made clear was that traders such as Earthshine could no longer rely on HMRC, if they had been relying on them hitherto, to check on chains, and advise affected traders if risks, or worse, were identified; and as the F-tT recorded at [470], Earthshine did not in fact rely on them. What is also clear from the F-tT's decision, particularly [472], is that it was the manner in which Mr Sharp in particular dealt with questions about his understanding of the letter and of line checks, rather than the letter itself, which contributed to the conclusion that his evidence was unreliable. We therefore reject this ground of appeal.

73. We also do not agree with Mr Green's argument that the rejection of Earthshine's evidence while the evidence led for HMRC was, broadly speaking, accepted is an indication of partiality or selectivity. The focus of the hearing, as we have said, was on connection and knowledge, and once the F-tT had reached its conclusions about connection it was the knowledge of Earthshine's officers which was in question. It is inevitable that their evidence would be subject to close scrutiny. Although, as the F-tT made clear, Mr Sharp's engagement of Mr Young, and what it concluded he must have known of the unlawfulness of Mr Young's activities, was a major factor in its reasoning that he was himself dishonest, its overall conclusion was, equally plainly, based not on that—or indeed any other—individual item, but on an accumulation of factors of which the most important was its evaluation of Mr Sharp, Mr Knatchbull and Mr Agoh and of their evidence. As we have said before, the F-tT saw and heard the witnesses and its assessment of them is to be respected unless it can be shown to be irrational. We are not persuaded that any of its findings about their reliability or honesty comes close to that description. At the same time, we see no reason to

think that the F-tT accepted the evidence of HMRC's witnesses uncritically; the reasons why that evidence was accepted were also given.

74. Moreover, some of Mr Green's attacks were based on a misreading of what the F-tT said. Mr Collins identified one such attack; we agree with him that [211] does not contain an answer to the rhetorical question posed at [622], or that it is an answer which shows that the conclusion in the later paragraph is wrong. As Mr Collins said, the two paragraphs are addressing different points, the one the ability of the broker to recover input tax from HMRC, the other the share of the overall profit received by Earthshine. We see no inconsistency between them. Similarly, we see no conflict between the finding that there was no risk that a deal would fail—because it was orchestrated—and the finding that, in a genuine market where failure would be a real possibility, Earthshine would be taking an unnecessary risk by sending the goods overseas before it had been paid. The contrast the F-tT was attempting to draw was between chains of transactions which, because of orchestration, either all went ahead or, if one participant pulled out, all did so, on the one hand, and, on the other hand, the risk in a genuine market, where the inability of a seller to supply, or of a purchaser to pay, are real possibilities against which a prudent trader will make sensible provision.

75. In addition, the claim that Mr Fletcher conceded that there could be an explanation for the transactions other than connection to fraud is not in fact what he said. The answer he gave, extracted from the transcript and set out in Earthshine's closing submissions for the F-tT, is as follows:

> " … I couldn't see a rational reason for the trade to be carrying on in the way that it was … I would accept that from my statement one would have to, I think, reach a logical conclusion that another explanation is called for, but I haven't advanced any hypothesis as to what that other explanation could be … but there could be explanations other than, as I understand you are putting it to me, fraud for the trading. But I haven't considered those."

76. We do not see in that answer a concession that there was an explanation other than connection to fraud for the seven transactions with which the F-tT was concerned. Rather, Mr Fletcher was not ruling out the possibility of another explanation; but he had not considered what that explanation might be. The question, however, was not one for Mr Fletcher, who was called as an expert on the grey market in mobile phones, but for the F-tT; and the F-tT was required to determine, not (as Mr Fletcher was asked) whether there was, hypothetically, another explanation, but whether there was evidence on which Earthshine's officers could reasonably have thought there was another explanation.

77. It is clear from the decisions to which we were referred that different tribunals have taken different views about the admissibility of Mr Fletcher's evidence, his standing as an expert and the weight to be attached to the evidence given by him in any case where it is admitted. But it does not seem to us that the fact that different tribunals have adopted different courses does more than show that each tribunal at which he is tendered as a witness must take care to ensure that it is satisfied that he has the necessary expertise and independence to give the evidence he is asked to give in that case. Whether his evidence is admitted, and if so what the tribunal makes of it is, ultimately, a matter of judicial discretion and, in accordance with long-established principles, a superior court or tribunal will not interfere with the exercise of judicial discretion save where it is plain the tribunal misdirected itself. Mr Green's argument showed no more than that

another tribunal might have taken a different view, and that is not enough. We detect no reason to think that the F-tT in this case was unmindful of the need to confine an expert witness to his area of expertise; on the contrary, there are several observations in the decision which indicate that not only the F-tT itself but Mr Fletcher too was conscious of the limits to what he could speak of.

78. The underlying gravamen of Earthshine's complaint with respect to Mr Fletcher's evidence is the supposed assumption on the F-tT's part that if it was not trading on the grey market, it must be trading in a fraudulent market—what Mr Green said was a false dichotomy. That is not, however, how the F-tT approached the matter. It is apparent that it examined Mr Fletcher's evidence about not one but four different grey markets, satisfying different requirements, and concluded that Earthshine was not engaged in any of those markets. We detect no reason to think that it then jumped, as Mr Green's argument implies, to the conclusion that Earthshine was engaged in a dishonest, or contrived market. Moreover, as it explained at [258], it treated Mr Fletcher's evidence as corroborative of the conclusion it had already reached about the nature of the market in which Earthshine was engaged.

79. We are willing to accept that the F-tT may have misunderstood Mr Green's position with regard to the Santok spreadsheet. However, it seems to us that any such misunderstanding is of no significance. At [144] and [145] the F-tT discussed the origin of the document, reciting Mr Green's arguments, and reached the conclusion that on the balance of probabilities it was produced by Santok. Mr Green's argument before us amounted to no more than a complaint that the F-tT was probably wrong. But even if we agreed with him we could not overturn the finding on that ground; we would need to be satisfied that there was no evidence to support such a finding, or that the finding was contrary to the evidence. Mr Green's argument falls far short of the requirement. Moreover, as the F-tT said at [149] (set out above), it based its conclusion that there was a connection on more than the Santok spreadsheet alone. We see no error in its approach.

Conclusions and disposition

80. For the reasons we have given the appeal is dismissed. Any application for costs must be made within the prescribed time limit but need not be accompanied by a schedule of the costs claimed.

Colin Bishopp
Upper Tribunal Judge

Edward Sadler
Upper Tribunal Judge

Release Date: 20 June 2014