



TC02881

Appeal number: LON/2008/0827

PROCEDURE – application to exclude witness evidence – admission of non-expert opinion evidence – Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 15(2)(a) – relevance of evidence – evidence including conclusions on matters for decision of the tribunal - whether certain evidence was the evidence of an expert – alleged non compliance with duties and responsibilities of an expert – alleged lack of independence

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MEGANTIC SERVICES LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE JOHN WALTERS QC
JUDGE ROGER BERNER**

**Sitting in public at Victoria House, Bloomsbury Place, London WC1 on 3 and 4
September 2013**

Michael Patchett-Joyce, instructed by Litigaid Law, for the Appellant

**Jonathan Kinnear QC and Nicholas Chapman, instructed by the General
Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

1. We set out in this decision notice our reasons for the decisions we gave at the hearing, with brief reasons only, on applications by the Appellant (“Megantic”) that certain evidence served by the Respondents (“HMRC”) be excluded. For reasons of timing, and to permit a revised indicative timetable for the lengthy substantive hearing to commence on 23 September 2013¹ and for the parties to be able to prepare accordingly, we considered it appropriate to give our decisions on each category of evidence in issue in that way, to be followed by more detailed reasons.

2. The context of Megantic’s application is that this is, by any measure, a substantial case. The evidence served is voluminous, such that a system of electronic document management has been directed to be employed at the hearing. It is unnecessary to say too much about the substantive issues, save to say that Megantic’s appeal falls within the category known as missing trader intra-community (or “MTIC”) fraud, the appeal being against the decision of HMRC to deny credit for input tax in respect of certain transactions of Megantic in the accounting periods of May and June 2006, on the ground that those transactions were connected to the fraudulent evasion of VAT, largely through contra-trading, and that Megantic knew or should have known of that connection.

3. Megantic’s application, made on 9 August 2013, was for the exclusion of 15 witness statements. They were conveniently categorised as follows:

- (a) FCIB (First Curaçao International Bank) evidence. This comprised the evidence of Michael Downer, Michael Mercer, David Young, Andrew Letherby and Darren Loftus.
- (b) The overall cell evidence of Nigel Humphries.
- (c) The evidence of Roderick Stone.
- (d) The Operation Ghash evidence of Mr Downer.
- (e) The grey market evidence of John Fletcher.

4. With the exception of Mr Fletcher, who is an employee of the professional services firm KPMG, all the witnesses are HMRC officers.

The FCIB evidence

5. The FCIB evidence, to summarise it very briefly, comprises materials derived from Dutch and Paris servers containing records of banking transactions through the FCIB, and analysis carried out by the HMRC officers on that material, including evidence as to the processes carried out.

¹ Since the hearing of the application the timetable has been revised so that the substantive hearing is to commence on 30 September 2013.

6. There is some history to the admission of the FCIB evidence to which we have had regard. First, evidence of Mr Downer was, on application, admitted by this tribunal following a hearing on 18 December 2009; that decision was upheld on appeal by the Upper Tribunal (see the decision of Arnold J reported at [2011] STC 1000). Secondly, further evidence of Mr Downer, along with evidence of Mr Mercer, Mr Young, Mr Letherby and Mr Loftus was, on application, admitted following a hearing on 3 May 2013.

7. The FCIB evidence having been admitted, any application that it subsequently be excluded must point to some material change of circumstances that would justify such exclusion. The argument of Mr Patchett-Joyce is that there has been such a change, as a consequence of developments in European law, that renders the FCIB evidence irrelevant to what he argues is the proper issue to be determined by this tribunal.

8. In support of that argument Mr Patchett-Joyce referred in particular to the judgment of the Court of Justice of the European Union (“ECJ”) in *Mahagében kft v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága; Dávid v Nemzeti Adó- és Vámhivatal Észak-alföldi Regionális Adó Főigazgatósága* (Joined cases C-80/11 and C-142/11) [2012] STC 1934, and to paragraphs 43 to 45 of the judgment. On this basis he argued that the four-stage test adopted, as he put it as a matter of domestic construct, comprising the questions (1) was there a tax loss; (2) was it occasioned by fraudulent evasion of VAT; (3) were the transactions in question connected to that fraud; and (4) did the taxable person know, or should he have known, of that fraud, was not correct. Instead, he submitted, there was only a two-stage approach, involving first consideration of whether the conditions for the establishment of a right to deduct input tax had been established under the EU directive, and secondly whether, having regard to objective factors, related solely to the transactions in question, the taxable person knew or should have known that the transactions were connected to fraud. Mr Patchett-Joyce argued that the evidence of money movements involving traders not engaged in transactions with Megantic is far removed from evidence of objective factors relating to each one of Megantic’s own transactions.

9. That of course is a different approach to that taken by HMRC in the way they have put their case. That case includes an assertion, which HMRC say is supported by the FCIB evidence, that numerous of the traders were under common control, that a striking number of deals involved the same few, often connected, parties and that there was repeated circularity in the goods and money chains. HMRC say that this tends to the conclusion that there was an overall contrived fraudulent scheme.

10. There is clearly an issue as to the correct approach to be taken as a matter of law. That issue can, however, only be addressed by the tribunal hearing the substantive appeal. It is not appropriate, in those circumstances, for us to express any view on the respective merits of the parties’ cases on this important issue. The sole question for us is whether the argument raised by Mr Patchett-Joyce has the effect of rendering the FCIB evidence irrelevant so that, having regard to the circumstances that now prevail, it should properly be excluded.

11. In our view the clear answer is that it should not be excluded on this basis. In a case where an issue can clearly be re-defined by reason of an accepted change in the law, or in the proper understanding of the law, it may be possible for evidence to become unarguably irrelevant, such that it would be proper to exclude it on that basis.
5 Those circumstances do not exist in this case. There is a dispute on the law, which will have to be resolved, but until it is the FCIB evidence remains as relevant to the case as put by HMRC as it was when originally admitted.

12. Mr Patchett-Joyce took us to a number of specific examples of payment chains put forward in the evidence of Mr Downer as showing the way money is alleged to
10 have moved between various traders, including Megantic, in the chain of transactions said by HMRC to be capable of being traced in respect of the goods dealt in by Megantic. Mr Patchett-Joyce argued that, where the connection to fraud was said to arise through contra-trading (at one or two removes), that evidence was not relevant to establishing a connection with any tax loss because there was no tax loss in the
15 sequence of supplies or payments in question.

13. We do not intend for this purpose to engage in an analysis of the probative value of particular strands of evidence. That is a matter for the tribunal hearing the substantive appeal, having considered each element of the evidence in its proper context, and having heard submissions following examination and cross-examination
20 of the evidence. The case of HMRC is, to an extent, based on their submission that the transactions of Megantic were part of an overall contrived fraudulent scheme. Evidence of what HMRC say is a tracing of supplies and payments from and to Megantic and more remotely cannot, in our view, in those circumstances be regarded as irrelevant.

25 14. Mr Patchett-Joyce also argued that the FCIB evidence was opinion evidence, and should not be admitted as it was not the evidence of expert witnesses. He cited in support of this argument the conclusions reached in two decisions of this tribunal in *JDI Trading Limited v Revenue and Customs Commissioners* [2012] UKFTT 642 (TC) and *Chandanmal and others (t/a Narain Bros) v Revenue and Customs*
30 *Commissioners* [2012] UKFTT 188 (TC). In each of those cases evidence of the conclusions drawn by an HMRC witness that a pattern of payments showed circularity was held to be a matter of opinion, and was not admitted.

15. In both *JDI* and *Chandanmal* the tribunal considered the excision of certain limited passages only of the evidence relating to payment chains. We respectfully
35 agree that an expression of a view that certain payments demonstrate circularity is not a matter of fact but a matter of opinion. It is merely a view of a witness on a matter on which the tribunal itself must reach its own conclusion, and as such is of no value as evidence. Such evidence may rightly be excluded on that basis. In most cases, however, we would not see it as necessary, or indeed proportionate, for a forensic
40 exercise to be undertaken, either by the parties or by the tribunal, to identify any such matters in each witness statement and for the tribunal formally to direct that they be excluded. Generally speaking, we think that the parties can rely upon the good sense of the tribunal to disregard purported evidence that represents conclusions that the

tribunal itself must reach. That can usually conveniently be the matter of submission at the substantive hearing, rather than a formal application to exclude.

16. To the extent that the tribunal in *JDI* or *Chandanmal* based its conclusion on the mere fact that the evidence was opinion evidence of the witness, and decided that because the witness was not an expert the evidence must thereby be excluded, we must respectfully disagree. There is no such rule applicable to this tribunal. The position was summarised by Arnold J in *Megantic* (at [80]):

10 “... r 15(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, SI 2009/273, allows the tribunal to admit evidence whether or not the evidence would be admissible in a court trial. It follows that the tribunal is entitled to admit evidence which would not be admissible in a court and give it such weight, if any, as the tribunal considers that it is worth. What weight should be given to the evidence is a matter for the tribunal to decide in the light of all the evidence at the hearing. Even if Mr Downer is not qualified to give expert evidence, that would not prevent his opinion evidence being received by the tribunal.”

17. We do not accept Mr Patchett-Joyce’s argument in this connection that rule 15(2)(a) is designed for the special circumstances of the tribunals, having regard to the use of the tribunals by self-represented parties, and that the application of the rule should therefore be confined to such cases. That was certainly not the view taken by Arnold J in this very context. Each case must be considered individually, having regard to the overriding objective to deal with cases fairly and justly. If there is no unfairness or injustice in the admission of opinion evidence by a non-expert, then it may be admitted.

18. Nor, having regard to the regime which statute has provided for the tribunal, do we consider that the references made by Mr Patchett-Joyce to the Civil Evidence Act 1972, to the rules of civil procedure that are applicable to the courts (CPR, rule 35) and to authorities, such as *R v Bonython* [1984] SASR 45 and *J P Morgan Chase Bank v Springwell Navigation Corporation* [2007] 1 All ER (Comm.) 549, to which we shall return later, directed towards the exception in non-tribunal cases for opinion evidence to be admitted if it is expert evidence, can affect that conclusion. The purpose of the tribunal’s rules is to relax the normal civil procedure rules to enable evidence to be admitted that could not otherwise be admitted. That includes the opinion evidence of a non-expert. It would be contrary to the intention of the rules to import as a general matter the same restraints on non-expert opinion evidence as would apply to expert evidence, unless in a particular case the interests of fairness and justice would demand it.

19. Mr Patchett-Joyce reserved special criticism for the evidence of Mr Letherby, explaining the mechanics for the extraction of information from the Dutch and Paris servers. Mr Patchett-Joyce submitted that this evidence purported to be expert in nature, but was given by a non-expert. He criticised a number of elements of the evidence as failing to comply with the duties and responsibilities of an expert witness, referring in this regard in particular to the summary of those duties given by Cresswell

J in *National Justice Campania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) (No 1)* [1993] F.S.R. 563 (at ¶5B). Those are not matters that we consider should lead us to exclude Mr Letherby's evidence. They are instead matters for cross-examination which will go to the weight the tribunal will give to that evidence.

20. This application was not for any "filleting" exercise to be undertaken, as was the case in *JDI and Chandanmal*. It was for the wholesale exclusion of the FCIB evidence. There is in our view no basis for such an exclusion, either on the grounds of relevance or on the ground that the witnesses are not expert witnesses. We refuse the application on that basis. Having said that, we indicated to the parties that there were in the witness statements clear expressions of view on the conclusions that could be drawn from the analysis presented, and that such expressions of view, on matters which it is for the tribunal to determine, did not amount to evidence to which the tribunal would have regard. We are grateful for the indication from the parties that they will cooperate to agree which elements of the evidence can simply be disregarded, although as we have said, the tribunal itself is quite capable of distinguishing between the evidence on which a conclusion falls to be drawn by the tribunal and an attempt by a witness to draw that conclusion themselves.

The overall cell evidence

21. The evidence in question under this category is that of Mr Humphries. Mr Patchett-Joyce argued that Mr Humphries has no expert credentials and no direct knowledge of the facts or circumstances of this case. What Mr Humphries has done is to take information provided by others, reviewed it, and prepare various charts in support, it is said by HMRC, of an argument that there has been an overall contrived scheme involving the fraudulent evasion of VAT.

22. The absence of expert credentials of Mr Humphries is, as we have described, no bar to the admission of his evidence. It is clearly appropriate for evidence to be given of the genesis of charts which are used to support a party's case. That evidence is, again for the reasons we have outlined, and having regard to the rival submissions of the parties on the applicable law, relevant to be considered by the tribunal.

23. To the extent that Mr Humphries' evidence includes conclusions, particularly as to the contrivance of the deal chains, the commercial logic or the supposed rationale of the transactions, that evidence should rightly be disregarded. The application for the exclusion of Mr Humphries' evidence as a whole did not contemplate such an exercise of excision, but we are once again grateful to the parties for the indication that this will be attempted. In any event, the tribunal will be mindful of the zero weight to be attached to the expression of any view by a witness on a matter which the tribunal itself must decide.

24. Mr Patchett-Joyce made other criticisms of Mr Humphries' evidence, largely going to probative value or weight. We do not find those criticisms to be such as to merit the exclusion of this evidence. Such matters are more properly addressed by way of cross-examination.

Mr Stone's evidence

25. The admissibility of Mr Stone's evidence, in similar form to that in this case, has been the subject of judicial decision at the level of this tribunal in a number of cases. For example, in *Atlantic Electronics Ltd v Revenue and Customs Commissioners* [2011] UKFTT 314 (TC), the tribunal judge (Judge Wallace) expressed (at [31]) the following view when deciding to exclude Mr Stone's evidence:

10 "…the statement contains very limited potential evidential value and a considerable amount of material which is irrelevant or potentially prejudicial. Some of it is after the event, such as the revocation of FCIB's licence and the reverse charge legislation. It contains substantial expressions of opinion although Mr Stone does not purport to be an expert witness. Unless ignored the evidence will take up time both in reading and cross-examination and distract the Tribunal from the direct evidence. The appeal falls to be decided on the facts of this case, not on Mr Stone's view of other cases."

26. A similar view was adopted by the tribunal in *Digit Three Ltd v Revenue and Customs Commissioners* [2013] UKFTT 288 (TC), where the tribunal said that the evidence "seemed to consist of general comments and that as the Tribunal was familiar with the background to MTIC fraud generally such evidence added nothing of specific relevance and should be excluded". In other cases, such as *Chandanmal* and more recently *CCA Distribution Ltd (in administration) v Revenue and Customs Commissioners* [2013] UKFTT 253 (TC), only those elements of Mr Stone's evidence that consisted of opinion were excluded. In *CCA Distribution*, having heard the evidence, the tribunal concluded that, although it had included some factual evidence of relevance, it had largely consisted of general background and had not been of material assistance in determining the issues of substance.

27. Having regard to the evidence of Mr Stone as a whole, we share the approach of the tribunal in *Chandanmal* and *CCA Distribution*, that is to accept that there are matters of relevance, and appropriate to be considered by the tribunal, within the statements, but that there are clearly also expressions of opinion, going to matters that it is for the tribunal to determine on the facts, that ought properly to be disregarded. We accept that the examples provided by Mr Kinnear, such as evidence of a memorandum of understanding, the operation of the MTIC validation team at Redhill, the identification of IMEI numbers and the description of the NEMESIS database, are all matters of relevance or potential relevance.

28. For these reasons we do not consider that it would be right to exclude Mr Stone's evidence as a whole. On the other hand, having regard to the views we expressed at the hearing, we are grateful for the indication that the parties that they will together seek to narrow down the areas of Mr Stone's witness statement that the tribunal will be invited to consider, and in particular that Mr Kinnear and Mr Chapman will indicate to Mr Patchett-Joyce those parts of Mr Stone's evidence on which HMRC will not seek to rely.

The Operation Ghast evidence

29. What is termed the Operation Ghast evidence is in the witness statement of Mr Downer in this respect. It takes its name from the name given to a police operation in connection with a murder investigation in which two CDs had been uplifted. Those
5 CDs had been considered irrelevant to the police investigation, but they are considered by HMRC to contain information relevant to the claim that two companies, alleged to be relevant contra-traders in this case, were involved in a substantial and orchestrated MTIC fraud in 2005.

30. Mr Patchett-Joyce's objections to this statement are, first, that the evidence is
10 from a period which pre-dates the periods in which the transactions in this appeal took place, and secondly that the entities in question, Blackstar and Digikom, feature only in chains relied upon by HMRC as part of their contra-trade construct, and accordingly in supply sequences to which Megantic was not a party. Mr Patchett-Joyce submitted that the statement was not relevant, was prejudicial and contained
15 pure opinion.

31. Mr Patchett-Joyce referred us again to *Atlantic Electronics*, this time to [69], where Judge Wallace had excluded similar evidence of Mr Downer. But we find no assistance from that comparison: in *Atlantic Electronics* Judge Wallace had refused to exclude similar evidence of a Mr Jolly (except for certain paragraphs) and the
20 principal reason for excluding Mr Downer's evidence was that it was duplicative, and an exhibit could be produced by another witness.

32. In our view Mr Downer's Operation Ghast evidence is relevant. We do not accept the submission that evidence put forward to show the involvement in similar fraud of an entity at an earlier time to the transactions in issue in this appeal cannot be
25 relevant to the question of involvement of those entities at a later time. Mr Patchett-Joyce's arguments on the relevance in the contra-trading construct go back to his submissions of law based on EU law. As we have described, those are matters that will need to be decided by the tribunal hearing the substantive appeal, but the existence of such an argument does not render the evidence irrelevant to the case as
30 put by HMRC.

33. To the extent that the evidence consists of opinion, there is no bar to its admission, for the reasons we have given earlier. But the tribunal will be mindful to disregard any conclusions drawn by Mr Downer which are properly matters for
35 determination by the tribunal itself. The existence of any such conclusions is not, however, a reason to exclude the whole of Mr Downer's statement in this regard.

The grey market evidence

34. Evidence as to the grey market, and commentary in that context on certain of Megantic's transactions, has been provided in an expert report of Mr John Fletcher of KPMG. As this is put forward as expert evidence, and the tribunal is accordingly
40 invited to give it appropriate weight, it is evident that, in order to meet the requirements of fairness and justice, certain safeguards in the assembly and presentation of that evidence are required.

35. In our view Mr Fletcher is an expert for this purpose. As we alluded to earlier, we were referred by Mr Patchett-Joyce to *Springwell Navigation*, where (at [20]) Aikens J said:

5 “The tests that must be satisfied before opinion evidence can be adduced by an expert were set out by Chief Justice King in the Australian case of *R v Bonython* [1984] SASR 45, at page 46. This test has frequently been acknowledged and adopted in English cases. Chief Justice King said:

10 ‘Before admitting the opinion of a witness into evidence as expert testimony, the Judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in
15 the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area; and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised
20 to be accepted as a reliable body of knowledge or experience, a special acquaintance with which of the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issue before the court.’”

25 36. Of particular relevance here is the question whether Mr Fletcher’s opinion relates to a body of knowledge that is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience. Clearly, as a matter of general observation, questions of medicine or foreign law would satisfy this criterion. Analysis of a market by a professional experienced in the industry in question is no
30 less capable of doing so. The grey market is a part of the telecoms industry, and that industry is capable of giving rise to a reliable body of knowledge or experience, such as that demonstrated by Mr Fletcher’s evidence. If doubts remain as to the nature of that experience, those can be explored in cross-examination.

35 37. In that regard we note the similar conclusion reached by Sir Andrew Park in *Mobile Export/Shelford IT Limited v Revenue and Customs Commissioners* [2009] EWHC 797 (Ch) where, at [17.2], he said, in relation to similar evidence to that of Mr Fletcher:

40 “For most purposes, I think that Mr Taylor can be regarded as an expert. He has considerable past experience, which he describes in his witness statement, of the mobile telephone business generally, even though he has not himself worked in the particular sector of it in which the appellants have operated. Further, an important point in my opinion is that Mr Taylor appears to be KPMG’s internal expert upon the mobile telephones sector. In that role it must be expected that he would
45 have acquired a great deal of specialist knowledge of the business. And the content of his evidence displays to my mind that he plainly does

have extensive knowledge and understanding of the field to which the evidence is directed.”

38. In common with Sir Andrew Park, we do not consider that a finding that Mr Fletcher was not an expert would have precluded his evidence from being admitted.
5 As we have described, the tribunal may admit opinion evidence even if that evidence is not given by an expert. If it does, then there will be a question of weight. If the evidence is not given by an expert, or if it is given by an expert, but relevant safeguards have not been observed, that may go to the weight that the tribunal may give to the evidence. But neither of those matters compels a conclusion that the
10 evidence, if it is relevant, should not be admitted.

39. This, we consider, is the extent of the role that CPR 35 can play in tribunal proceedings. There is no such rule in the tribunal’s rules. Nonetheless, the principles that underlie CPR 35 are relevant to consideration by the tribunal of the quality, and thus probative value, of the evidence. It is therefore likely to assist the tribunal if an
15 expert giving evidence complies with CPR 35 and states that he has done so (see *Chandanmal*, per Judge Mosedale at [12] and [13]). But a failure to do so will not, unless the tribunal considers that such evidence will only be acceptable in particular circumstances if full compliance is demonstrated, necessarily result in the evidence being excluded; such failure will instead raise questions of weight.

20 40. In view of our conclusion on that matter, it would not be appropriate for us to consider at this stage the criticisms levelled by Mr Patchett-Joyce as to the extent to which, as he put it, Mr Fletcher paid “lip service” only to the provisions of CPR 35, nor the deficiencies which Mr Patchett-Joyce sought to identify in the evidence by reference to the summary of the duties and responsibilities of expert witnesses given
25 by Cresswell J in *The Ikarian Reefer*, to which we have referred. As those are matters on which Mr Fletcher will be subject to cross-examination when giving evidence at the substantive hearing, it will be for the tribunal at that stage to consider what weight, if any, it attaches to Mr Fletcher’s evidence.

30 41. It is axiomatic that expert evidence can only be given by an expert who is independent of the parties, and who has no conflicts of interest that call that independence into question. This is, in our view, fundamental, and is not simply a question of weight. If an expert is not independent, or has such a conflict of interest, his evidence will for that reason alone be of no value, and should accordingly be excluded.

35 42. Mr Patchett-Joyce argued that Mr Fletcher’s status as an independent expert was compromised in four ways:

(1) First, that KPMG had been retained by a company, Caledonian Consulting, that was part of a group structure with Megantic that KPMG had been advising on, to assist with Caledonian’s due diligence procedures.
40 Caledonian, as we understand the position, was providing employee services to Megantic.

(2) Secondly, that KPMG had been involved in advising a company, Dragon Futures, involved in MTIC trading.

(3) Thirdly, that KPMG had an involvement with the Anti-Gray Market Alliance in the US, exemplified by a 2008 Report compiled by KPMG which commented that “most channel partners believe their market positions would benefit by eliminating gray markets”.

(4) Fourthly, that KPMG were a major provider to the UK government, and had received substantial fees for the expert reports compiled by Mr Fletcher in relation to grey market trading in a number of cases.

43. We are not persuaded that any of these matters, individually or collectively, amount to a conflict of interest that could compromise Mr Fletcher’s independence for the purpose of giving expert evidence in this matter. In this respect we respectfully disagree with the tribunal in *JDI*, and agree with the differently-constituted tribunal in *Libra Tech Limited and related appeal v Revenue and Customs Commissioners* [2013] UKFTT 180 (TC) in that tribunal’s conclusion that, having regard to the nature of the global organisation of KPMG, the mere fact that Mr Fletcher was an employee of KPMG was too remote a connection to compromise his own independence. We reach the same conclusion in this case. That is not to say that this cannot be the subject of cross-examination at the hearing; there always remains the question of weight to be attached to evidence according to the circumstances of the particular witness.

44. Irrespective of the particular status of Mr Fletcher’s evidence, Mr Patchett-Joyce submitted that it should in any event be excluded as irrelevant. He based this submission on the conclusion drawn by Mr Fletcher in respect of Megantic’s trading transactions between April and May 2006, namely that those transactions were extremely unlikely to have been part of the profitable arbitrage market or any other rational and profitable white or grey handset trading market.

45. Mr Patchett-Joyce says that the evidence of Mr Fletcher is not relevant because Megantic’s transactions cannot be taken out of the common system of VAT by virtue of the nature of the market in which those transactions took place. In support of this argument he took us to two cases in the ECJ, that of *Optigen Ltd and others v Customs and Excise Commissioners* (Joined Cases C-354/03, C-355/03 and C-484/03) [2006] STC 419 and that of *Gábor Tóth v Nemzeti Adó- és Vámhivatal Észak-magyarországi Regionális Adó Főigazgatósága* (Case C-324/11).

46. At [38] of his Opinion in *Optigen*, Advocate General Poiares Maduro explained that, with the exception of certain activities with special characteristics, such as the supply of narcotic drugs, the principle of fiscal neutrality precludes any generalised differentiation between lawful and unlawful activities. In *Tóth*, Mr Patchett-Joyce referred us to one of the questions before the ECJ, which asked whether the fact that the issuer of an invoice had no declared workers and was thus part of the “black” economy would preclude the deduction of input tax by the recipient of the supply. Mr Patchett-Joyce argued that *Tóth* showed that even a transaction taking place in the black economy remained subject to the common system of VAT.

47. We consider that, like the arguments on relevance in the context of the FCIB evidence, Mr Patchett-Joyce's arguments on the relevance of Mr Fletcher's evidence essentially anticipate legal submissions on the scope of the right to deduct input tax and the parameters of the power to refuse such deduction that will be addressed by the tribunal at the substantive hearing. His argument on relevance might have some force were HMRC in these proceedings arguing that the mere nature of the trading activity of Megantic, or its supplier, precluded the right to deduct. That was the argument in *Optigen* to which the Advocate General was responding. But that is not the way in which HMRC put their case. The evidence of Mr Fletcher as to the nature of the trading activity is relevant to the case that Megantic knew, or ought to have known, of a connection to fraud. Mr Patchett-Joyce may argue, as he did before us, that HMRC's case shows a fundamental misapprehension as to how the common system of VAT works, but that is an argument for the substantive hearing, and cannot for these purposes render evidence relevant to HMRC's case as put as irrelevant so as to be excluded.

48. Mr Patchett-Joyce also referred us to certain observations on Mr Fletcher's evidence made by the First-tier Tribunal in *H T Purser Limited v Revenue and Customs Commissioners* [2011] UKFTT 860 (TC). It will suffice for us to note that those observations were made by a tribunal that in the course of the substantive hearing had heard the evidence of Mr Fletcher under cross-examination. Those observations will not be binding on the tribunal in this case. The observations went to the weight the tribunal placed on Mr Fletcher's evidence. *H T Purser* does not therefore support any argument that Mr Fletcher's evidence is irrelevant; the question is one of weight, which in this case will be a matter for the tribunal at the substantive hearing.

49. Having found that Mr Fletcher is an expert for this purpose, we should add that we do not consider there to be any requirement in this tribunal for permission to be given for the service of expert evidence. That is a question that has divided tribunals in the First-tier. In *Chandanmal*, Judge Mosedale (at [13]) expressed the view that it was arguable that rule 15(1)(c) of the tribunal's Rules:

“... the tribunal may give directions as to ... whether the parties are permitted or required to provide expert evidence, and if so whether the parties must jointly appoint a single expert to provide such evidence”

required such permission to be obtained. The tribunal in *JDI* took this a step further, stating (at [75]) that it was apparent that the tribunal's Rules envisaged that a direction should be sought for permission to adduce expert evidence before serving a statement of an expert witness. On the other hand, the tribunal in *Libra Tech* refused to follow that interpretation, reasoning (at [31]) that rule 15(1)(c) could not be construed as imposing a mandatory requirement to seek such permission.

50. We agree with the tribunal in *Libra Tech*. Although we accept, as Mr Patchett-Joyce submitted, that in the higher courts there is an express duty to restrict expert evidence to that which is reasonably required to resolve the proceedings (CPR 35.1), that does not itself translate into a mandatory requirement for permission to be obtained before that evidence is adduced; but if such evidence is served without

permission, and it is found to be have been unnecessary, the costs of that evidence may be irrecoverable. That does not, therefore, provide for support for an interpretation of the tribunal's Rules as imposing a requirement for permission.

51. Rule 15(1)(c) must be construed and applied in the usual way, that is having regard to the overriding objective of dealing with cases fairly and justly (rule 2(3)). The language of rule 15 is not mandatory but permissive. It contains no requirement, such as can be found where relevant in other parts of the Rules, for any application to be made. Its context is that of the exercises of case management powers generally in relation to evidence and submissions, none of which powers are susceptible to construction as a mandatory requirement. The tribunal is given power to intervene and make directions as to evidence, including expert evidence, but there is no requirement (and it is not possible in our view to infer one) that expert evidence can be served only if the tribunal gives permission.

Decision

52. For the reasons we have given, we refuse in each case Megantic's application to exclude the witness evidence of the HMRC witnesses at issue.

Application for permission to appeal

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

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**JOHN WALTERS QC
ROGER BERNER
TRIBUNAL JUDGES**

RELEASE DATE: 13 September 2013