

**ALL EYES ON MICHAEL PATCHETT-JOYCE, COUNSEL  
AND BLUE SPHERE GLOBAL et al IN THE COURT OF APPEAL**

**MTIC CRIMINAL AND CIVIL DEFENCE SPECIALISTS**



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Liban worked for HM Revenue & Customs for 20 years, predominately in VAT investigations, before being recruited as an indirect tax advisor at **KPMG**. He formed CTM in 2005 and now manages all Tribunal and High Court appeals.

**Overleaf:**

Court of Appeal  
legal arguments.

Advice on  
Tribunal appeals.

**Blue Sphere Global, Mobilx and Calltel in the Court of Appeal**

The Court of Appeal will sit on 15 February 2010 for 5 days to hear legal arguments relating to the joined appeals for the above companies. This is in the midst of some surprising Tribunal decisions.

Tribunals, having discovered that it is extremely difficult to find that a trader *could* have identified the fraud several companies away, now state that the trader, in fact, *knew* of the fraud, simply by the manner in which it traded, or the manner in which the director gave evidence. These decisions are reached without any direct evidence of knowledge and results in the trader being described as a “knowing participant” in the fraud.

CTM, having been successful in its opening appeal, and on the verge of further success prior to a trial, received a negative decision relating to a CPU traders’ appeal. In this case, the decision appears to bear little resemblance to events in the trial.

All our appeals will now be conducted, or reviewed, by Michael Patchett-Joyce and he will appeal CTM’s recent Tribunal decision. The appeal will be sat behind Blue Sphere Global et al regarding the legal issues, but further grounds regarding an unfair trial are also being considered. As with most Tribunal decisions, appeals to higher courts appear the best way forward until the Court of Appeal provides guidance to Tribunals. Having said that, in the Brayfal appeal, referred back to the Tribunal from the High Court, we would expect positive news due to the findings of fact previously made by the Tribunal. However, Olympia, also referred back to the Tribunal, has recently had its appeal dismissed on all direct tax loss chains.

We strongly advise that a trader’s legal arguments and evidence are, at least, reviewed by very experienced MTIC counsel before being served and we are happy to advise on the best way forward.

CTM is preparing appeals in 25 cases and, although we are not offering any further ‘no win no fees’, we are able to offer reduced fee arrangements. Although our experience is vast, we are also able to provide the most competitive rates in the industry whilst still using only the best counsel, where funding allows.

**Legal Arguments in the Court of Appeal**

We are not aware of the exact nature of the legal arguments; however, it is clear that two main issues will arise in the Court of Appeal next month, although associated arguments of proportionality etc. will also be heard. Both arguments relate to the interpretation of Kittel in the ECJ in 2006.

1. The ECJ in Kittel appears to indicate that each Member State should introduce its own legislation to deal with ‘means of knowledge’ cases in this way. It will be argued that no new legislation has been introduced and that the UK authorities have misunderstood the French meaning. It should be pointed out that France and Belgium (both obviously French speakers) have introduced new legislation in light

## Next Edition:

Reaction to Court of Appeal hearing, ahead of the Judgement.

of Kittel and we say this is how the UK authorities should have acted and the current action is unlawful. Paragraph 11 of the Blue Sphere High Court Judgement indicates that the Judge had serious concerns about how HMRC are dealing with these cases.

2. Again, it is submitted that the UK authorities have misunderstood the French meaning of “connected with”. Kittel clearly refers to fraud being perpetrated by the “seller”, not by a party at the end of a chain. If successfully argued, this would mean that a Tribunal could not find that a trader knew, or should have known, of a fraud in its supply chain, unless it was purchasing directly from a fraudster. It is extremely likely that only a successful, and much more difficult, HMRC allegation of a conspiracy would succeed.

The arguments are more complex, but, if point 1 is accepted by the Court of Appeal, it could mean HMRC will be forced to repay several billion pounds to traders. However, as with the Tribunals, it may be a big ask for a UK court to do this, particularly in this economic climate, and Europe beckons. It is also clear that HMRC will not give up without a lengthy and aggressive fight, as they did with Bond House et al.

### **Our Advice on Tribunal Appeals**

Clearly, it is better not to use untested counsel in what are very hard fought appeals, unless cost is a real issue. HMRC are throwing top criminal barristers into most appeals and have endless resources. If you have to use inexpensive counsel, make sure counsel with significant MTIC experience is on hand within the same chambers to, at least, ensure all necessary legal arguments are put forward and to give advice in conference. Such additional costs can be minimal and we have seen huge benefits with this strategy. If you don't put forward every relevant legal point, or overlook important evidence, this could have a significant and adverse effect on your trial and any subsequent appeal.

Move your case forward as quickly as possible. If traders have some success in the Court of Appeal, HMRC, as they did after Livewire and Blue Sphere, will quickly change direction and those left behind will feel the brunt.

Everything that is inserted into your witness statement needs to be supported by evidence, if possible. Also, if HMRC have an expert witness, such as KPMG, get your own expert to counter it. We are aware of such expert witnesses and we agree with the IPT website on this point, which also has advice on this subject. Most of all, seek advice from different sources and read, and learn from, Tribunal decisions.

CPU traders also need to deal effectively with the quality of box issue, where inspection reports describe boxes as in fair, or poor, condition. Do not ignore this and we suggest you do not simply say it doesn't matter, “I'm buying the CPU not the box”; it is becoming a major area and we can advise on this.

### **CTM Word Search on Website**

Please see our new search engine on our website (top right), where you can conduct a word search on all “means of knowledge” Tribunal or High Court Judgements. It may provide useful information for your appeal regarding what has been said about companies in your supply chain, including your suppliers, customers, missing traders, freight forwarders or, in fact, HMRC witnesses. You can even search phrases such as “poor condition” to examine how the courts view a particular area of HMRC's evidence.

Please contact us if you have any queries relating to this newsletter, or if you simply wish to discuss your appeal. Due to the importance of regular advice, a great deal of our time is set aside to discuss the progress of appeals and our phones are always on.