

**THE COURT OF APPEAL HANDS DOWN CONFUSING
AND INCOMPLETE JUDGEMENT**

CTM - ASSISTING TRADERS IN CRIMINAL AND CIVIL CASES



Liban Ahmed
Director

Ipswich Office
9 Lower Brook Street
Ipswich
IP4 1AG
Tel: 0844 826 7695

liban.ahmed
@ctmltd.com

Liban worked for HM Revenue & Customs for 20 years, predominately in MTIC investigations, before being recruited by **KPMG**. He formed CTM in 2005 and now manages all Tribunal and High Court appeals.

Overleaf:

Further analysis.

CTM had expected much more clarity from the Court

The long awaited Court of Appeal Judgement has come as a disappointment to many traders, but is it as bad as some believe?

Firstly, we remind you of our comments in our January 2010 Newsletter:

“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 seems that it *was* a big ask and the Court of Appeal Judges, for reason known only to themselves, have not agreed with some of the traders arguments. We continue to disagree with this position and this Judgement will be appealed to the Supreme Court.

The issue of “connected with” is of most surprise and the ECJ may be the only place to receive a sensible Judgement. Further, many key areas, such as proportionality, have not even been discussed and we find this quite remarkable. You will note by reading our February 2010 Newsletter that most of the issues we identified during the hearing have not even been touched on.

Interpreting the key points in plain English

A Tribunal can no longer state that a trader should have known that, on the balance of probabilities, its transactions were connected with fraud. This is a move in favour of the traders and has been a key plank in the Tribunal’s decision making progress in recent months.

The Tribunal can only find against a trader if they knew that their transactions *were* connected with fraud without doubt. Even if a trader was almost certain that its transactions were connected with fraud, it is not good enough, they must know for sure. In the words of one Court of Appeal Judge during the hearing *“this is quite a high bar for HMRC to get over”*.

This simply means that a trader’s suspicion cannot be taken into account, no matter how great it is.

It also means that some traders that recently lost as a result of this suspicion test, such as Olympia, are likely to be successful in appeal.

Next Edition:

CTM's assistance
in criminal cases.

What makes life slightly complicated for traders is that this doesn't fit very well with another key part of the Judgement. The Court stated the following, which amply demonstrates their thought process.

“As I indicated in relation to the BSG appeal, Tribunals should not unduly focus on the question whether a trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is that his transactions have been or will be connected to fraud. The danger in focussing on the question of due diligence is that it may deflect a Tribunal from asking the essential question posed in Kittel, namely, whether the trader should have known that by his purchase he was taking part in a transaction connected with fraudulent evasion of VAT. The circumstances may well establish that he was.”

This will relate to what a trader sees himself and is not related to his own actions. For example, a Tribunal may find that a trader who was offered 200,000 heavily discounted mobile phones on one day from a timber merchant, should have known that the only reasonable explanation for this offer was that the goods were connected to fraud.

The Court implies that no real weight should be put on due diligence, but we disagree. If the due diligence checks, for example, involved third party advisors who informed you that the supply was credible, this would go strongly in a trader's favour. The enquiries could confirm that the source of your supplier's goods is from a reputable company with many years experience in the industry. These are only general examples, but this would show that there is another reasonable explanation for the supply. Due diligence both here and overseas should, in our opinion, remain a high priority to traders.

Regarding Blue Sphere Global and the contra trading argument; the court appears to have only confused the issue. It should also not be forgotten that Mobilx was a contra trader, in part, and this topic was avoided altogether.

It is a Judgement that is confusing, has adopted the wrong legal test and is incomplete. It is being appealed and we await the next stage with interest.

What next

All we advise is that you examine closely the expense involved in such appeals. This will be a long drawn out affair and traders should seek the most cost effective legal teams, particular those who are utilising the same barristers.

We have taken time off this week to simply deal with the many calls from clients and we are happy to discuss any issue, with any trader, at any time.

CTM Limited – 9 Lower Brook Street, Ipswich IP4 1AG

----- Tel: 0844 826 7695 - Fax: 0700 585 0573 - E-mail: liban.ahmed@ctmltd.com -----