Neutral Citation: **[2026] UKUT 00275 (TCC)**

Case Number: UT/2025/000098

UPPER TRIBUNAL
(Tax and Chancery Chamber)

The Royal Courts of Justice,
Rolls Building, London

VALUE ADDED TAX – denial of input tax recovery on the basis of Kittel *– whether the FTT erred in applying the test of constructive knowledge – whether FTT gave sufficient reasons –* Edwards *v* Bairstow *challenge to certain findings of fact – appeal dismissed*

Heard on: 18 June 2026
Judgment date: 20 July 2026

Before

JUDGE THOMAS SCOTT
JUDGE ANDREW SCOTT

Between

(1) OPUS LABOUR SERVICES LIMITED (IN LIQUIDATION)
(2) JASON GILLER

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Tim Brown, instructed by direct access

For the Respondents: Joanna Vicary, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. The Respondents ("HMRC") denied Opus Labour Services Limited ("Opus") various input tax credits for VAT purposes and imposed related penalties on the company. HMRC also imposed two Personal Liability Notices ("PLNs") on Mr Jason Giller, the sole director of Opus. The denial of input tax was on the grounds that the relevant transactions were connected with the fraudulent avoidance of VAT and that Opus knew or should have known that this was the case.

2. The Appellants appealed against certain of the decisions to the First-tier Tribunal (Tax Chamber) (the "FTT"). In its decision issued on 30 June 2025 (the "Decision"), the FTT dismissed the appeals.

3. This is the decision on the appeal by the Appellants against the Decision.

BACKGROUND FACTS

4. The following summary is largely taken from the Decision.

5. Opus was incorporated on 24 October 2016 and was registered for VAT from 1 November 2016 until it was deregistered by HMRC on 11 December 2019. Its business as detailed at Companies House was "temporary employment agency activities". Opus entered into administration on 9 January 2020. For the periods relevant to this appeal, Mr Giller was the sole director and majority shareholder.

6. Opus operated as a recruitment company, providing staff to customers within the construction industry. It purchased supplies of payroll services from a number of companies (the "Payroll Companies"). Opus engaged the Payroll Companies to provide all of its payroll services and outsourced its payroll function to those companies.

7. Opus supplied workers to carry out asbestos removal at building sites throughout the country. These workers carried out their roles in return for payments which the workers received from the Payroll Companies (or their suppliers) net of any sums owing to HMRC.

8. HMRC alleged that the Payroll Companies were defaulting suppliers who fraudulently defaulted on their obligations to make payments of VAT and/or were "buffers" in chains which led directly to the loss of VAT. HMRC claimed substantial amounts of input tax for VAT purposes for the periods under appeal.

9. HMRC denied Opus the right to deduct input tax and imposed related penalties on the company. HMRC also imposed Personal Liability Notices on Mr Giller in respect of certain of the penalties.

THE FTT DECISION

10. References below in the form [x] are, unless the context requires otherwise, to paragraphs of the Decision.

11. The FTT correctly identified the issues arising, at [31][1]:

> In respect of the denial of input tax, the Tribunal will need to be satisfied of the following matters:
>
> i. Whether or not there is a tax loss?
>
> ii. If so, whether or not that loss resulted from a fraudulent evasion?

[1] This is the well-settled formulation described in *Blue Sphere Global Limited v HMRC* [2009] EWHC 1150 (Ch) at [29].

> iii. If so, whether or not the transactions that are the subject of this appeal are connected with that evasion?
>
> iv. If so, whether or not the Appellants knew or should have known that the transactions were connected to a fraudulent evasion of VAT?

12. Before the FTT, issues (i) to (iii) were conceded, so the only issue to be determined was whether the Appellants knew or should have known that the transactions were connected to fraudulent evasion of VAT: [34].

13. The FTT began by setting out the relevant domestic and EU law. It recorded that the burden of proof rested with HMRC, the standard being the balance of probabilities: [47].

14. Having set out in summary the case of each party, the FTT then considered in detail the issue of "VAT awareness": [55]-[86]. One particular area of dispute between the parties was the extent of Mr Giller's knowledge of VAT and VAT fraud in the supply chain prior to his starting work at Opus, in particular that arising during his prior employment as a managing director at another company, which acted as a labour provider, Ebrit Labour Services Ltd (initially Ebrit Services Limited) ("Ebrit"). The FTT concluded that it was "more likely than not that Mr Giller would have known of the issues relating to the integrity of the supply chain" in his prior employment at Ebrit and, certainly, before he started at Opus: [71].

15. At [87]-[202], the FTT carried out a detailed analysis of the dealings by Opus with the five defaulting companies in the VAT chains.

16. In relation to Mr Giller's actual or constructive knowledge (as relevant to the *Kittel* test), the FTT concluded that Mr Giller did not have actual knowledge of the connection to fraud: [204]-[207]. In relation to whether Mr Giller had "blind-eye knowledge", namely that he had deliberately decided not to obtain confirmation of facts which he suspected, the FTT concluded "with some reservations" that, on a balance of probabilities, he did not have such knowledge: [208]-[209].

17. However, the FTT concluded that Mr Giller did have constructive knowledge for *Kittel* purposes, in a passage we consider in detail below, and dismissed the appeals: [210]-[218].

GROUNDS OF APPEAL

18. The FTT granted permission to appeal on the following grounds:

> **Ground 1**
>
> The FTT applied the wrong test when it concluded that Mr. Giller ought to have known that the only reasonable explanation for the transactions was that they were connected to VAT fraud.
>
> **Ground 2**
>
> Alternatively, the FTT did not give adequate reasons for coming to that decision.
>
> **Ground 3**
>
> The FTT made findings of fact, or drew inferences that were perverse/irrational, or had no evidence to support them, or were made without regard to factors that were relevant, or by reference to irrelevant factors, namely:
>
> (a) that on the balance of probabilities, Mr. Giller had become aware of VAT fraud in the industry during his employment at Ebrit;
>
> (b) that Mr Giller had not carried out checks on suppliers; and
>
> (c) that there was a repeated pattern of supplier failures.

APPLICATION BY APPELLANTS TO ADMIT NEW EVIDENCE

19. On 2 June 2026, Mr Giller applied to the Upper Tribunal for permission to admit and rely on the evidence of an additional witness. HMRC opposed the application, giving detailed reasons for their opposition.

20. On 15 June 2026, we informed the parties that we had decided to refuse the application, and that we would give our reasons at the start of the hearing, with more detailed reasons to be set out in this decision. Those reasons now follow.

21. The new evidence was presented as relevant to Ground 3(a), being the challenge to the FTT's finding of fact that Mr Giller had become aware of VAT fraud in the industry during his employment at Ebrit. The evidence comprised a short witness statement from Mr Darren Wood. Although the application and the witness statement contained no information as to Mr Wood's position, it is apparent from the Decision that he was a registered director of Ebrit ([57]) and that Mr Giller was next in the chain of command at Ebrit after Mr Wood and another individual, Mr Saman ([66]). Neither Mr Wood nor Mr Saman gave evidence before the FTT.

22. An apposite starting point in relation to the relevant criteria for the admission of new evidence remains the decision of the Court of Appeal in *Ladd v Marshall* [1954] 1 WLR 1489. In relation to the relevance of those criteria in this tribunal, we agree with and adopt the position as summarised in *Ketley v HMRC* [2021] UKUT 218 (TCC), at [52]-[54]:

> 52. There is no doubt that the Upper Tribunal has power to admit new evidence that was not before the FTT pursuant to the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules"). Rule 15(2)(a)(ii) states that the power should be exercised in accordance with the overriding objective to deal with cases "fairly and justly".
>
> 53. Both parties referred us to the three-part test for the admission of new evidence on an appeal in the civil courts set out by Denning LJ, as he then was, in *Ladd v Marshall* [1954] 1 WLR 1489 at page 1491:
>
>> "… first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."
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> 54. The parties agree that these criteria should be regarded as being of persuasive authority, but should not be applied as strict rules in the exercise of the Tribunal's discretion (see *Anglian Water Services Limited v HMRC* [2018] UKUT 431…at [100]).

23. In his application, Mr Brown referred to the *Ladd v Marshall* criteria, and stated as follows:

> 5. The Appellant submits the first test is satisfied by the fact that the evidence in relation to the Appellant's involvement with HMRC's enquiry into Ebrit demonstrated that no letters from HMRC were addressed to him, and he attended no meetings, nor was mentioned in any meetings, with HMRC. The Appellant took the view that given the strength of the documentary evidence, or lack of it, implicating him it was not necessary or reasonable to call any witnesses to confirm that fact.
>
> 6. Given the finding of fact by the FTT above, the second and third tests in *Ladd v. Marshall* are satisfied.

> 7. The evidence of Mr. Wood clearly rebuts paras. 65 and 69 of the Decision and is apparently credible.
>
> 8. The Appellant acknowledges that the *Ladd v Marshall* criteria should not be applied as strict rules and that the Upper Tribunal must exercise its discretion in accordance with the overriding objective to deal with cases "fairly and justly" according to rule 2(1) Tribunal Procedure (Upper Tribunal Rules) 2008 (*Ketley v Revenue and Customs* [2021] UKUT 218 (TCC) at para. 69). The Appellant therefore submits that, given the evidence is highly relevant and rebuts the FTT's finding that the Appellant knew of VAT fraud in the market, which was fundamental to its decision, the application should be allowed.

24. We decided to refuse the application primarily for two reasons. First, nothing was produced to show (indeed, it was not even asserted) that the evidence could not, with reasonable diligence, have been obtained for use before the FTT. Indeed, the Appellants, who were represented before the FTT, were on clear notice from HMRC's case before the FTT that the issue of Mr Giller's prior knowledge at Ebrit was a contentious issue which was argued and relied on by HMRC. A decision by the Appellants not to call any evidence from Mr Wood (or Mr Saman) in those circumstances was a voluntary tactical choice taken by the Appellants as part of the litigation before the FTT. That is confirmed by Mr Brown's explanation above as to the view taken by the Appellants of the strength of their evidence. So, the new evidence clearly fails to satisfy the first *Ladd v Marshall* criterion. Second, the putative evidence relates to an *Edwards v Bairstow* challenge to a finding of fact by the FTT, and it would not be procedurally fair, or in accordance with the overriding objective, for the Appellants now to have a second bite at the cherry by the introduction of evidence in this appeal which would (as HMRC confirmed in their response to the application) have caused HMRC to conduct the FTT hearing differently.

25. We also have reservations as to whether or not the new evidence would in any event have satisfied the second and third *Ladd v Marshall* criteria, but we have not needed to decide those issues in view of the two reasons we identify which, in our opinion, militated decisively against the admission of the new evidence.

GROUNDS 1 AND 2: THE FTT APPLIED THE WRONG TEST OR FAILED TO GIVE ADEQUATE REASONS

26. Mr Brown rightly acknowledged that Grounds 1 and 2 effectively fall to be resolved together, since the adequacy of reasons argument turns on the test which the FTT applied.

27. Ground 1 asserts that the FTT "applied the wrong test when it concluded that the Appellant ought to have known that the only reasonable explanation for the transactions was that they were connected to VAT fraud".

28. This requires some unpacking. The error of law which is alleged is that (1) the correct test for establishing constructive knowledge is that it must be shown by HMRC that a reasonable businessman would have known that the only reasonable explanation for the transactions was that they were connected to VAT fraud, and (2) taking into account the reasons given by the FTT for its decision, the FTT did not properly apply this test.

29. This description is consistent with Ground 2, which is described in Mr Brown's skeleton argument[2] as a contention that "even if the FTT did apply the correct objective test (see Ground 1 above), it did not record the critical elements of its decision making as to why objectively a reasonable businessman, from the perspective of the Appellant, in all of the circumstances

[2] Appellant's amended skeleton argument paragraph 19.

should have concluded the only reasonable explanation was the connection with VAT fraud and therefore it failed to reach the minimum level [for adequacy of reasons] required".

30. Before we consider the FTT's reasoning, we begin by setting out our views on the issue of law as to the correct test to be applied.

Demonstrating constructive knowledge for Kittel purposes

31. HMRC denied Opus the right to recover input tax on the basis of the principle established in the CJEU[3] decisions in *Kittel v Belgium, Belgium v Recolta Recycling SPRL* (Joined cases C-439/04 and C-440/04) [2008] STC 1537 ("*Kittel*"). *Kittel* establishes that the right to deduct input tax will be lost where a taxable person "knew or should have known" that their transaction was connected with the fraudulent evasion of VAT. There the CJEU stated (emphasis added to original):

> 56. In the same way, **a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.**
>
> 57. That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.
>
> 58. In addition, such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them.
>
> 59. Therefore, **it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT,** and to do so even where the transaction in question meets the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity'.

32. In *Mobilx Ltd (in administration) v HMRC* [2010] EWCA Civ 517 ("*Mobilx*"), Moses LJ said this, at [59]-[60]:

> 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*.
>
> 60. The true principle to be derived from *Kittel* does not extend to circumstances in which a taxable person should have known that by his purchase it was more likely than not that his transaction was connected with fraudulent evasion. But a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion.

[3] We use "CJEU" to refer to both the Court of Justice of the European Union and the earlier Court of Justice of the European Communities.

33. This passage from *Mobilx* generated some confusion. In particular, it raised the question of whether Moses LJ was defining (or redefining) the *Kittel* constructive knowledge test as an "only reasonable explanation" test, or whether he was simply indicating that an "only reasonable explanation" approach was one way in which HMRC could discharge the burden on them to establish *Kittel* constructive knowledge.

34. That question has been clarified in various decisions of the Upper Tribunal subsequent to *Mobilx*.

35. In *GSM Export (UK) Limited and another v HMRC* [2014] UKUT 0529 (TCC) ("*GSM Export*"), Mrs Justice Proudman stated as follows:

> 18. Mr Trollope [counsel for the taxpayer] submitted that the FTT had erred in its interpretation and application of *Mobilx*. He said that the Court of Appeal in *Mobilx* had held that there should be either (i) actual knowledge of the connection to fraud on the part of the taxpayer or, if not, (ii) no other reasonable explanation for the transaction in which the taxpayer was involved but such a connection to fraud. In the present case, however, there was such a reasonable explanation, namely the appellants' legitimate grey market trading.
>
> 19. However *Mobilx* does not purport to change the test in *Kittel's* case. The requirement as to the taxpayer's state of mind squarely remains "knew or should have known". The reference to "the only reasonable explanation" is merely a way in which HMRC can demonstrate the extent of the taxpayers' knowledge, that is to say, that he knew, or should have known, that the transaction was connected with fraud, as opposed to merely knowingly running some sort of risk that there might be such a connection…

36. In *AC Wholesale Ltd v HMRC* [2017] UKUT 0191 (TCC) ("*AC Wholesale*"), the Upper Tribunal addressed the application of the "only reasonable explanation" test and concluded as follows:

> 29. In our view, Mr Brown's submissions place a weight on the words used by Moses LJ in *Mobilx* that they cannot bear. Moses LJ was clear that the test in *Kittel* was a simple one that should not be over refined. It is, to us, inconceivable that Moses LJ's example of an application of part of that test, the 'no other reasonable explanation', would lead to the test becoming more complicated and more difficult to apply in practice. That, in our view, would be the consequence of applying the interpretation urged upon us by Mr Brown. In effect, HMRC would be required to devote time and resources to considering what possible reasonable explanations, other than a connection with fraud, might be put forward by an appellant and then adduce evidence and argument to counter them even where the appellant has not sought to rely on such explanations. That would be an unreasonable and unjustified evidential burden on HMRC. Accordingly, we do not consider that HMRC are required to eliminate all possible reasonable explanations other than fraud before the FTT is entitled to conclude that the appellant should have known that the transactions were connected to fraud.
>
> 30. Of course, we accept (as, we understand, does HMRC) that where the appellant asserts that there is an explanation (or several explanations) for the circumstances of a transaction other than a connection with fraud then it may be necessary for HMRC to show that the only reasonable explanation was fraud. As is clear from *Davis & Dann*, the FTT's task in such a case is to have regard to all the circumstances, both individually and cumulatively, and then decide whether HMRC have proved that the appellant should have known of the connection with fraud. In assessing the overall picture, the FTT may consider whether the only reasonable conclusion was that the purchases were

> connected with fraud. Whether the circumstances of the transactions can reasonably be regarded as having an explanation other than a connection with fraud or the existence of such a connection is the only reasonable explanation is a question of fact and evaluation that must be decided on the evidence in the particular case. It does not make the elimination of all possible explanations the test which remains, simply, did the person claiming the right to deduct input tax know that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT or should he have known of such a connection.

37. We derive the following principles from the relevant case law:

(1) The test of constructive knowledge remains as described in *Kittel*.

(2) That test is simple and should not be over-refined: the statement to this effect by Moses LJ was explicitly approved by the Court of Appeal in *Fonecomp Limited v HMRC* [2015] EWCA Civ 39 at [53].

(3) HMRC can satisfy the burden of establishing constructive knowledge by showing that the facts demonstrate satisfaction of the "only reasonable explanation" test.

(4) An "only reasonable expectation" approach is not the only way of establishing constructive knowledge: see *GSM Export*, *AC Wholesale*, *HMRC v CCA Distribution Limited* [2015] UKUT 0513 at [99] and *Northside Fleet Ltd v HMRC* [2022] UKUT 00256 (TCC) at [8(2)].

(5) The extent to which HMRC's case, and the resultant focus of the FTT hearing an appeal, should seek to establish (by reference to the factors relied on by HMRC) whether the "only reasonable explanation" was connection to VAT fraud depends to a significant extent on the way in which the taxpayer puts their case. If the taxpayer in fact relies on a reasonable explanation other than connection to VAT fraud, HMRC may well need to address that other explanation, and the FTT should make appropriate findings: *AC Wholesale* at [30].

(6) There is no need for HMRC or the FTT to identify and eliminate all conceivable reasonable explanations other than a connection to VAT fraud: *AC Wholesale* at [29], cited with approval in *The Official Receiver v Kelly* [2023] EWHC 1181 (Ch) at [23].

The FTT's decision

38. We turn now to approach and reasoning of the FTT, which is the subject of Grounds 1 and 2.

39. The FTT referred to various relevant authorities, including *Kittel*, *Mobilx* and *GSM Export*. Having considered and made findings on the issue of Mr Giller's knowledge of VAT and associated risks in the supply chain, the FTT looked in detail at the dealings between Opus and the five defaulting traders. After concluding that Mr Giller did not have actual or "blind-eye" knowledge, the FTT's conclusions on constructive knowledge were as follows:

> **Constructive knowledge**
>
> 211. We have no doubt, though, and find that Mr Giller failed to think about the facts that were directly in front of him and, equally, we find that he failed to consider and realise the implications of those facts.
>
> 212. We find that his failure to make checks can be characterised as being seriously negligent. We have, in reaching that conclusion, taken into account carefully that the facts in this case involve Opus having traded directly with five consecutive fraudulent traders one after another. The relationship with the first, RWR Ltd, commenced in May 2018. The relationship with the fifth,

> ATC Ltd, commenced 12 months later in May 2019. It might be said that one or two fraudulent traders could be attributed to bad luck but five in a sequence or pattern of one after another in this manner and demonstrating a repeating pattern of failures is, in our view, entirely beyond the realm of what could be characterised as misfortune.
>
> 213. Mr Giller was subjected to lengthy and robust cross-examination during the course of many hours over two days. As stated above, at times we found his evidence to be noticeably improvisatory, inventive and lacking in substance, particularly as to the entirely inadequate approach taken towards commercial due diligence and the carrying out of checks. That in the context of Opus paying over substantial sums of money (often in the region of £20,000 on a weekly basis) to companies about which it knew next to nothing and when, clearly, Opus also had to be very mindful of its cashflow position given its reliance upon credit.
>
> 214. We found Mr Giller to be an experienced person in business. He had worked at a number of businesses prior to setting up Opus. We reject entirely, as submitted, that Mr Giller only became aware of VAT fraud in mid-July 2019 on receipt of HMRC's letter of 15 July 2019 which included a link to HMRC's leaflet entitled 'Use of Labour Providers – Advice on Due Diligence' and VAT Notice 726.
>
> 215. We have found that Mr Giller became aware of VAT fraud prior to his leaving the employ of Ebrit Labour Services Ltd in October 2016 and, therefore, prior to starting Opus. Consequently, we find that his approach at Opus was in no way sufficiently circumspect about his trading connections and maintaining the integrity of the supply chain.
>
> 216. It is no answer for Mr Giller to argue, as he seeks to do, that he was not told by his accountant nor told expressly by HMRC of what checks he must carry out in order to seek to maintain the integrity of the supply chain. His approach was one of simply not caring whether or not his counterparties were fraudsters.
>
> 217. Mr Giller referred on a number of occasions in his evidence, with respect to due diligence discussions and checks, to that being guidance and that he was not being told to do it. That, in our view, misses the point. The point, clearly, is that undertaking proper due diligence and carrying out routine commercial checks is about seeking to avoid being a party to fraud and keeping the monies of the company safe. It is commercial common sense.
>
> **Conclusion**
>
> 218. Having taken into account all of the circumstances and having drawn together all of the strands, we find that HMRC has proved to an extent well beyond the balance of probabilities that the Appellants should have known that the relevant transactions were connected to the fraudulent evasion of VAT.

Discussion

40. Mr Brown argued that the FTT's reasons simply set out what Mr Giller did or did not do, but did not consider or explain, as they needed to, "why the reasonable businessman should have concluded that the <u>only</u> reasonable explanation for the transactions was that they were connected to <u>VAT</u> fraud". He said that paragraphs [216] and [217] also failed to apply the correct test, because they considered irrelevant factors and wrongly addressed the risk of fraud generally rather than VAT fraud.

41. We will consider Grounds 1 and 2 on the assumption that the challenges to findings of fact which comprise Ground 3 are unsuccessful. If we were to uphold Ground 3 in whole or part we will need to revisit our conclusion on Grounds 1 and 2.

42. We firmly reject Mr Brown's arguments, for the following reasons.

43. First, as we have set out above, the FTT was not obliged to determine constructive knowledge for *Kittel* purposes by applying an "only reasonable explanation" test. The FTT correctly directed itself on the law, and was under no obligation to explain either its overall conclusion or its reasoning on the various factors which it identified as supporting that conclusion by reference to that formulation.

44. As we have said, if a taxpayer argues their case by relying on another reasonable explanation for a factor said by HMRC to demonstrate constructive knowledge, then that should be considered by the FTT. However, in this appeal, that was not a central aspect of the Appellants' response to the facts relied on by HMRC. Their defence was (in a nutshell) that they only became aware of potential VAT fraud in July 2019 and that they carried out meaningful due diligence, in particular by verifying that suppliers were registered with HMRC for Gross Payment Status: see [48]-[49]. It was hardly surprising against that backdrop that a considerable part of the FTT's deliberations were spent in considering those two assertions.

45. Second, as to the complaint that the FTT failed to consider the position of the reasonable businessman, and erred by considering solely the subjective position of Mr Giller, we consider it clear from the decision read fairly and as a whole that the FTT was adopting the correct position and considering the various causes for concern and "red flags" by reference to the objective position of a reasonable businessman.

46. This is reinforced by the fact that the FTT plainly had the correct approach in mind. In directing itself on the law, the FTT stated as follows at [46]:

> The task of the First-tier Tribunal is to apply the impersonal standard of the reasonable businessman. Namely, would the reasonable businessman have concluded that the taxpayer ought to have known that the only reasonable explanation for the transactions was that they were connected with fraud (*S&I Electronics plc v HMRC* [2015] STC at [64]). The question of 'means of knowledge' involves applying an objective test: whether, even if the taxpayer did not actually know that its transactions were connected with fraud, a reasonable businessperson with ordinary competence in its position would have known (*HMRC v Beigebell Ltd* [2020] UTUK 176 (TCC)).

47. As Popplewell LJ explained in *DPP Law Ltd v Greenberg* [2021] EWCA Civ 672, at [58]:

> …where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload.

48. We consider it clear that in the Decision the FTT did not "slip up in the application" of the relevant principles.

49. Third, Mr Brown's argument "island hops" onto paragraphs [211]-[217] and treats that passage (paraphrased by Mr Brown as "Mr Giller didn't do enough checks and knew about VAT fraud") as encompassing the FTT's reasons for finding that Mr Giller had *Kittel* constructive knowledge. The Decision must, of course, be read as a whole. That is not simply a point of principle in this case, because the FTT set out meticulous and detailed findings as to the shortcomings and "red flags" in the dealings by Opus with the five defaulting traders. Those findings, at [87]-[202], comprise roughly half of the Decision, and must be read together with the remainder of the Decision in order to determine the reasons relied on by the FTT.

50. Fourth, in so far as Mr Giller might have been seeking to rely on another reasonable explanation for any of the facts relied on by HMRC in relation to knowledge, a significant problem is that the FTT did not find his evidence wholly reliable. In relation to his prior knowledge of VAT/supply chain issues, the FTT "[did] not accept that claimed lack of knowledge of Mr Giller to be either plausible or credible": [65]. In relation to the analysis of Opus' dealings with the defaulting traders, in several respects the FTT did not accept Mr Giller's evidence: for example, at [100] it found his evidence as to how Opus became engaged with one of the suppliers "to be improvisatory, lacking in substance and not credible". At [212], set out above, in relation to Mr Giller's lengthy cross-examination, the FTT said that "at times we found his evidence to be noticeably improvisatory, inventive and lacking in substance".

51. Finally, we reject the suggestion by Mr Brown that the FTT fell into error by considering the risk of connection to fraud generally, rather than to fraudulent evasion of VAT. It is not unusual in decisions relating to *Kittel* for a court or tribunal to refer shorthand to fraudulent evasion of VAT as "fraud". In identifying the issues before the FTT at [31], the FTT referred to fraudulent evasion of VAT. In summarising the relevant passages from *Kittel* and *Mobilx* (at [38]-[41]) the FTT again used this terminology. In its conclusion, at [218], the FTT refers specifically to connection to the fraudulent evasion of VAT.

52. As we have described, the FTT also made detailed findings, on which it relied in its conclusion, as to Mr Giller's prior knowledge of VAT fraud and supply chain issues, in a passage titled "VAT awareness". That clearly indicates that the FTT correctly understood the issue before it.

53. Our conclusion and reasoning is sufficient to dismiss Ground 2, which is that the FTT did not provide adequate reasons for its decision on constructive knowledge. As Mr Brown accepted, that argument is inextricably linked with Ground 1, which we have firmly rejected. The requirement to provide adequate reasons means that the loser must be able to understand why they have lost. In light of the reasons we have given for rejecting Ground 1, the FTT was under no obligation to frame its reasons by reference to an "only reasonable explanation" formulation, and there can in our opinion be no doubt from the Decision why the appeal failed.

54. The appeal under Grounds 1 and 2 is dismissed.

GROUND 3: EDWARDS V BAIRSTOW CHALLENGES

55. The grounds of appeal state as follows:

> **Ground 3 – Facts, or the inference from facts, vital to the decision of the Tribunal, were perverse/irrational, or had no evidence to support them, or were made without regard to factors that were relevant or by reference to irrelevant factors.**
>
> The FTT's decision was based on a finding of fact or inference from the facts which;

(a) was perverse or irrational; or

(b) there was no evidence to support it; or

(c) it was made by reference to irrelevant factors or without regard to relevant factors (*Begum v Tower Hamlets LBC* [2003] UKHL 5 at para. 99, applying *Edwards v. Bairstow* [1956] AC 14).

56. The principles applicable to an *Edwards v Bairstow* challenge, to either a distinct finding of fact or an overall evaluative conclusion, are well-established. An appeal to this tribunal lies only on a point of law: section 11(1) of the Tribunals, Courts and Enforcement Act 2007. While there cannot be an appeal on a pure question of fact which is decided by the FTT, the FTT may arrive at a finding of fact in a way which discloses an error of law. In *Edwards v Bairstow*, Viscount Simonds referred to making a finding without any evidence or upon a view of the facts which could not be reasonably entertained, and Lord Radcliffe described as errors of law cases where there was no evidence to support a finding, or where the evidence contradicted the finding or where the only reasonable conclusion contradicted the finding. Lord Diplock has described this ground of challenge as "irrationality"[4].

57. In the well-known words of Evans LJ in *Georgiou v Customs and Excise Commissioners* [1996] STC 463, at 476:

> … 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. A failure to appreciate what is the correct approach accounts for much of the time and expense that was occasioned by this appeal to the High Court.

58. The Appellants were granted permission to appeal under Ground 3 in relation to three findings of fact by the FTT, discussed below. In the hearing, Mr Brown raised an additional challenge to another finding of fact. Mr Brown, quite rightly, accepted that he did not have permission to argue that point, and that it would become relevant only if we were to set aside the FTT's decision and remake it. Since that is not the decision we have reached, we need say no more about that additional challenge.

First challenge: the Appellants' awareness of VAT fraud

59. The Appellants assert that the FTT erred when it found that Mr Giller was aware of VAT fraud in the industry from his time working at Ebrit, before he began work for Opus.

60. Mr Brown relied on the following points:

(1) There was no direct evidence of Mr Giller being involved in any discussions, either with HMRC or within Ebrit, about VAT fraud in the industry.

(2) Although Mr Giller had the title Managing Director at Ebrit, he was not a director registered at Companies house.

(3) The FTT failed to take into account a relevant factor, being that Mr Giller's role at Ebrit was finding new customers, so he would not automatically be aware of issues in the supply chain. It was his colleague Mr Wood who selected payroll providers.

[4] *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374, at 410F-411A.

(4) There was no evidence to support the finding, which was therefore irrational.

61. The challenge to this finding is without merit.

62. The FTT examined this issue, and the arguments of the Appellants, in considerable detail, at [55]-[70]. It explicitly referred to and took into account all of the issues raised by Mr Brown. Point (1) is recognised by the FTT at [58], [59], [60] and [62]. Point (2) is explicitly referred to at [66]. Mr Giller's evidence regarding point (3) is clearly recorded at [56], [66] and [67].

63. The FTT took all of these factors into account, and, in accordance with the task before it, weighed them against other factors, including those relied on by HMRC. Its conclusion is recorded at [68]-[70]as follows:

> 68. Given the leading role of Mr Giller as Managing Director of a small team, his taking instructions directly from Mr Wood (who selected the payroll provider) and Mr Saman, his overseeing of the whole operational side of the business, and his intimate involvement with the payroll process, we fail to see how Mr Giller could have been, as he claims, oblivious to not just the historical problems that were in existence when he commenced his employment but also, importantly, the continuation of those problems that endured during his tenure of two years.
>
> 69. We also fail to see any logical or reasonable explanation as to why Mr Wood or Mr Saman would not have made Mr Giller aware of the enduring issues relating to the integrity of the supply chain. Mr Wood and Mr Saman would have gained no benefit from failing to inform Mr Giller of these issues. To the contrary, not informing Mr Giller of these issues would have resulted in an increased risk that such problems could continue and impact detrimentally upon the company. That makes no sense to us.
>
> 70. In conclusion on this point, we find that it is more likely than not that Mr Giller would have known of the issues relating to the integrity of the supply chain at Ebrit Labour Services Ltd at some point during his employment and, certainly, before his employment there ended and before he started Opus in October 2016.

64. In reaching that conclusion, the FTT had decided not to accept Mr Giller's evidence, stating at [65]:

> Pausing there, in summary HMRC submit that Mr Giller must have been made aware by Mr Wood and/or Mr Saman of the issues identified above (relating to the integrity of supply chains and connection with tax losses) at the point of taking up employment with Ebrit Services Ltd. Mr Giller vehemently refuted this on a number of occasions when it was put to him on cross-examination. Mr Giller was equally vehement in his denial of having any knowledge at all of the issues identified above at any point during his employment with Ebrit Services Ltd or Ebrit Labour Services Ltd. For reasons that we will set out, we do not accept that claimed lack of knowledge of Mr Giller to be either plausible or credible.

65. The FTT's reasoning in relation to this issue took all material relevant factors into account and reached an evaluative decision. The weight to be afforded to the various facts, and the weight to be afforded to Mr Giller's evidence, were quintessentially matters for the FTT. We cannot find fault with the FTT's reasoning. Its decision was entirely rational.

Second challenge: Failure to make checks

66. Mr Brown argued that the FTT "did not take into account, in finding that [Mr Giller] had failed to make checks, that he had checked the suppliers had Gross Payment Status i.e. that the

Commissioners had granted suppliers GPS and therefore the Appellant believed they had carried out their own checks on the reliability of the supplier”[5].

67. In addition, said Mr Brown, Mr Giller did carry out further checks in respect of the final supplier, ATC Nationwide. The FTT’s conclusion (at [202]) that these additional checks “indicated no meaningful departure by Mr Giller from the woeful approach to due diligence up to that point in time” was unfair and irrational, particularly since the additional checks are said by HMRC to be relevant in their published guidance.

68. We have no hesitation in rejecting the complaint regarding checks said to have been made by Mr Giller of the GPS status of the five suppliers.

69. In the first place, the FTT clearly did take those checks into account, expressly recording the Appellants’ case on the point at [48]-[49]. Mr Brown’s real complaint can only be that the FTT should have accepted that those checks were adequate due diligence, or should have carried more weight. However, the FTT was fully entitled to place limited weight on GPS status. It is a status which exists for the purposes of the subcontractor regime applicable to the Construction Industry Scheme, and not for VAT purposes, and it cannot replace adequate due diligence where, as the FTT found, there were so many “red flags” in relation to each of the five suppliers.

70. Secondly, Mr Giller did not, in any event, check the GPS status of each defaulting company. In relation to the first company, RWR Contract Management Ltd, the FTT did not accept Mr Giller’s evidence on this issue, and found as a fact that no GPS check was carried out: [108]. In relation to the fifth company, ATC Nationwide, the FTT again did not accept Mr Giller’s evidence, and found as a fact that no GPS check had been made: [201].

71. In relation to ATC Nationwide, a complaint that the FTT was unduly dismissive of the checks which Mr Giller did carry out could not serve to establish any error of law. The FTT took into account the checks that were done. The extent to which those checks were satisfactory from a due diligence perspective was a matter for the FTT.

72. In any event, Mr Brown’s complaint in relation to the ATC checks is, at best, another island hop. It fastens on to one part of [202] while ignoring both the rest of that paragraph and, more importantly, the other findings of fact which preceded it. In the FTT’s detailed analysis of Opus’ dealings with ATC Nationwide, the FTT found that: although Opus had a contract with ATC (whereas it had no contracts with the other four defaulters), the contract had absolutely nothing to do with the services in fact supplied and actually provided for Opus to supply services to ATC ([191], [[197]); Opus was introduced to ATC by someone at ATC called Dean who approached Opus after ATC had found Mr Giller on LinkedIn ([195], [196]); Mr Giller made no check of the accounts of ATC ([198]); Mr Giller did not check who the directors of ATC were ([198]); Mr Giller did not check the banking details of ATC or obtain any credit report or trade reference for ADT ([199]); while trading with ATC, Opus had received from HMRC letters deregistering for VAT all of the previous four suppliers dealt with by Opus ([200]), and Opus carried out no CIS or GPS checks on ADT ([201]).

73. That is the context in which the FTT then concluded at [202] that it agreed with HMRC that there had been “no wholesale appraisal by Mr Giller of due diligence or the contract with ATC Ltd”, and made the comment complained of under this head.

74. It is not possible to detect any error, of law or otherwise, in the FTT’s conclusion.

[5] Appellants’ amended skeleton argument paragraph 23.

Third challenge: a repeating pattern of failures

75. This aspect of Ground 3 is an argument that the FTT erred in taking into account that there was a "repeating pattern of failures" arising from Opus dealing with five consecutive defaulting traders one after another.

76. The relevant finding was as follows, at [212]:

> We find that his failure to make checks can be characterised as being seriously negligent. We have, in reaching that conclusion, taken into account carefully that the facts in this case involve Opus having traded directly with five consecutive fraudulent traders one after another. The relationship with the first, RWR Ltd, commenced in May 2018. The relationship with the fifth, ATC Ltd, commenced 12 months later in May 2019. It might be said that one or two fraudulent traders could be attributed to bad luck but five in a sequence or pattern of one after another in this manner and demonstrating a repeating pattern of failures is, in our view, entirely beyond the realm of what could be characterised as misfortune.

77. The basis of Mr Brown's complaint was that Mr Giller claimed that he did not become aware of any potential VAT problem with any of the defaulters until August 2019, and had only become aware of the risk of VAT fraud in the supply chain in July 2019. This meant that he would only have had visibility, and therefore awareness, of any pattern of failure in relation to the suppliers by the time Opus was dealing with ATC.

78. This complaint is in part parasitic on the first complaint under Ground 3, challenging the FTT's finding that Mr Giller was aware of the risks of VAT fraud in the supply chain before he joined Opus. We have rejected that challenge, and that element of the complaint therefore falls away.

79. In relation to the defaulting traders specifically, the FTT was fully entitled, and indeed obliged, to take into account the "repeating pattern" described at [212]. In directing itself on the law, the FTT had referred to this at [43]:

> In *Red 12 Trading Ltd v Revenue & Customs* [2010] STC 589 at [109-11], it was stated that it is necessary to consider individual transactions in their context, including drawing inferences from a pattern of transactions, and to look at the totality of the deals effected by the taxpayer and their characteristics and at what the taxpayer did or omitted to do, and what it could have done, together with the surrounding circumstances in respect of all of them.

80. It was the objective existence of the pattern which mattered, not Mr Giller's subjective awareness of individual deregistration notices. As Mr Brown correctly pointed out in relation to Ground 1, the test which the FTT must adopt in considering *Kittel* constructive knowledge is that of a reasonable businessman.

81. The FTT's approach of taking the pattern into account was entirely rational and involved no error.

Ground 3: Conclusion and an observation

82. We reject Ground 3 in its entirety.

83. For our part, we would not have granted permission to appeal in respect of Ground 3. That is for two related reasons. First, it personified the "roving selection of evidence" which was criticised in *Georgiou* as leading to the unwarranted use of the Tribunal's resources. Second, it did not address the materiality of the asserted errors in the context of the totality of the FTT's extensive and meticulous findings of fact regarding the relevant transactions.

DISPOSITION

84. The appeal is dismissed.

JUDGE THOMAS SCOTT
JUDGE ANDREW SCOTT

Release date: 20 July 2026