TC01367

Reference no: LON/2007/0901

Value Added Tax - MTIC case involving four purchases and sales of Nokia mobile phones - transactions preceded by only one other such supply by the Appellant - many of the functions of the Appellant undertaken on its behalf by independent accountants - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX

BUSINESS MANAGEMENT CONCEPTS LIMITED

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: HOWARD M. NOWLAN (Tribunal Judge)
HELEN MYERSCOUGH

Sitting in public at Victoria House, Holborn, London on 16 to 25 May 2011

Fiyaz Saeed of Golden Solicitors on behalf of the Appellant
Andrew Westwood, Counsel, on behalf of the Respondents

DECISION

Introduction

1. This was a relatively simple MTIC appeal in which the Appellant appealed against the denial of an input refund claim of £644,043.75 in the return for its 3-month VAT period ending on 31 May 2006. The claim relating to the sale to one single European buyer of four consignments of Nokia mobile phones all purchased from the same supplier, the purchases and sales all being effected by the Appellant on 30 May.

2. The Appellant had initially indicated that it would put HMRC to proof in relation to all relevant matters, including the case law requirement for the Respondents to demonstrate that the Appellants' four transactions had all been traced to fraudulent losses of VAT by HMRC. At the commencement of the Appeal, whilst the Appellant was represented by Mr. Tariq Rasul ("Mr. Rasul"), the Managing Director of the Appellant, and the holder of one of the two shares of the Appellant (the other share being held by his wife), a letter was read out to us by the Respondents' counsel indicating that the Appellant would no longer wish to cross-examine any of the Respondents' witnesses. We did not take this to indicate that the Appellant conceded that its transactions were connected in the requisite sense to fraudulent losses of tax, though the letter obviously indicated that less attention would be directed to this aspect of the Appeal, and more to the issue of whether the Appellant "knew or ought to have known that there could be no other reasonable explanation for its transactions than that they were connected to fraudulent losses of VAT".

3. At the commencement of the third day of the hearing, it was indicated to us that the Appellant would be represented by Mr. Saeed, a solicitor. We were told that Mr. Saeed had only been instructed on the evening of the previous day, and that he had spent much of the night reading papers. We were also told that at an earlier stage Mr. Saeed had represented the Appellant in relation to the Appeal though, not entirely surprisingly, the Appellant had then sought to save and reduce legal costs by dealing with all the exchanges of documents and information in the lead up to the appeal without legal representation. Mr. Saeed indicated that, contrary to the terms of the letter to which we have just referred, the Appellant would now wish to cross-examine some of the Respondents' witnesses, and that the Appellant's case would include a vigorous contention that the Respondents had failed to demonstrate that the phones bought and sold by the Appellant were the phones that had been traced to any fraudulent VAT defaulter.

4. The Respondents advanced their case on the basis that ample evidence had been advanced for tracing the four relevant transactions to fraudulent tax losses, and that it was their contention that the Appellant knew, and failing that certainly ought to have known, that there could be no other reasonable explanation for its transactions than that they were connected to fraudulent tax losses.

5. The Appellant advanced essentially five arguments for its proposition that the Respondents had failed to trace the Appellant's transactions to fraudulent tax losses. We have absolutely no hesitation in concluding that the Respondents amply made out their case in relation to tracing the transactions to tax losses. We will summarise

below each of the five contrary arguments advanced on behalf of the Appellant but it is our unequivocal conclusion that none of the arguments were persuasive.

6. We also accept the Respondents' contentions both that the Appellant must in fact have known that its transactions were connected to fraudulent losses of VAT and that, failing that, it certainly ought to have so known. We will support our conclusions below by listing the factors that were present in this case and common to most MTIC appeals which render such a conclusion highly likely. We will then list the special circumstances in this case that we concluded put the matter entirely beyond doubt, and justified the proposition that the Appellant knew, in the sense that it must have known, and that failing that, definitely ought to have known, that there could be no other explanation for its transactions than that they were so connected.

7. We should finally mention in this Introduction that there were some unusual facts in this case. These centred around the point that the Appellant, being wholly ignorant of how to deal with the administration and documentation of back-to-back mobile phone deals, and allegedly being too busy in his consulting work to attend to the paperwork and considering it more cost-efficient to delegate these functions, engaged its accountants, Rebecca Associates ("RA"), to attend to such matters, and to be more involved in the Appellant's day-to-day business than one would ordinarily expect. The Appellant certainly knew that RA's premises were next door to the premises of its own and only supplier, namely T. M. Global Limited ("TMG"). The Appellant's director, Mr. Rasul, claimed to have looked at the due diligence material furnished by TMG to the Appellant prior to the first deal effected between the parties, but to have failed to spot the point revealed in that due diligence exercise, that the principal of RA, a Mr. Hafiz (who had been known to Mr. Rasul for 15 years), was disclosed to be the financial controller of TMG. This, and other curious tie-ups between TMG and the Appellant, certainly left us very curious as to what the relationship was between the two companies. In the final event, we concluded that there was nothing in this relationship that had been shown to be central to our decision, albeit that it might theoretically have had considerable bearing on the outcome. We will deal with the relevant points after summarising the facts and other matters. At this point we are simply flagging the slightly unusual circumstance to which we will have to give some attention.

The evidence

8. Evidence was given by Officer Chak Cheung ("Officer Cheung"), HMRC's case officer in relation to this Appeal, albeit that he had not himself been involved with the Appellant at the time of the transactions in dispute, or when the first enquiries were made. We found Officer Cheng's evidence to be entirely trustworthy, albeit that most of it related to written information with which he had not been directly involved, so that the evidence was not in the event particularly material.

9. Evidence was also given by Mr. John Fletcher of KPMG ("Mr. Fletcher"). Mr. Fletcher was called by the Respondents principally to give expert evidence about the retail market for one of the phones involved in one of the four contested deals. He was extensively cross-examined by Mr. Saeed, and the subject of that cross-examination is something that we will refer to in due course in dealing with the first of the five points advanced for disputing either the existence of, or the tracing of the Appellant's transactions to, relevant fraudulent tax losses. Mr. Fletcher's evidence was virtually totally irrelevant to this particular contention.

10. Evidence was finally given on behalf of the Respondents by Mr. David Ellis of HMRC, in relation to the banking evidence obtained by HMRC in relation to the Dutch and Paris servers of the Netherlands Antilles bank, First Curacao International Bank ("FCIB"). That evidence was of less relevance in this case than in some other Missing Trader ("MTIC") cases, but we will certainly summarise the relevant evidence quite shortly below. Mr. Ellis was again entirely trustworthy, and his evidence was confined principally to explaining the banking evidence, particularly with the assistance of useful diagrams.

11. The Appellant's only witness was Mr. Rasul. Mr. Rasul gave his evidence in relation to the facts relevant to the Appeal in a hesitant and somewhat vague manner. We were both struck by the sudden change in confidence when he dealt swiftly and with more authority with the largely irrelevant background facts in relation to his dealings in relation to his earlier company, European System Solutions Ltd ("ESS"), to which we will refer in paragraph 14 below. By contrast, we were never clear as to the basic facts in relation to such crucial matters to the present Appeal as the source of the funding for the Appellant's first mobile phone deal and, more particularly, the source of funding for the four deals that are the subject of this Appeal. Whether Mr. Rasul was having difficulty in remembering such utterly basic facts, or whether he was being vague quite deliberately,was not immediately clear, but we eventually concluded that the latter was the more realistic explanation.

12. It is also the case that there were several respects in which HMRC's counsel pointed out that Mr. Rasul had changed his evidence. Many of these points were somewhat marginal. We do however agree that we were very unconvinced by the suggested facts about the change of intention in relation to the business sector into which the newly-formed Appellant decided to embark shortly after commencing business; we were unimpressed by the statement that Mr. Rasul refrained from notifying that proposed new line of business in "telecommunications – wholesale" to HMRC because such trade category might adversely affect his wife's position at Morgan Stanley, and certainly Mr. Rasul's answers to an earlier VAT officer, Rosalynn Macaulay, at a meeting shortly after the transactions (the meeting held on 8 August 2006) were wrong or simply untrue in two respects. Mr. Rasul was recorded by Rosalynn Macaulay to have said that the Appellant's mobile phone deals were initially funded from the Appellant's consultancy income which, as we will mention below, was manifestly impossible, and he said that the company had no loans, overdraft facilities or private investors. This was an utterly central fact in relation to the four presently contentious deals, and the truth was that the supplier had provided £130,000 credit for those deals, which even today remains outstanding. Without that credit, the Appellant could not have financed "the VAT gap" involved in buying on a VAT-inclusive basis, and selling on a VAT-exclusive basis. In several respects, therefore, Mr. Rasul has either shifted his ground, or has simply lied. We cannot therefore say that we felt that we could accept his evidence at face value.

The facts in more detail

13. The Appellant was incorporated in August 2005. The two issued £1 shares were held by Mr. Rasul and his wife, Ghazala Shabbir. Both Mr. Rasul and his wife had business management degrees; Mr. Rasul also had a BSc in Applied Chemistry and an MSc in Information Technology Systems. His wife worked or had worked in investment banking, principally with Morgan Stanley. Mr. Rasul was the Managing Director of the Appellant, and his wife was the Company Secretary.

Mr. Rasul's business background

14. Mr. Rasul had had a 17-year period as a seemingly successful consultant in the IT sphere. In this period he operated through a jointly-owned company called European System Solutons Ltd ("ESS"), it being evident that this company was headed by Mr. Rasul and another "principal", albeit that much of its work was undertaken through chosen sub-contractors. He referred to some well-known clients that he had advised, and in 2003 he had personally been featured in a half-page article in the Independent newspaper for having built up the turnover and profits of ESS, the company being profiled in the article as a fine example of a successful growing company.

15. In the article in the Independent, Mr. Rasul listed 10 suggestions to be followed in setting up and expanding a new business. In the light of the way in which several of these suggestions appeared to have been completely ignored in his own formation of the Appellant, it is noteworthy that the suggestions included the following; namely, that:

- *2. Never start a business with inadequate investment. Lack of capital scuppers the best ideas.*
- *5. Never take anything for granted and always have a "get-out-of-jail" card.*
- *8. Always work with integrity and honesty.*
- *10. Be selective when seeking contracts. Know your customer and market and make sure you understand the impact on cashflow as well as profit."*

16. The other point to make in relation to this article and in relation to Mr. Rasul generally is that the article supported the point that Mr. Rasul was a relatively experienced businessman. His wife, as a Morgan Stanley employee, was perhaps also experienced in business matters, though no evidence was given in relation to that. These factors are all the more extraordinary when we are forced to conclude that Mr. Rasul's venture into mobile phone trading revealed absolutely astonishing naivety, or something worse.

17. We were not directly concerned with the fate of ESS, but it appears that, following a takeover of one of ESS's major clients, most of the clients ceased to instruct ESS and eventually ESS went into liquidation. We were told that there was no surplus to be distributed in the liquidation to the shareholders.

The formation of the Appellant

18. Following the demise of ESS, Mr. Rasul decided to set up a company to pursue consultancy work in the management consultancy field, rather than the IT field that had been ESS's main line of business.

19. When the Appellant registered for VAT purposes on 17 September 2005, following the Appellant's application made on 29 August 2005, it described its intended business activities as "Management Consultancy". It also indicated that its turnover in the next 12 months was estimated at £100,000, and that it did not expect to be making regular VAT refund requests. It failed to answer the question relating to likely sales to other EC Member State customers.

20. HMRC's counsel drew our attention to the fact that when the Appellant responded to a further question in relation to registration from HMRC, that response being dated 10 October 2005, no mention had been made of any new intended business or adjustment to the turnover estimate of £100,000. By that time, however the following proposal had plainly been pursued to quite some extent.

21. According to Mr. Rasul's evidence, it occurred to Mr. Rasul shortly after forming the Appellant, that the business model would be less risky if he could add to the consultancy function a trading function in selling products, since this might furnish a more even stream of business that would be particularly helpful when there were quiet periods in the management consultancy activity. In this context he was interested in the field of wholesale selling of mobile phones partially because his secretary at ESS had previously been employed by Carphone Warehouse, and partially because on buying computer and other equipment, including mobile phones, back in 2001 for ESS he had struck up quite a relationship with a Mr. Rashid of the company TM Global Limited ("TMG"). Mr. Rashid had apparently been in this market for many years, and Mr. Rasul was impressed by the busy activity, and apparent success, that he witnessed in TMG's office. He also obviously had a reasonably good relationship with Mr. Rashid.

22. It seems that the management consultancy business suffered a fairly slow start, unless the Appellant was simply slow to submit bills. We reach this conclusion because the VAT return for the period ending 11/05 recorded outputs of only £3,902. The outputs in the return for the period 02/06 were admittedly the much higher figure of £726,652, but deleting the amount referable to the Appellant's first purchase and sale of mobile phones effected on 28 February 2006, the remaining gross outputs were again of only £14,132.

23. There were several slightly unusual features to the Appellant's initial mobile phone trading.

24. First Mr. Rasul admitted that he knew little about mobile phones. His knowledge of phone pricing was apparently gleaned from reading the Carphone Warehouse brochure. He was also unfamiliar with the documentation that would be required in relation to any wholesale purchase and sale of mobile phones, and therefore he engaged the firm of accountants that he had used before, RA, to provide services. As he expressed it in his Witness Statement, RA had "branched out and become involved in providing business and financial services to various companies", and he therefore appointed them "to act as my agents professionally and in particular to prepare all necessary paperwork and carry out the required business checks and keep sales and purchase records including all necessary due diligence work that may be needed."

25. We will mention below the far more central fact that Mr. Hafiz, whose accountancy firm would be heavily involved with the Appellant's mobile phone trading, was also involved with the Appellant's supplier, TMG. Of less significance are the two facts given to us that Mr. Hafiz and Mr. Rasul were, or had been, officers of the company Sienna Mount Plc, and that Mr. Hafiz had been company secretary of Standard Enterprises Limited, which was asserted to be or have been a proven MTIC trader.

26. Mr. Rasul concluded a deal with RA under which he would pay £75 an hour for their services, which he said was the obvious way in which to proceed since he could earn far more than £75 an hour in rendering his consultancy services, and

therefore delegating much of the paperwork in relation to phone trades to RA made good sense. He also obtained all the experience and expertise of RA in relation to a field in which he was inexperienced. The relevant personnel at RA were Mr. Hafiz, the principal, two assistants named Mr.Shabbir and Mr. Osmann Younis and a work-experience student, named Mr. Nadine Malik. As summarised by Mr. Rasul, the respective roles of RA and Mr. Rasul himself in relation to the Appellant's hoped for mobile phone trading would be that "they would ensure the set up of trade contracts and potential clients and [his] role would be to clinch deals and to meet and greet." The role of RA was not confined to producing documentation that the Appellant would then use in its deals: RA were to be involved in seeking out, and later fully documenting, deals that Mr. Rasul would simply "clinch". RA's role was also to extend to educating Mr. Rasul about the business, and to conducting all dealings with HMRC in relation to any transactions effected.

27. Mr. Rasul had no mobile phone trader contacts other than Mr. Rashid of TMG, so that, being new to the business, all the efforts by RA on behalf of the Appellant to solicit suppliers or customers were unsuccessful. Nothing had resulted from a visit that Mr. Rasul apparently made to a specialist trade fair in Hanover, Germany, with a view to trying to establish some "useful business contacts for future business", and his commitments in relation to the consultancy business were said to make it impossible to visit other trade fairs. The only avenue into mobile phone trading was, therefore, that offered by Mr. Rashid, who suggested that the Appellant contact three possible European customers, one being Comica Handelsonderneming BV("Comica") a Dutch company. The other two suggested contacts came to nothing. The approaches to Comica, however, both by RA and by Mr. Rasul, prompted some interest in that they eventually indicated that they were "interested but wanted more information and wanted to check our credentials". Mr. Rasul explained that they had been suggested to him as a possible customer by TMG, and "with this and my polite but convincing manner they were interested in doing business".

28. A meeting was set up with Comica at their offices in Nigmegen, in the Netherlands in October 2005, to which it was said that Mr. Rasul and Mr. Hafiz both originally intended to go. Mr. Rasul said that other more pressing business arose in his consultancy business, so that he had to step down and in the event the visit was only made by Mr. Hafiz. Mr. Hafiz brought back some information that we will refer to below, and a picture of the front door of the premises where Comica were said to be based, albeit that their name was not amongst those names shown on the name board in front of what looked somewhat like a converted residential town house. Mr. Rasul, however, said that he was encouraged by the information brought back by Mr. Hafiz since he asserted that it demonstrated that Comica was an established company that had been in the business for several years. We will also have to refer below to whether the information brought back actually justified that remark, and alleged confidence, on the part of Mr. Rasul.

29. No transaction resulted from RA's visit to Comica, perhaps because Mr. Rasul himself had been unable to make the relevant meeting, and it was therefore not until 13 January 2006, when a Director of Comica, one Mr. Karman, was visiting London, that contact was renewed, and the chance of being able to supply phones to Comica looked more promising. Mr. Rasul referred to the fact that in this meeting the discussion lasted for about an hour, and included the business of wholesale trading in

mobile phones, the shortage of suppliers, what products the Appellant could supply, what products Comica often ordered, "the price differentials between the UK and Europe", and generally about London, the UK and the weather.

30. Following the January meeting in London, Comica at some time enquired whether Mr. Rasul would be able to supply considerable quantities of various phones, and on making enquiries Mr. Rasul discovered that available stock from suppliers other than TMG was at prices that he considered would afford him insufficient profit, and that "TMG therefore presented the only opportunity as they were willing to sell the stock on credit". Mr. Rasul made the somewhat extraordinary remark that he was hoping to make a mark-up and profit of 25%, but eventually settled for a lower margin in the hope of actually effecting his first deal, and thereby getting a foothold in the market.

The brief details of Deal 0

31. The deal that was then done was effected on 28 February, with the Appellant buying 2500 phones from TMG and selling them on the same day to Comica. This deal, which was referred to throughout the hearing as Deal 0, in contrast to Deals 1,2,3 and 4, which were effected on 30 May 2006, was not challenged by HMRC. Accordingly we did not obtain full details in relation to it, and it was only following Mr. Rasul's cross-examination, when we ourselves asked him questions, that we learnt broadly how the deal was effected.

32. Mr. Rasul was generally vague when answering questions about the phone deals, but our eventual understanding was that TMG may not have provided credit for deal 0, other than in the marginal sense of being prepared to release phones for inspection, prior to receiving payment. Mr. Rasul had hoped to secure a deposit from Comica, but that was not forthcoming, and the deal thus followed the normal pattern that once the goods had been shipped (in fact to France, at Comica's instruction), Comica would pay the full invoice price, and only then would the phones be released from the "Ship to Hold" instruction sent to the French freight forwarder. The more complex aspect of the payment flows in relation to deal 0 resulted from the fact that fairly late in the day the Appellant's bankers, HSBC, indicated that they would not deal with payments geared to mobile phone transactions for the Appellant, and therefore the Appellant eventually persuaded TMG and Comica, that Comica would send the whole of its payment, due to the Appellant, directly to TMG. Having regard to the fact that the Appellant was liable to pay TMG a greater amount than its own receipt from Comica, on account of the obvious fact that its payment to TMG was a VAT inclusive payment, whilst the receipt from Comica was exclusive of VAT (based on the expectation that HMRC would refund the VAT), it eventually emerged that Mr. Rasul probably lent the Appellant amounts (variously put at £50,000 or up to £75,000), to enable the Appellant to pay TMG the balance of the VAT inclusive price.

Due diligence and Redhill checks in relation to Deal 0

33. Although Mr. Rasul had known Mr. Rashid and his company TMG for some years, RA had produced a certain amount of due diligence material in relation to TMG for Mr. Rasul to consider, and Mr. Hafiz had brought back some similar material from his visit to Comica. Mr. Rasul confirmed in giving oral evidence that he had looked at all of this material. He admitted that in looking at the TMG disclosures, he had failed to notice that TMG's financial controller was disclosed to be Mr. Hafiz. No credit reference was taken out in relation to TMG. So far as the

information concerning Comica was concerned, Mr. Rasul said in evidence that he was encouraged by the material to see that they must be an established trader. As HMRC's counsel observed, it is difficult to see that Mr. Rasul had any remotely sound basis for this conclusion. The notice-board outside the accommodation address, whose front door (with a bicycle standing in front of it) was shown on the only photograph to contain a considerable number of names, but not that of Comica. Comica's contact particulars contained a PO Box number, but no reference to the address of the building whose front door had been photographed. Whilst the company had been formed in 2003, a VAT certificate appeared to be dated May 2005. A Dun & Bradstreet report admittedly indicated that an "Import/Export" business was conducted, and seemingly this had started in 2003, but the report gave no estimate of net worth, and put the recorded gross sales at $344,082 and Euro 259,000. Whether those two should be aggregated, or whether one was simply the currency conversion of the other we are unclear, but neither seemed to indicate a substantial level of turnover of a well-established trader.

34. One other piece of relevant due diligence information is that information from HMRC's Redhill officer revealed that Mr. Rasul himself had sought confirmation of both TMG's and Comica's valid VAT registrations, immediately prior to implementing Deal 0. The only significance that we attach to this is that when in oral evidence Mr. Rasul repeatedly asserted that, until the visit by Officer Monk that we are about to refer to in March 2006, he, Mr. Rasul, had never heard of the initials "MTIC", and knew absolutely nothing about MTIC trading, it seems strange that he knew that it was appropriate to verify VAT registration details of suppliers and customers with Redhill before implementing transactions. Some of the rest of the documentation that Mr. Rasul alleged that he had seen in relation to Deal 0 would also have seemed somewhat odd to someone entirely ignorant of the existence of MTIC concerns.

35. As we have said, we never obtained a full understanding of Deal 0, but on the basis that when HMRC repaid the VAT reclaimed in respect of Deal 0 on 5 May 2006, the amount of the refund (£111,000) did seem to confirm the point that if, with the refund, the Appellant made a profit on Deal 0 of about £50,000, then the amount that the Appellant would have needed, when implementing the transaction, so as itself to pay the full VAT inclusive price to TMG, and to fund shipping and insurance costs, would indeed have been in the range of £50,000 to £75,000.

The meeting arranged by Officer Monk, the meeting notes and the confirmatory letter

36. As soon as HMRC received the refund claim by the Appellant in respect of its VAT period 02/06, Officer Monk was sent by HMRC's Redhill office (the office that verifies the continuing validity of VAT numbers for UK and other European traders, and that is thus in the front-line of HMRC's activity to combat MTIC fraud) to visit Mr. Rasul and the Appellant.

37. Officer Monk first made an unannounced visit to the Appellant's "virtual office" when no-one from the Appellant was present so that he left a letter with the general receptionist, asking the directors of the Appellant to contact him urgently. A meeting was then arranged for 24 March 2006, the meeting being attended by Mr. Rasul and Mr. Ash Saujani, the "operations manager".

38. According to Officer Monk's unchallenged Witness Statement, Officer Monk gave a full explanation of how MTIC fraud worked, how goods were passed down a

chain of intermediate traders to create distance between the company importing goods from Europe and defaulting in then paying the VAT on its initial UK sale, and the later company selling the goods back to Europe and re-claiming the VAT that had never been paid. He described all the checks that should be undertaken, strongly recommended recording IMEI numbers, warned the Appellant not to import product from Europe as it might be set up as a defaulter, never to be involved with third party payments, and to keep numerous records. In his Witness Statement, Officer Monk recorded that he "explained the criminality behind the fraud and that [he] believed the scale of fraud to be so widespread that it was virtually impossible to undertake deals involving large quantities of mobile phones that would not be connected to fraud".

39. We should mention that two points mentioned at this meeting and attributed to Mr. Rasul appeared not to be true or at least in one case not to be "quite accurate", and there was also a dispute between the parties as to whether one other point had specifically been mentioned.

40. The first point that appears to us to have been untrue is that Officer Monk was told that the phone trading deal was financed from the profits of the Appellant's consultancy work. Since deal 0 was never in issue in this Appeal, we were never entirely sure whether TMG provided credit to bridge the VAT gap in deal 0, or whether (as seems in fact to have been the case), Mr. Rasul made the suggested loans of between £50,000 and £75,000 to finance the feature that the Appellant's VAT-inclusive purchase price obviously exceeded its VAT-exclusive sale price, pending the recovery of VAT from HMRC. The point that was manifestly not credible was that the Appellant funded this difference from its consultancy profits, since by the end of the 02/06 VAT period, even the gross receipts of that business appeared to be manifestly inadequate to fund any deal, before even referring to the fact that the inputs in the period ending 11/05 considerably exceeded the outputs.

41. The second point that was at least inaccurate was that Mr. Rasul had said to Officer Monk, when asked how he had "got into this trade sector", that "the director of TMG was a personal friend of his who had recommended the trade". It was later said by Mr. Rasul, both in his Witness Statement and in evidence before us, that his venture into mobile phone trading was based on two experiences that he had had in his former ESS business, and the way in which he was so impressed with the profits and apparent high activity of the business conducted by TMG. Furthermore it was he, Mr. Rasul, who had sought assistance from TMG in facilitating his company's entry into the business, rather than the other way round.

42. The contentious point related to Mr. Rasul's suggestion, in the course of giving oral evidence, that at this meeting he had asked Officer Monk whether, in the light of MTIC risks, he should cease trading in mobile phones, and Mr. Rasul's evidence was that Officer Monk had not said that he should. He should implement the due diligence, and perform all the checks but there was no suggestion that he should cease trading.

43. It was contended for HMRC that since there was nothing in either Officer Monk's meeting note, his subsequent letter, or indeed even in Mr. Rasul's Witness Statements about this reference to whether the Appellant should or should not continue trading, it was curious and unconvincing that these remarks should only be brought out during the hearing.

44. We cannot of course know whether this point was mentioned or not. The entire thrust of everything recorded in relation to this meeting was of warning after

warning of the endemic nature of fraud, the precautions that the Appellant should take, and the risks of reclaims being subjected to extended verification. If indeed, Mr. Rasul had asked whether he should cease trading, we accept that an HMRC officer could not have banned future trading. All that he could do was to emphasise the risks, and give the warnings, and certainly Officer Monk did both those things.

45. In this context, we consider it extremely important to record that it appears that Officer Monk did not confine his warnings to merely undertaking the checks, many of which seem to us to have been potentially fairly pointless, since the fraudsters would generally seek to ensure that the immediate seller to the company reclaiming the VAT would appear to be legitimate. In addition, Officer Monk, who we repeat was not called to give evidence in person and to be cross-examined, even when Mr. Saeed had indicated that he would be calling some of HMRC's witnesses to give evidence in person, made the following two statements in his Witness Statement:

> *"15. I explained any repayment claims made by BM Concepts in relation to deals of this nature would be subject[ed] to in depth scrutiny by HMRC which [was] likely to result in delays of many months and possible refusal [to refund the reclaimed VAT] if the circumstances merited it.*
>
> *16. I concluded the meeting by advising Mr. Rasul and Mr. Saujani in the strongest terms that I believed MTIC fraud to be endemic in the trade sector they had chosen to operate in and that it was virtually impossible to trade in large quantities of mobile phones that did not originate with a company that had defaulted upon their tax liabilities".*

46. Consistently with the above statements, Officer Monk's contemporaneous hand-written meeting note recorded the following:

> *"Warned traders will be prosecuted criminally if evidence warrants it.*
>
> *Warned fraud was endemic and it is virtually impossible to avoid buying goods that originate with a defaulter."*

47. We should mention finally in relation to this meeting between the Appellant and Officer Monk that the follow-up letter of 28 March 2006 included the following paragraph:

> *"Given the endemic nature of the fraud prevalent in the trade sector BM Concepts Ltd intends to do business in, it will be necessary to closely monitor the company's trading activity. To that end I will require you to complete the deal log e-mailed to you, and provide copies of your trading records (including sales & purchase invoices, payment instructions, release notes and bank statements) at the same time you render your VAT return."*

The refund on 5 May of the £111,000 claimed in respect of Deal 0

48. On 5 May 2006, HMRC refunded approximately £111,000, being the VAT re-claimed in respect of deal 0. Prior to this point Mr. Rasul had been resisting any enquiries for further business, but he obviously concluded, once the refund had been received, that further deals could now be undertaken because on 11 May, prior to any deal being arranged, he sent £100,000 to TMG. No document clarified why, or on what terms, that payment was made.

The implementation of Deals 1,2,3 and 4 on 30 May

49. Mr. Karman of Comica had apparently been contacting Mr. Rasul with requests for more phones even prior to the Appellant's decision to place the £100,000 with TMG, and so Mr. Rasul was very pleased to note that the flexibility with which he had effected deal 0 (i.e. without insisting on a deposit) had led to the opportunity to do more attractive deals. When he received an enquiry from Comica for more phones, he instructed RA to enquire whether the phones could be sourced from various possible suppliers, but none of their prices would afford the Appellant with a sufficient profit margin. Mr. Rasul suggested that he was still hoping to make a margin of 20%.

50. Since the prices required by other possible suppliers were said to reflect the same problem encountered with deal 0 "of inflated stock prices", Mr. Rasul again contacted TMR "who were ready and willing to sell some of the stock that Comica wanted at a reasonable price and on credit." A further statement from Mr. Rasul's Witness Statement refers again to the credit point, when he said that "It was TMG that therefore presented the only viable opportunity as they were willing to sell the stock on credit".

51. As with deal 0, there were further common factors in relation to the implementation of deals 1 to 4 that were in fact documented on 30 and 31 May 2005. The first common feature was that while Mr. Rasul again sought a 10% deposit from Comica, that was again not forthcoming. Allegedly Comica had paid a deposit to some other trader, and that trader had let Comica down in some way so that Comica could not afford to pay a deposit to the Appellant. Comica explained that, because the Appellant would be paid before the goods shipped to Comica's freight forwarder were released from the "Ship to Hold" constraint, the Appellant would anyway suffer no risk even though no deposit would be paid. Mr. Rasul eventually accepted this position.

52. The other common factor was that there was again a problem in relation to bank accounts because, although it appears that it was not until 6 June that HSBC actually closed the Appellant's account and retrieved the Appellant's cheque book, it was clear that HSBC would not be prepared to process large payments in relation to mobile phone deals. Accordingly there was correspondence between the Appellant and both Comica and TMG, referring to the fact that Comica would have to make the payment owed to the Appellant directly to TMG. A great fuss was seemingly made by both Comica and TMG about the way in which the Appellant was inconveniencing these two companies into doing something extremely unorthodox. We are far from clear whether this apparent uneasiness in relation to the request that Comica pay TMG directly was remotely genuine. First, HMRC's objection to third party payments is far more material at the point when money might be diverted around the defaulter, rather than at the point where the company re-claiming VAT would actually be having initially to pay more to its supplier than it received from its customer. Rather more materially, we were informed that every company in the four transaction chains, apart from the Appellant, had FCIB accounts, and that as usual the payments between them were circled, on 8 June, in times of between one and two hours. It would have thus been extremely inconvenient had the Appellant needed to deal with payments through an account with a different bank, and very much more inconvenient still if that bank, known to be resisting payments related to MTIC transactions, had actually taken the receipt from Comica and blocked any payment out of the Appellant's account. Accordingly, much as the two companies made a great fuss about the need

to make third-party payments straight from Comica to TMG, it actually rather appears that no other arrangement would have been acceptable.

53. There is one other very important point to make in relation to the payments relating to Deals 1 to 4.

54. The number of phones, category of phone, and VAT-inclusive prices payable by the Appellant to TMG in Deals 1 to 4 were as follows;

Deal 1	2,585	Nokia 9300i	£1,239,977.50
Deal 2	3,040	Nokia 8800	£971,137.50
Deal 3	2,900	Nokia 9500	£1,232,340.00
Deal 4	3,050	Nokia 8801	£880,838.75

It follows that the aggregate VAT-inclusive price payable to TMG was £4,326,291.75. There is a marginal difference in the figure quoted in the Respondents' Statement of Case, where it is suggested that the aggregate price was £4,320,710.00, but the minor disparity is presently irrelevant. The point that is relevant, and highly relevant, is that when the Appellant had paid £100,000 to TMG on 12 May, prior to the deals being agreed, (perhaps, or presumably, as a deposit though nothing confirmed this) and when Comica's payment, owed to the Appellant, of £4,091,217.50, was to be paid straight to TMG, this would still leave TMG failing at this point to receive the balance owed to it of £129,492.50 or roughly £6,000 more still if the figure of aggregate gross price that we have just calculated is the right one. In other words, roughly £130,000 was still owing to TMG. For present purposes all that we need say is that that balance has not yet been paid, but we will need to refer to this feature in due course in much more detail.

55. We should also record at this point that considerable incidental costs were incurred by the Appellant in paying fees to freight forwarders, in paying for insurance, and indeed in paying fees to RA. It appears that RA funded the relevant minor third party costs, and deferred charging for its own fees. This was dealt with on the basis of the suggestion that RA had lent the Appellant or Mr. Rasul the amount to cover these various costs, so that the accounting treatment adopted was that the Appellant had borne the various costs, but it owed the total amount, including the amounts in respect of RA's fees, to RA. We understand that, just as the Appellant refused to pay TMG the balance of £130,000 when problems began to emerge with HMRC in relation to the reclaim for Deals 1 to 4, he also refused to repay this loan from RA. Again we were not given details of the extent to which this debt has subsequently been reduced. We were certainly told that the Appellant, in its continuing consultancy activities, was still using RA as its accountant, and that various amounts had been paid to RA. We were unclear whether any part of this original debt, resulting from the incidental costs of Deals 1 to 4 had been reduced or fully discharged. The impression that we gained was that some or all of it was still owed.

The due diligence in relation to Deals 1 to 4

56. To save repetition, we will not give at this point facts in relation to the detail of Deals 1 to 4 that will emerge perfectly clearly from the points that we discuss in full

in giving our decision. At this point, therefore, there is only a need to mention the following few facts.

57. No further material "due diligence" information was actually obtained in relation to the supplier and customer with which the Appellant had already dealt. We were however shown Powergen statements in relation to supplies to TMG that were actually dated after Deals 1 to 4 had been effected.

58. As HMRC contended, the terms of trade, in the sense of the content of Invoices, was extraordinarily basic. Whilst the Appellant would not have known this, we accept, earlier suppliers in the supply chain, all on the same day, provided for Title Retention protection, until payment had been made in full. By contrast, TMG's invoice to the Appellant contained no such term, and provided a full release even before payment was made to TMG. It made no reference to £130,000 being left outstanding, and simply referred to the fact that there were no special remarks or conditions. The Appellant's Invoice was again silent in relation to any Title Retention protection, though it did indicate "TT on Inspection". Furthermore, the Appellant's Release Note indicated that the French freight forwarder should hold the goods on behalf of Comica on a "Ship to Hold" basis.

59. The payments for the various supplies were all made on 8 June. Since the payment from Comica was diverted to TMG, it actually followed that all the payments flowed through FCIB accounts, and were accomplished (as we will note in the following paragraphs) in a very short time scale. The end result of the making of the various payments was that the Appellant still owed TMG approximately £130,000 and we will deal below with the unclear evidence in relation to the basis on which this amount was left outstanding.

The limited relevance of the FCIB evidence

60. In this case we can summarise the limited relevance of the FCIB evidence very shortly. This is because, when we have summarised (in paragraphs 63 and 64 below) HMRC's grounds for tracing the fraudulent tax losses from 3D to the Appellant's transactions, it will be clear that less significance than usual attaches to the FCIB evidence.

61. The points that we should mention are as follows:

- Mr. Saeed first challenged the FCIB evidence on the basis that the manner in which it had been collected, or assembled, was alleged to fall short of some UK standard in relation to data collection. We never got to grips with this point because it seemed to be of secondary relevance when we were in any event basing little reliance on the FCIB evidence.
- In the case of all four deals, the payments appeared to revolve first in a circle, with payments usually ending up where they started, then always from and to FCIB accounts, and thirdly it took roughly between one hour and two hours for the payments to flow through 7 or 8 stages. The fastest payment flow was of roughly one hour through 7 stages.
- The payments did not always flow in a manner that exactly matched the invoices, particularly where payments were always diverted around 3D, sometimes flowing to and from one Ahamed Farook, who was thought to have been a director of 3D.
- Several companies shared the same IP Address.

62. The only marginal conclusions that we based on the FCIB evidence were that:

- the circular payment flows had plainly been pre-arranged by some master-mind, and
- there would have been a very serious problem had Comica's payment liability to the Appellant not been diverted straight to the Appellant's supplier, particularly if HSBC might have blocked any payment actually received by the Appellant, had Comica in fact paid moneys into the Appellant's HSBC account.

HMRC's case for contending that the Appellant's transactions in Deals 1 to 4 were all traced, on the balance of reasonable probabilities, to fraudulent tax losses

63. HMRC's contention that the Appellant's four deals were traced to fraudulent tax losses was based on the following facts:

- All four consignments of phones were said to have been acquired by a company called 3D Animations Limited ("3D") from European suppliers, and then held in the warehouse of the freight forwarder, Globe ("Globe").
- HMRC's attention was drawn to the activity of 3D by the freight forwarder sending HMRC information relating to supplies by 3D, a company of which HMRC was unaware.
- 3D had supplied phones to the total value of £866 million in May 2006, had never made a VAT return, had never been located, and had failed to respond to, or pay, the VAT included in an assessment made by HMRC, the sales in which included the four consignments of phones said to be traced to the Appellant.
- Information from Globe indicated that in those cases where release notes from suppliers to 3D were available (by no means all the cases, and specifically not including the four batches of phones alleged to be traced to the Appellant), the release notes came from a Cyprus incorporated company, Leriant Trading Limited ("Leriant"), the release notes containing a Cyprus VAT registration number.
- No information was obtained from 3D itself, and information as to the identities of companies that acquired phones from 3D was derived from a trading log made available to HMRC by a company called Mopani Limited ("Mopani").
- Mopani's trading log was presented in the form that dealt with each consignment of phones on a long line from left to right in the schedule, which line conveniently indicated on the one single line for each consignment, the supplier of the phones (3D) and the customer to which they were sold, all transactions in relation to the four categories of phones allegedly traced ultimately to the Appellant, occurring on 30 May 2006.
- No other documentation, such as copies of customer orders and Mopani's invoices were obtained from Mopani, which appears later to have ranked as a defaulter and to have disappeared.
- Having ascertained the identity of Mopani's customers, HMRC then traced each of the four batches of phones in issue by showing the purchase orders and invoices between Mopani's immediate customer and the next buffer company in the chain, and so on at each link in the chain, each transaction being effected at the typical type of margin (ranging between 20p per unit and £1 per unit) for the margins made by buffer companies in MTIC chains.

- At all steps in the transaction chains, release notes issued by each trader in the chains to Globe were accompanied by invoices submitted to each trader by Globe for holding the batch of phones on behalf of each such customer and these invoices contained an individual reference number, which number was unique to the batch of phones but consistently attached to each invoice as the various traders in the chain were invoiced for freight forwarding services.
- Whilst the identity of the intermediate buffer companies varied for the four consignments of phones traded by the Appellant in Deals 1 to 4, several of the buffer companies ended up in three of the chains, 3D and Mopani were always parties in the chains, and the immediate supplier to the Appellant was always TMG.
- TMG's mark-up was always 25p per unit, whilst the supplier to TMG always made the highest mark-up of the various buffers, at £1 per unit.
- Finally, whilst this fact was doubtless not known to the Appellant, TMG was simultaneously selling phones to Comica at a very substantial unit mark-up.

Our finding of fact in relation to HMRC's claim that there was a fraudulent tax loss, and that that loss has been traced, on the balance of probabilities, to the transactions effected by the Appellant

64. We can say immediately that we are entirely satisfied that 3D was a fraudulent defaulter. This was not seriously questioned by the Appellant. It is inconceivable that a company that has made sales in one month of the staggering order made by 3D in May 2006 can have been anything other than a fraudulent defaulter, particularly when it has made no return and never been traced in any way by HMRC. Whilst this further conclusion is somewhat dependent on the tracing exercise, to which we will turn next, it also appears to us that unsatisfied assessments were made against 3D that included the VAT for the four consignments of phones allegedly traced to the Appellant's transactions.

65. We can also make the tentative finding of fact that, unless this conclusion is undermined in any way by the five points that the Appellant has raised, we are entirely satisfied with the basis on which HMRC has purportedly traced the relevant tax losses to the Appellant's transactions. The combination of the Mopani log (and the highly convenient way in which that gave details of the supplier to Mopani, and Mopani's customer for each batch of phones on a singe line), the later purchase orders and invoices between all the buffer companies, and the final feature that the Globe documentation for each batch of phones at each stage along the chain included an individual reference number for the batch of phones in question, indicates to us that the tracing exercise has been undertaken perfectly accurately. We repeat that we make this conclusion tentatively at this point, in case any of the Appellant's contentions throws any doubt on the tracing exercise, and we now turn to that topic.

The Appellant's contentions for disputing the tracing of the batches of phones to the Appellant

66. The Appellant did not advance any contention that 3D itself appeared to be anything other than a fraudster, but confined its contentions to the following five points. Two related to the suggested possibility that, whilst many phones acquired by 3D were doubtless acquired from European suppliers and sold to UK customers, with 3D defaulting in paying the VAT on such supplies, it was asserted that some consignments of phones might have been acquired by 3D in circumstances where VAT would have been paid (or where failure to pay VAT had not been

demonstrated). The other three contentions all related to suggested breaks in the tracing.

67. Without troubling even to mention the names of intermediate buffer companies, and the typical margins that they made, and without suggesting that any or all of such companies were knowing parties to the frauds, we will record that the volume of sales in various short periods made by each buffer were not consistent with ordinary trading. Since no evidence was given that the Appellant was aware of the identities of any entity prior to TMG in the chains, and there was no reason to suppose that the Appellant would have been aware of these identities, we attach little significance to recording this point.

Contention 1 - the US phones

68. The first contention advanced by the Appellant related to the phones supplied in Deal 4, namely to 3,050 Nokia 8801 phones. The Respondents had indicated that these phones were manufactured in Korea, and that they were destined for the US market. They were also unsuitable phones in Continental Europe, partly because they doubtless had 110-volt chargers, but more particularly because of their three available radio frequencies, only one was common in Europe. This would mean that while the phones could be used in some parts of Europe, there were many parts of Europe where they would not operate.

69. Mr. Fletcher confirmed these points and drew our attention to the fact that there were two very similar phones, namely the Nokia 8800 and Nokia 8801, and that whilst most of their characteristics were basically similar, the former was the version intended for use in Europe, and the latter the version for use in the US. He then mentioned that the well-known German market research firm, GSK, that calculated retail sales of mobile phones by information recorded at point of sale in 22 European countries and 1 country in the Middle East, indicated that the total retail sales of the 8801 phone in Europe in the whole of the year 2006 were about 300, and by the relevant month of June, only 3 retail sales had been recorded. On the basis that the wholesale market feeds the retail market, it was very surprising that the Appellant's Deal 1 transaction involved a wholesale sale of approximately 10 times the volume of 8801 phones that would be sold to retail customers in 23 countries in the whole of 2006.

70. On cross-examining the evidence of Mr. Fletcher, the Appellant established that these phones could have been used in some European markets, so long at least as the user did not wish to make a call through areas and countries where the particular radio frequency of the US phone could not be received. The Appellant also learnt, once Mr. Fletcher had been told that information from the freight forwarder indicated that the phones had been manufactured in Korea, that it was then Mr. Fletcher's opinion that it was "overwhelmingly likely" that the phones would initially have been delivered by the Korean factory to the USA. The contention that the Appellant advanced in relation to these phones was that it was therefore possible, or likely, that the phones had been imported into the UK from the USA, rather than from a European supplier, and that this would have made the evasion of VAT more difficult, or perhaps impossible.

71. Whilst we ascertained ourselves that it was quite possibly more difficult or impossible for VAT to be avoided on importations (in the loose, general, sense) from countries outside the European Union than from companies within it, we were not persuaded that there was much relevance in the point that the Appellant's solicitor

sought to establish, namely that the Korean manufacturer would almost certainly initially have delivered the phones to the USA. What was now perfectly obvious was that on 29 May 2006, the phones were in the UK, and apart from the freight forwarder evidence that we will refer to shortly, there was no indication as to whether their immediate import into the UK came from an EU source, or from the USA or indeed any other non-EU source.

72. The reasons why we were not persuaded that the Korean manufacture, or likely initial delivery into the USA, indicated that VAT was bound, or likely, to have been accounted for honestly on the importation of the phones from a non-EU supplier into the UK was that:

- where it was available, the freight forwarder information indicated that 3D's phones were always sourced from the EU, notably from the Cyprus company, Leriant, which had a VAT number;
- when import documentation was missing (as it was for all of the phones traced from 3D to the Appellant), it seemed improbable that 3D and the freight forwarder would have lost the documentation establishing that VAT had duly been paid in relation to some phones, whilst every item of evidence in relation to 3D's importations of phones that had been retained, indicated that the phones had come from an EU supplier registered for VAT purposes, such that 3D did then emerge to be the defaulter;
- it was manifestly obvious that 3D's transactions had been organised by a fairly disciplined "mastermind", and it thus seemed improbable that, from an MTIC standpoint, the wrong category of phones (namely ones on whose importation into the UK VAT would have been paid) would have been included amongst the phones traded by the manifest defaulter;
- it also seemed improbable, if VAT had been properly accounted for and was then properly to be refunded on the supply to Comica (so that the VAT was then "neutral"), that Comica could be buying phones where the price would simply have been ramped up by virtue of the phones coming into the UK (by the various margins, the Appellant's profit, transport and other costs) and then exported to Comica; and
- finally, if there was the remotest substance in this contention, then it could equally have been advanced on the basis that the phones came initially from Korea, which is obviously also outside the EU, such that there was no need for us to have been detained for some hours whilst Mr. Fletcher was questioned as to whether the phones would initially have been delivered first to the USA.

73. In short, this point appeared to have no merit whatsoever. The conclusion that remained was that it was decidedly odd for there to be a deal in phones that could not be retailed very promisingly in the EU. There is little significance to this point, however since, whilst in other circumstances it might have indicated that the Appellant trader was knowingly dealing in a very curious model of phone that should have put it on notice that something was odd, in this case Mr. Rasul accepted, and it was perfectly obvious, that he had no idea that the phones were either unsuitable, or that they were the variant of the 8800 phone specifically targeted at the US market.

Contention 2 - the supplies by Leriant to 3D

74. The FCIB evidence revealed a rather confusing fact which was that, whilst all the Release Instructions that Globe provided to HMRC from those that had been sent to 3D all appeared to come from Leriant, the company incorporated in Cyprus, with a VAT number, the FCIB evidence appeared to indicate that Leriant was a UK

company. It was therefore suggested that the UK company Leriant might have accounted for VAT, or that at the very least 3D might not have acquired all of its phones from a European supplier, such that 3D should have accounted for VAT on its first UK sale of the phones.

75. Whilst this fact was curious, the Respondents' counsel indicated that HMRC had ascertained that the name of a UK company had been changed in March 2006 to "Leriant Trading Limited", and that both the Cyprus and UK versions of Leriant Trading Limited had one and the same bank account with FCIB. This seemed to suggest very strongly that a deliberate endeavour had been made by the fraudsters to confuse matters. Since all freight forwarder release notes from Leriant all came from the Cyprus version of the company, with a VAT number, we concluded that none of the phones had been traded legitimately, and VAT accounted for, by the UK version of Leriant. The change of name, and the distinctly odd feature of both variants of the company having one single FCIB account, were part of the fraud.

76. We therefore concluded that this point did not shake our conviction that 3D had been liable for VAT on all the phones imported by it, and that it was the defaulter.

Contention 3 - the misdescription of the phones in Deal 2 in the Monpani deal log

77. The Appellant advanced no particular contention in relation to this point which was drawn to our attention on the first day of the hearing by counsel for the Respondents. This point was that, although the phones in Deal 2 were said to be Nokia 8800 phones in every invoice or order shown to us from companies after Monpani in the chain for Deal 2, in the Monpani deal log, the similar unit numbers of phones bought and sold by Mopani were described as Nokia 9300i phones, and not as Nokia 8800 phones. HMRC had suggested that there was therefore a misprint in the Schedule, and that the phones must have been 8800 phones, such that the deal trace was then complete.

78. HMRC's support for the proposition that there had simply been a misprint in the Mopani schedule was based on the dual proposition that the unit numbers in question tallied with those of Mopani's immediate customer for Nokia 8800 phones, and that the unit price for the phones was consistent with the price at which Mopani had traded Nokia 8800 phones in the relevant period, and inconsistent with the price for Nokia 9300i phones

79. We accept the Respondents' suggestion that there was indeed a misprint.

Contention 4 - the confusion about the change of freight forwarder

80. A particular point made in relation to Deal 1 was that at the point when the broker in question (referred to as "Powerstrip") purportedly sold the 2,585 Nokia 9300i phones to TMG which HMRC then traced to the Appellant, Powerstrip's Invoice to TMG indicated that the phones were to be delivered to TMG, c/o the warehouse of Warehouse Logistics in Hayes, Middlesex, rather than Globe, and consistently its Release Instruction to release the phones to TMG was also addressed to Warehouse Logistics. This information was not entirely clear in that on the Invoice, although the freight forwarder's address was given as Warehouse Logitics's correct address, the postcode given was in fact Globe's postcode. Furthermore Globe did invoice Powerstrip for freight forwarder services, and TMG's purchase order for

the purchase of the goods from Powerstrip also indicated that the goods were in Globe's warehouse.

81. The Appellant's contention was that it was clear that the phones that had been traced to the Appellant by HMRC were phones that had been held in Globe's warehouse and not therefore the phones, derived from 3D's importation, that must have been diverted and delivered to Warehouse Logistics' warehouse. HMRC contended that Powerstrip had simply made a mistake and must simply have inserted the name of the wrong freight forwarder, (albeit the correct Globe postcode) with the goods in fact remaining at Globe's warehouse throughout, as indicated initially by HMRC.

82. It proved impossible to clarify this matter with either of the freight forwarders because it seemed that both had ceased business. Whilst Mr. Saeed objected very strongly to this proposed course of action, we asked HMRC to see whether they could access the deal logs of Powerstrip and TMG so that we could consider whether those deal logs indicated that Powerstrip might have sold the 9300i phones traced from 3D to some different customer than TMG, with those phones being moved to Warehouse Logistics' warehouse, and whether TMG had acquired any other consignment of 9300i phones, most obviously but not necessarily in the 2,585 unit number, such that it was possible that it was those phones that had been sold by TMG to the Appellant, and not phones traced from 3D.

83. Mr. Saeed objected to this suggestion that we endeavour to verify whether his suggestion of a break in the deal chain was credible, which we considered to be wholly unreasonable since, from Day 3 of the hearing, we had allowed Mr. Saeed to cross-examine witnesses when it had earlier been indicated that such witnesses would not be cross-examined. We had also allowed Mr. Saeed, right throughout the hearing, to raise whatever contentions he wished, notwithstanding that he never produced any form of written Skeleton Argument, and only with considerable protest and very late in the day, an advance brief summary of the contentions that he would advance. The feature therefore that Mr. Saeed objected to our seeking to clarify whether the goods had indeed been moved to a different freight forwarder struck us as quite extraordinary.

84. It is to HMRC's credit that on the final day of the hearing they indeed produced the requested deal logs. These indicated that, of the relatively few transactions that Powerstrip and TMG had effected in relation to Nokia 9300i phones, those transactions other than the sale of 2,585 phones from Powerstrip to TMG, recorded on both deal logs, had been of totally different unit numbers of phones. Powerstrip's log indicated the supplier and customer for all trades on adjacent lines, and so it conveniently indicated that Powerstrip had acquired the 2,585 phones from a company for which we had matching evidence, namely Electrex Midlands Ltd, and on the next line those phones had been sold to TMG. The few other Powerstrip deals in totally different numbers of 9300i phones were all matched from supplier to customer (with identical numbers bought and sold on immediately adjacent lines), the sales never being to TMG. And correspondingly, TMG's log also indicated that the only other acquisitions of 9300i phones in the relevant period had been matched with identical unit number sales to companies referred to as Apwest and Cayenne. TMG appeared clearly, thus, to have purchased the 2,585 Nokia 9300i phones from Powerstrip, and it appears that Powerstrip must indeed have made the slip (including a slip within a slip, in that the Globe postcode was allocated to Warehouse Logistics) in indicating that the relevant phones were to be passed to, or were held in Warehouse Logistics' warehouse.

85. We might also mention that it would have been distinctly surprising if a batch of phones that was manifestly in Globe's warehouse when sold to Powerstrip, would actually be moved to a different freight forwarder's warehouse some miles away.

86. We conclude that HMRC's tracing was entirely vindicated, and we were grateful for the work undertaken in obtaining the requested further verification.

Contention 5 - the argument concerning the suggested "allocation" of phones by Verify in the inspection carried out by that company

87. The final argument was that it was incumbent on HMRC to demonstrate that the phones traced from 3D were definitely the phones sold by the Appellant, and that in this context it was perfectly possible that when Verify had undertaken its inspection report on 30 May, the day before Globe also inspected the phones, Verify might have boxed up loose phones into the requisite numbers that the Appellant was selling to Comica, such that the phones identified earlier throughout the chains and traced from 3D were not the phones that the Appellant had in fact sold to Comica. TMG must have had other phones, probably in single boxes, and by referring to the fact that Verify "allocated" phones to Comica, the word "allocated" had some connotation of actually counting out loose boxes and attaching them, so to speak, to the Appellant's sale to Comica.

88. In this regard, there was some dispute as to whether Verify's inspection was a more detailed inspection than the simple box count undertaken by Globe, and whether, if it was, and the charge for the inspection was perhaps then higher, it might have been consistent to suggest that Verify might have allocated loose boxes to the movement of phones from TMG to the Appellant, such that again HMRC had failed to produce sufficient evidence to confirm the deal trace.

89. It was eventually clarified that although Verify's terms of trade indicated more comprehensive checking exercises that might be done, all these would only be done if additional fees were paid, and additional fees were not paid. The concept therefore that either freight forwarder might have boxed up loose boxes of phones, and that the word "allocated" has some connotation of matching numbers of phones lying around, not in large boxes and on pallets, into an order for a very considerable number of phones, struck us as deserving the description of being both fanciful and ludicrous.

Our decision in relation to the issue of the tracing of the Appellant's transactions to fraudulent VAT losses

90. We indicated in paragraphs 64 and 65 above that we considered that HMRC had established, not just on the balance of reasonable probabilities, but virtually to the level of absolute certainty, that the fraudulent tax losses at the level of 3D had been traced to the Appellant's transactions. It is a very regrettable feature that the contentions in this case for the Appellant in relation to tracing appeared to be based on the notion that HMRC "were to be put to strict proof", in relation to the tracing exercise, and that any element of fanciful doubt was sufficient to undermine HMRC's evidence. This expectation appears unfortunately not to have been unique to this particular appeal. Looking just at the contentions advanced on behalf of the Appellant in this case, however, it is our conclusion that not one of the five points advanced were sustained.

The unusual features of this case

91. Prior to dealing with the critical points concerning the "knowledge and means of knowledge issue", we consider that it will be clearer first to raise, and then essentially to dismiss, a feature of this case that struck us as being both unusual, and potentially of considerable significance.

92. That feature is that the trading of the Appellant appears all to have been facilitated by its supplier, TMG, and that whilst the Appellant claims to have failed to spot that Mr. Hafiz, the senior partner of RA, his accountants, was acting as the financial controller of TMG, and had in the past been TMG's company secretary, it was nevertheless the case that RA's role appears to have been somewhat pivotal. Many of the factors that occasion these observations will have been known to the Appellant. Others may not have been, but they are still significant. The odd relationship between TMG and the Appellant and the pivotal role of RA are illustrated by the following factors:

- TMG introduced the Appellant to the only customer that the Appellant ever had.
- That customer had appeared wary of dealing with the Appellant until Mr. Rasul informed Comica that he had been introduced to Comica by TMG, so that Comica could check the Appellant's credibility with TMG.
- Whilst there is nothing wrong in delegating the role of preparing documentation to outside solicitors or accountants, the Appellant's reliance on RA went very much further. It was reasonably accurate for Mr. Rasul to say, as he did, that he appointed RA "as his agents" to conduct much of the trading. Mr. Hafiz had been a friend of Mr. Rasul for 15 years. The two men had been jointly involved in the past in another company. The confidence thus led to RA having the very extensive role that we have described.
- It was unusual for independent accountants to lend their client a reasonably significant amount of money to enable the Appellant to pay the incidental costs, relating to freight forwarders, insurance etc.
- At the same time, whilst Mr. Rasul might have known no more than that TMG had presumably dealt in the past with Comica, and that as their offices were next door to RA's offices, RA might be involved with TMG, these connections were in fact much closer.
- TMG had not only previously dealt with Comica, but was also in May 2006 exporting product to Comica, whilst simultaneously selling product at a very fine margin of 25p per unit, to the Appellant to enable it to do likewise.
- RA must have known this if Mr. Hafiz was the financial controller of TMG.
- Mr. Hafiz would also have known, though Mr. Rasul may very well not have known, that in its "buffer" role in the chain of companies that ended up with the Appellant selling to Comica, TMG took only a 25p unit mark-up. Whether or not it knew of this, the buffer above TMG took a £1 unit mark-up. We have no way of knowing whether, in its turn, TMG was funded to provide the finance to the Appellant that we will return to shortly, and to whether for instance TMG's supplier might also have given credit. We certainly observed that TMG's ostensible transaction was very odd when it took a minute 25p mark-up on supplying goods to the Appellant, which the Appellant was only able to sell because of TMG's introduction to Comica, and when TMG simultaneously left £130,000 of the price owed to it by the Appellant outstanding, on no known, and certainly no written, terms.

- It was quite extraordinary that the Appellant paid £100,000 to TMG on 12 May, very shortly after receiving its £111,000 refund in respect of Deal 0 from HMRC. No deal was remotely firm at that point, and if the Appellant and RA were ascertaining in late May whether the Appellant could source product more cheaply from some other supplier in order to meet the order from Comica, the feature that the Appellant would have paid £100,000, on no terms (written or oral) that were ever mentioned to us, would have made it somewhat difficult to source phones from any other party.
- In his Witness Statement, Mr. Rasul said on at least two occasions that the purchase from TMG was the only attractive one, because their prices were more competitive, and "they offered credit". We were never clear what was meant by the provision of credit. Theoretically, Mr. Rasul could have been referring to the almost invariable practice of MTIC buffer companies to release product to their customers (possibly on a "Ship to Hold" basis) before receiving payment, once the various deals were all in place. When payment then came cascading back down the line from the European buyer to the "broker" (i.e. in this case the Appellant), and then to the various buffers, once all the payments had been made, any "Ship to Hold" condition of supplies would be released, buffer by buffer, until the ultimate customer that had started the payment flow obtained the last release. Whilst the reference to credit could have been a reference to this common form of credit, it is highly significant that in Deals 1 to 4, TMG did actually give credit of £130,000 to TMG, in the sense that that amount of the gross sale price from TMG to the Appellant has still not been paid. In an extremely confused way, Mr. Rasul tried to explain this feature. He said that he did have the money to pay. A Scottish property of some sort had been sold, and while the proceeds had been reinvested, he still had funds with which to pay the balance. In the event he did not pay it, and he said that TMG accepted that he would "pay later". No written or oral terms were even mentioned. Implicitly the debt was immediately due, though it had certainly not been paid by the point, sometime later in 2006, and before the formal Refusal letter from HMRC in March 2007, when it became clear that the VAT reclaim for Deals 1 to 4 might not be received quite as easily as that for Deal 0. At this stage Mr. Rasul said that he refused to pay the balance until he got his money from HMRC, and also refused to pay the separate debt owed to RA, reflecting the way in which they had funded the incidental expenses of Deals 1 to 4. When we have no idea on what terms the balance of the price was owed, we can only observe that, if it was owed on a full recourse basis, then to date it appears that there has been no action on the part of TMG to enforce payment of the £130,000.

93. We considered the general picture occasioned by the above facts to be so central to the case that when, towards the end of the hearing, no particular significance had been attached to these points we raised them in order to ask three important questions.

94. The first question was whether, in judging what was in fact known to the Appellant, we should attribute not just the knowledge of its only director, but the knowledge of the RA personnel, who appeared to be acting in a far broader role than simply that of acting as accountants.

95. The second question was virtually to the other extreme of whether we should give any thought to the possibility that the Appellant was simply being used as a "front" to spread the risk and enable TMG to secure refunds of VAT in two different names, one its own, and one that of the Appellant. In short, was the Appellant "set

up"? We quite appreciated that in asking this question, there could be several possible reasons, ranging from friendship and loyalty to fear, as to why we might not obtain a straightforward answer.

96. The third question was whether we should just note the odd inter-twined relationships, and the pivotal role of RA, and then just address the case entirely on conventional grounds, definitely refraining from attributing to the Appellant the knowledge on the part of RA personnel, though obviously attributing Mr. Rasul's knowledge to the Appellant.

97. The Appellant's solicitor made it clear, in response to the second question, that it was entirely accepted that the director of a company remained responsible for the company's acts even when he had delegated many functions to outside parties. In any event it was Mr. Rasul who (according to his own evidence) had agreed the deals, dealt with the supplier and the customer and considered the responses to due diligence enquiries. Neither was any suggestion made at any point that the Appellant had been "set-up". Mr. Rasul had specifically said that he had initially sought assistance in setting up the Appellant's trade from his friend at TMG. His initial attraction to mobile phone trading stemmed from the two experiences at ESS to which we alluded, and at how impressed he was with TMG's operation. Therefore no suggestion was advanced that he was "sought out" or "set up" by TMG. Had he felt that he had been set up, then it would have been odd for him to have continued to use the services of RA in relation to his continuing consultancy activities, as he indicated he had done.

98. At one point we had suggested to HMRC's counsel that he might exchange written submissions with Mr. Saeed, after the oral hearing, on the subject of whether there was authority for the proposition that when independent accountants acted almost as "agents", it became appropriate to attribute the knowledge of the agents to the Appellant. In view of the fact that HMRC had not initially advanced its case on this basis, we asked HMRC at the end of the hearing whether they would prefer to drop the suggestion that we had once made, and ask us just to reach our conclusion on the basis of the argument that had been advanced throughout the hearing. In other words, that argument was that we should treat the arrangement with RA as an independent one, and definitely not attribute any of the knowledge of RA personnel to the Appellant. HMRC said that they would prefer us to deal with the case on that basis, and that is accordingly what we will now proceed to do.

99. We have aired these points, and the way in which they were both raised and then dropped, largely because they are all so obvious that it would have been remiss just to have ignored them both in the hearing, and in summarising matters in this written Decision.

The contentions on behalf of the Appellant in relation to the knowledge and means of knowledge issues

100. It was contended on behalf of the Appellant that:

- The prior warnings about MTIC risks, and in particular those mentioned at the meeting in March 2006 by Officer Monk, and confirmed in his follow-up letter, were largely standard-form warnings, and this led Mr. Rasul to conclude, once HMRC repaid the VAT reclaimed in respect of Deal 0, that HMRC was largely satisfied with the way the Appellant had undertaken Deal 0.

- Officer Monk and Officer Cheung's predecessor officer, Mrs. Rosalynn Macaulay, had seen all the documentation for Deal 0, and since the parties were the same in Deals 1 to 4 as for Deal 0, and no objection had been taken to Deal 0, it was again legitimate for Mr. Rasul to conclude that HMRC had acquiesced in the practice adopted by the Appellant. Even, in other words, if "VAT fraud was endemic", and it was virtually impossible to enter into a transaction to buy a large quantity of phones without that transaction being traced back to fraudulent losses, if the trader did what he could, at his level, the VAT would be returned.
- Mr. Rasul had not been told that he should cease to undertake transactions in relation to mobile phones.
- Mr. Rasul believed that at his level, in his dealings with his immediate supplier and customer, he had acted appropriately, and could have done nothing more.
- Finally there was a most extraordinary argument that must have been based on a complete misapprehension of the difference in roles between that of buffer companies and fraudulent defaulters on the one hand, and the brokers, seeking VAT recoveries, when selling the phones to EU customers, on the other hand. Mr. Saeed argued that because 3D, and indeed most of the buffer companies, including TMG, had undertaken a vastly greater number of transactions in the period when the Appellant had only undertaken four deals, and the Appellant's gross turnover was much lower than that of the other companies, the Appellant could not be considered to have been an MTIC trader. If it was, then why had it not done countless deals?

The contentions on behalf of the Respondents

101. Beyond specifically recording that the Respondents advanced the dual contention that the Appellant was aware that there could be no reasonable explanation for its transaction other than that they were connected to fraudulent VAT losses, and secondly that if not, then the Appellant ought to have been aware of that, we will not record the Respondents' contentions. The basis of our decision will reflect most of the Respondents' contentions.

Our decision

102. The decision as to whether the Appellant actually knew that there could be no other reasonable explanation for its transactions than that they were connected to fraudulent losses of VAT cannot be based in this case on any specific finding that one piece of evidence confirms this conclusion. The conclusion of "actual knowledge" must be based on the feature that the circumstances are so obvious that the Appellant must have known that this was the only conceivable explanation. That is indeed our conclusion.

103. At one point, the Respondents' counsel put to Mr. Rasul the proposition that his expectation of making honest, risk-free profits (from a credit, as distinct from challenge by HMRC viewpoint) when doing nothing, knowing nothing, and contributing nothing was "too good to be true". That proposition from HMRC was particularly apt when Mr. Rasul was suggesting that he hoped to make a 25% or 20% margin, all in the circumstances where TMG had provided his company with both the supply, inexplicable credit on no identified terms in relation to the supply, and the contact with the customer. Since that margin would have exceeded the rate of VAT, and would have more than doubled the improbably great rewards sought by "brokers" in MTIC transactions, we can only agree with HMRC. Mr. Rasul responded by

saying that "Nothing was ever too good to be true". We conclude that Mr. Rasul's expectations were not only too good to be true. If they were genuine, which we do not believe, then they reflect an embarrassing naivety in relation to elementary business logic. The reality must be that if you are offered deals on a plate by a supplier, and you can make 7% or 10% profit margins on deals in relation to stock that you never see, stock about which you know nothing, and stock in relation to which you do nothing (other than contribute to various transport, inspection and other costs) all on a nil credit risk basis, then that deal must be too good to be true, and therefore must be connected to fraud.

104. Whilst the following points are common to most MTIC transactions, we still consider that considerable significance attaches to the following points, some of which will indicate facts that we have not previously mentioned.

105. The first observation, relevant in virtually any MTIC case, is that there is something decidedly improbable in there being large profit margins to be made in relation to the movement of mobile phones to Europe, when none of the phones can have been manufactured in the UK, such that the phones have inherently come into the UK, and are now being despatched to a European purchaser. With honest transactions, VAT would be a neutral consideration because it would first have been paid, and so added to the various transfer prices, and then it would be refunded. Accordingly the only implication of the goods coming into and then leaving the UK would be that various costs would be incurred, and margins taken perhaps by intermediaries. Absent a VAT fraud, it would be a trade cycle that would make absolutely no sense.

106. We accept that Mr. Rasul almost certainly did not know that he was dealing with a very inappropriate phone when selling US frequency phones to a European customer. He could and should, however, have wondered about the feature that it was odd for the phones to have come into the UK if they were equipped with 2 pin continental chargers (as they were), and it would equally have been odd to have been selling them to Europe if they had had UK style chargers.

107. We reject the suggestion that the Appellant had done all that it could do in terms of due diligence. The information that it had about Comica gave the Appellant no basis for Mr. Rasul's suggested confidence that he was dealing with a fairly long established and substantial trader. Every indication was that he was dealing with a trader whose name it was not even worth adding to a list of names of companies using an accommodation address. He knew absolutely nothing about Comica's credit or financial standing, or their level of trading. In due course, Comica was de-registered by the Dutch authorities as an MTIC trader, and the principals considered for prosecution for criminal offences. We have no idea of the outcome of that, but we do have no hesitation in saying that the Appellant had no reliable or worthwhile information about Comica whatsoever.

108. We can appreciate that Mr. Rasul might have been in awe of TMG, and its apparent success, and we can understand why he felt it unnecessary (notwithstanding HMRC's advice) to seek references or credit checks in relation to TMG. We cannot however understand, if, as he asserted he did, he looked at the due diligence responses from TMG, how he missed the critical clear statement that revealed that Mr. Hafiz had a key role in both TMG and his own company. We cannot understand either why Mr. Rasul (particularly after his planning rules set out in the article in the Independent newspaper) did not question why TMG introduced the Appellant to TMG's own customer, why TMG was apparently ready to provide stock on

favourable terms and to give crucial credit in Deals 1 to 4, all in circumstances where TMG could obviously have sold directly to Comica.

109. We therefore reject the suggestion that "Mr. Rasul did everything that he could have done". He failed to do that by a very considerable margin.

110. Again the following factors are common in many MTIC cases, but they are still relevant. We agree with HMRC that the transaction documentation was skimpy in the extreme. TMG's invoice referred in no way to £130,000 being left outstanding. Conflicting terms about Title Retention protection until payment had been made in full, and different terms about releases and releases on a "Ship to Hold" basis could be explored at great length, but the salient point now is that Mr. Rasul had no idea of who would have had what rights in the event of some complaint being made, or loss arising. The insurance taken out was almost certainly void because the conditions were not satisfied. Mr. Rasul said that, whilst the Appellant had title to goods (whenever that might have been), he assumed that Globe would have insured the goods when they were in Globe's warehouse. Their Standard terms indicated that they had no such insurance. Mr. Rasul had no idea whether the goods were insured when in the warehouse of the French freight forwarder, to whom Comica requested that they be delivered, in the period between delivery, and payment and release of the goods which did not occur until 8 June 2006. Mr. Rasul said that he saw no need to take and record IMEI numbers, as suggested by HMRC, because he could do nothing with them himself (a remark with which we have considerable sympathy), so that in return he decided to commission two inspection reports, one by Globe, and one by a company referred to as "Verify". Both reports were little more than box counts, and when disparities were revealed between the two reports, Mr. Rasul did nothing to reconcile them.

111. Prior to turning to points that are particular to the Appellant's actual transactions, we confirm that we agree with HMRC's suggestion that the basis on which these deals were implemented were not consistent with the way in which a very small company would deal with transactions worth more than £4 million if the transactions were genuine *bona fide* commercial transactions, as opposed to pre-arranged transactions that all parties expected to work like clockwork because of the very pre-arrangement.

112. Turning now to the factors that are more specific to the facts of this case, the most telling point made on behalf of the Appellant was that it considered HMRC's MTIC warnings and in particular the March 2006 warning letter, to be a pro-forma letter intended for every trader, and it concluded legitimately, when the Deal 0 VAT was repaid on 5 May 2006, that HMRC had verified its transaction. HMRC must thus have concluded either that there was no tracing to fraud or that, if there was, the Appellant's due diligence in relation to its supplier and customer were sufficiently good and genuine, that that particular pattern of trading would result in VAT being repaid on similar exportations. That would be particularly pertinent if the parties were indeed the same, as they were in Deals 1 to 4, as for the one that HMRC had considered.

113. When HMRC's officer has stressed, however, both at the March meeting and in the March 2006 letter, that MTIC fraud was endemic; that it was virtually impossible to buy a large consignment of mobile phones without the supply ultimately being traced to fraudulent VAT losses; when the whole notion of chains of

intermediaries had been explained, and when the billions of tax loss had all been explained, we reject the argument that HMRC's warnings could be legitimately assumed to be withdrawn, or now inapplicable to this particular trader. We cannot believe that RA could have supported any such naïve and unfounded conclusion, unless RA was trying to mislead Mr. Rasul, and there was no suggestion of that. We note in particular that it had been stressed that future deals would be subjected to close examination. We consider that the Appellant realised that its transactions would be connected to fraud, but that it might "get away with it again" with some ostensible due diligence, and when using the same counter-parties. We do not believe that the Appellant genuinely thought that HMRC had no concerns with its transactions.

114. We find the Appellant's lack of concern at the refusal of HSBC to deal with transactions connected to mobile phone and computer chip trading to be unconvincing. When the Appellant had just been thoroughly warned of the widespread and highly serious nature of the fraud, Mr. Rasul's protestations that HMRC had put wholly inappropriate pressure on the banks and that the banks were wrongly letting down small honest traders, were groundless complaints, and we do not accept that they were in fact seriously believed. Anybody would think that HSBC's attitude would reinforce the concerns that had been explained by HMRC.

115. While we accept that Mr. Rasul did undertake some consultancy activity within the Appellant company, we share HMRC's suspicion that by the time on 10 October 2005 that he replied to the follow-up questions in connection with the request for registration, the plan to move into wholesale trading of mobile phones was at an advanced stage, and could and should have been referred to. His reluctance to refer to it, and also the statement that he did not change the description of the business sector in which the Appellant plainly operated, because he knew it was a somewhat dubious sector and he did not wish to prejudice his wife's position at Morgan Stanley, all confirm that Mr. Rasul had clear reservations about the activity. However, he preferred to keep it below the radar screen.

116. It is of no particular relevance in this case, and naturally evidence was not advanced to establish the point, but if one glances at the decisions published in relation to countless MTIC cases, it is very commonly the case that a company will secure registration for VAT purposes when making no mention or very veiled mention only, of wholesale trading in electronic goods, and placing most emphasis on some other innocent activity, only to forget the innocent activity, or to reveal that the turnover in wholesale trading very shortly exceeds all earlier estimates of turnover within a few months.

117. We found Mr. Rasul's explanation for branching into wholesale trading into mobile phones to be wholly unconvincing. He said that because there might be lull periods in the consultancy activity (a conclusion that he seemed to have reached within one month of commencing the activity, when anyone would anticipate a slow start in a new field), it was a good idea to blend the consultancy activity with a steady business that would provide more reliable and steady cash flow by trading with some product. It is difficult to conceive of an activity that might match that objective and characteristic quite so inappropriately as wholesale trading in mobile phones in a company with a £2 share capital, and no knowledge whatsoever of the product sector. Even if, which we are inclined to accept, Deal 0 was financed with a loan that Mr. Rasul was able to advance to the company of somewhere between £50,000 and £75,000 (we were never clear which), Deals 1 to 4 were conducted in a way that stretched the resources of the Appellant well beyond breaking point in that they left it

with debt of £130,000 to TMG and unspecified debt to RA. Neither debt appears yet to have been discharged. For a man who prided himself on "knowing his business sector", and always having adequate finance for a proposed activity, the suggestion that this move into mobile phone trading was designed to produce a nice steady flow of reliable profit to even out the humps and hollows of the consultancy activity was ridiculous. It was wholly unconvincing.

118. We are simply unable to understand why the Appellant paid £100,000 to TMG on 12 May, having received its VAT recovery of £111,000 on 5 May. There were no written terms indicating why, and on what basis, this £100,000 was paid. If it was paid as a deposit, and eventually it served as that, it is extraordinarily odd that a deposit was placed before any deal was even negotiated (none had even been considered before the receipt of the £111,000 we were told), and we were also told that, having been given an order list by Comica, the Appellant had actually engaged RA to see whether the stock could be supplied from sources other than TMG. This may have been true, but if it was true (and there was no evidence of this), did the Appellant anticipate any delay or problem in recovering the £100,000, should it wish to source supplies elsewhere? We were also told that the Appellant had indicated to TMG that it would always source product from TMG, but if this was so, then what were RA doing seeking alternative suppliers, and when, in ordinary *bona fide* business does one company place a £100,000 with a supplier from whom just one previous supply has been taken, on no known terms, and ostensibly as a deposit for a deal that has not been negotiated by 12 May?

119. When the Appellant decided to proceed with Deals 1 to 4, it embarked on deals in which it would have initially to pay TMG approximately £230,000 more than it would receive from Comica. £100,000 was paid, reducing that cash flow deficit to £130,000, but how did the Appellant assume that it would pay the remaining £130,000?

120. There was certainly no disclosed indication of the terms on which TMG would give the Appellant credit, though there were vague mentions that TMG's pricing was the best and that it gave credit. Notwithstanding that TMG's invoices for all four batches of phones simply indicated the gross VAT-inclusive price, and in relation to the heading "Comments or special Instruction", the invoice merely included the one word "None".

121. Mr. Rasul's evidence in relation to the missing £130,000 was vague and very unconvincing. Whilst a vague reference had been made to credit, at the same time Mr. Rasul said that he had other assets and that the director of TMG was aware that even if the Appellant had seemingly no more money to pay the balance (at least unless and until it recovered the VAT reclaimed), nevertheless the relevant TMG director know that Mr. Rasul would provide other cash to fund the balance. We were not clear where this cash would come from. We were told that a Scottish property had been sold, but it sounded as if the proceeds had been reinvested. In any event, we were never given any figures, or detail as to whether the funds could be withdrawn from some new investment. In the meantime, we were simply told that TMG said that "the Appellant could pay later". We enquired whether any implicit loan was expressly "recourse only to the VAT recovery, if obtained", and although Mr. Rasul suggested that it was not, and that he would "just pay later", in the facts that have emerged, once the VAT recovery began to look doubtful, Mr. Rasul refused to pay not only TMG, but also the separate debt to RA. No action seemed to have been taken by either TMG or RA to pursue their debts. If the Appellant was fully liable for the relevant debts, and the understanding between the director of TMG and

Mr. Rasul was that the Appellant was good for the balance, because Mr. Rasul would fund the Appellant with the proceeds of other assets that he owned outside the company (a guarantee in terms equally as explicit, as the loan terms indicated that there was a loan in the first place), why had no attempt been made to recover the moneys owing?

122. We consider that the whole manner in which the Appellant undertook deals that exceeded its cash flow capacity to fund the VAT gap, and the distinctly vague way in which it was suggested that TMG would inexplicably give credit for this gap indicates that it was inconceivable that this transaction was a *bona fide* genuine business deal. It simply had to be based on the expectations that the VAT would be recovered; that both parties had some common understanding as to where the risk in relation to non-recovery would lie, that common understanding being too embarrassing to record in writing, and that seemingly for no terribly obvious reason TMG were funding the gap, even if they were not meant to bear the ultimate risk.

123. We might mention, in answer to Mr. Saeed's suggestion that the Appellant could not have been "an MTIC company" because all MTIC companies in the chain from 3D downwards dealt in vastly greater amounts, and the Appellant only made four purchases and sales for the meagre amount of £4 million, that the more appropriate question would have been to ask how the Appellant embarked on a deal where it was £130,000 short of being able to pay the purchase price, when any credit terms were either "unbelievably vague", or "too embarrassing to reveal". It vastly over-stretched itself, breaching Mr. Rasul's "Rule 2" in the article in the Independent. Admittedly, it was not actually "lack of capital" that actually "scuppered" this particular "best idea", but it was still the case that the Appellant embarked on a transaction, with only £100,000 free cash at its disposal (and £50,000 to £75,000 of that owed to Mr. Rasul) that was well beyond its means.

124. When we endeavour to reach some conclusion as to precisely what was going on in relation to Deals 1 to 4, we confess that we are not entirely sure. The recurring theme of support and subsidies from TMG, coupled with the Appellant's trade being substantially administered (if not managed) by the financial controller of TMG, seems almost to suggest that TMG was using the Appellant as an alternative "name", or near-nominee, to secure VAT recoveries. The feature that virtually all of HMRC's £111,000 on 5 May was paid to TMG on 12 May, without documentation, and possibly for a deal that had not been negotiated, seems to support this possible analysis.

125. We are told, however, that Mr. Rasul took all the major decisions, and that the Appellant traded in its own right, and independently of TMG. Its terms of trade, however, were so extraordinary that we reject the possibility that Mr. Rasul, the mind of the Appellant, thought that there was any explanation to the Appellant's transactions other than that the Appellant was trying to get a bit of the profit from fraudulent VAT recoveries. The scanty trade terms; the inattention to due diligence as regards both Comica and the feature that TMG was being managed by Mr. Rasul's own accountants; the lack of attention to insurance; the disinterest in disparities between the two freight forwarder's reports and most significant of all, the feature that everything was put on a plate for the Appellant by TMG, cannot sustain any conclusion other than that the Appellant was in some way participating in the fraud of seeking to recover the VAT at the end of a chain of fraudulent, pre-orchestrated, transactions. The Appellant cannot have considered that it was participating in legitimate honest trading of any sort.

126. We decide that HMRC has made out its case, to a standard well beyond that of reasonable probability, that the Appellant actually knew that its transactions were connected to fraudulent VAT losses. Were that not so, it certainly ought to have so known.

127. This Appeal is accordingly dismissed.

Costs

128. The Respondents indicated at the end of the hearing that they applied for their reasonable costs, should they win this Appeal. Reference was made to a Direction issued by Sir Stephen Oliver QC on 29 January 2009, to the effect that the costs of a particular hearing would "in the cause", and the Respondents specifically drew our attention to the fact that Mr. Saeed appeared in that Directions Hearing for the Appellant. Furthermore our attention was also drawn to paragraph 5 of Howes Percival's letter to the First-Tier Tribunal dated 3 September 2010, in response to a question from the Tribunal in relation to whether the old or new costs regime should apply in this appeal. The answer given in that relevant paragraph was that the old rules should apply, and that were they successful the Respondents would indeed ask for their costs.

129. Although the circumstances under the old costs rules of the VAT and Duties Tribunal where HMRC could in practice apply for their costs were fairly limited, and were governed by a Parliamentary statement, we consider that this case fell within the category, under those guidelines, where HMRC were to be free to request an order for their costs if they requested one.

130. We accordingly grant the Respondents an order for their reasonable costs.

Right of Appeal

131. This document contains full findings of fact and the reasons for our 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.

HOWARD M. NOWLAN
Tribunal Judge