TC01376

Appeal reference: LON/08/543

VALUE ADDED TAX – input tax – denial of right to deduct on grounds of alleged knowledge or means of knowledge of fraud by others – alleged defaulter and contra-trading – whether defaulter chains constructed by HMRC led to losses – yes – whether losses fraudulent – yes – whether connection between appellant's transactions and losses -- yes – whether appellant had knowledge of connection between its transactions and fraudulent evasion of VAT – yes – whether appellant should have known that only reasonable explanation for circumstances in which its transaction in contra-trading transaction took place was that it was connected to fraudulent evasion of VAT – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

FUSION ELECTRONICS LTD **Appellant**

- and -

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

Tribunal: **David Demack (Judge)**
Tym Marsh (Member)

Sitting in public in London on 20 September 2010, 27 to 30 September 2010, 4 to 6 October2010, 11 to 14 October 2010 and 29 March 2011

Andrew Young of Counsel instructed by Dass & Co Solicitors, Birmingham for the Appellant
Mark Sutherland-Williams and Oliver Powell both of Counsel instructed by the Solicitor and General Counsel of Revenue and Customs for the Respondents

DECISION

Introduction

1. This appeal is concerned with what is known as MTIC (Missing Trader Intra-Community) fraud, and is made by Fusion Electronics Ltd ("Fusion"). The appeal is against a decision of the Commissioners by letter of 7 February 2008 refusing to repay input tax of £614,438.23 for which Fusion claimed credit for the two monthly accounting periods 04/06 and 05/06, and a related requirement by letter of 29 February 2008 that Fusion refund input tax of £1,464.44 repaid by the Commissioners in the same periods. The input tax concerned was incurred by Fusion in purchases of computer chips.

2. In their letter of 7 February 2008 the Commissioners say that they "are satisfied that the transactions set out in the attached appendix form part of an overall scheme to defraud the revenue", and that "there are features of those transactions, and conduct on the part of Fusion Electronics Ltd which demonstrate that you knew or should have known that this was the case". We particularly note that the Commissioners do not allege that Fusion was a party to such fraud.

3. The Commissioners add that in making their decision not to repay the input tax claimed they have taken into account a number of items of information and features of trade, namely:

- That the deals under consideration had been traced back to identified and assessed tax losses in the appropriate VAT periods

- That each of the deals was back-to-back, being made on the same day for the same amount of goods and for the same product

- That a trader in a legitimate market trading in goods worth millions of pounds would not have dealt with others without first satisfying itself that its suppliers could supply what they contracted to supply, and that its purchasers could pay for what they had agreed to purchase; Fusion knew perfectly well that its suppliers and customers would not let it down because the transactions had all been pre-arranged

- That despite the high value of the goods it was purchasing and selling Fusion did not enter into any formal written contracts with its suppliers, customers or freight forwarders during the periods concerned; it knew that it would not need formal contracts because the transactions had all been pre-arranged and were part of a scheme to defraud the revenue

- That due diligence undertaken on its customers consisted of, inter alia, a letter of introduction, a company profile, and a financial overview in a language other than English; that suggested that Fusion went through the motions of due diligence with the

objective of demonstrating compliance with the Commissioners' examples because it knew that its suppliers and customers would not let it down, the transactions having been pre-arranged

- That starting in May 2003, and prior to the transactions in point taking place, Fusion was issued with a letter detailing MTIC fraud and suggesting ways of ensuring the integrity of its supply chains, a copy of the Commissioners' Notice 726 "Joint and Several Liability", and a deregistration veto letter; and it received visits from the Commissioners' officers at which MTIC fraud was discussed: it could therefore be shown to have had a general awareness of MTIC fraud prior to its entering into the transactions in point.

4. We should explain that the disputed decisions of the Commissioners, as is usual in cases of MTIC fraud, are based on the European Community doctrine of abuse, as recognised by the Court of Justice of the European Communities ("ECJ") in a number of cases and, in the present context, particularly those of *Axel Kittel v Belgium* and *Belgium v Recolta Recycling SPRL* (joined cases C-439/04 and C-440/04) [2008] STC 1537 ("*Kittel*"). In those cases the ECJ expounded the principle that a trader who has participated in a fraudulent scheme involving the purchase and sale of goods, knowing or having the means of knowing that he is so participating, forfeits the right to deduct input tax he has incurred on his purchase of the goods used as a the vehicle of the fraud.

5. For a simple description of the basic structure of MTIC fraud we are thankful to Mr Owain Draper of Monckton Chambers. As slightly elaborated upon, his description takes the following form. A "missing trader", ie a UK VAT registered trader, or one who uses another's VAT registration, purchases goods from abroad and imports them into the UK. The importation bears no VAT. The trader sells the goods intra UK, charging VAT at the standard rate on the sale to an intermediary known as a "buffer". The goods then pass along a chain of purchase and sale of transactions intra UK through a series of other buffers. Each buffer properly charges and reclaims VAT. The final buffer in the chain then sells the goods to a "broker" – in the present case Fusion is the broker - who, as the last link in the chain, sells the goods abroad in a zero-rated transaction and proceeds to reclaim the input tax he paid to the final buffer. Consistently with his name, the missing trader then disappears having failed to account for the VAT he charged the first buffer.

6. In a more complex form of MTIC trading, known as contra-trading, the broker in the chain of transactions described in the last preceding paragraph himself purchases goods from abroad of equal value to the goods he sells, and sells them along a second chain of transactions before a second broker sells the goods abroad. The first broker has a net liability to VAT of nil, and so declares in his VAT return. (The claim for input tax in the first chain is cancelled out by the output tax in the second chain). The second broker – again in this case Fusion - who has no apparent connection with the fraudulent VAT loss in the first chain, then proceeds to claim repayment of the input tax on his purchase.

7. The present appeal concerns 10 separate deals, 9 of which the Commissioners say they are able to trace back to defaulting traders. The tenth is said to trace back to a contra-trader. All of the deals involved the purchase and onward sales of CPUs.

8. On 5 March 2008 Fusion gave notice of appeal against the Commissioners' decisions and contended that the burden of proving fraudulent evasion in relation to the transactions concerned was on the Commissioners;

a) that the standard of proof required was a heightened civil standard "commensurate with a criminal standard";

b) that there was no Community law authority enabling the Commissioners to take one chain of transactions into account when determining the fiscal consequences of another chain; and

c) that other than making a generalised, unparticularised allegation of fraud, the Commissioners had provided no information in support of their contention that an overall scheme to defraud the revenue existed.

9. Since the notice of appeal was served there have been developments in the law, two of which have a direct and important bearing on Fusion's claims. First, in *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2008] UKHL 35 at [13] and [15] Lord Hoffman offered the following authoritative guidance as to standard of proof required in civil cases:

> "13… I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.
>
> …
>
> 15. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities."

10. In reliance on that guidance, we record that we propose to deal with the evidence in the present case on the basis of the balance of probabilities, but we nevertheless recognise that the evidence must be cogent.

11. Secondly, in a number of joined cases led by that of *MobilxLtd (in administration) v Commissioners of Revenue and Customs* [2010] EWCA517, the Court of Appeal made plain that the refusal of a right to deduct input tax does not depend on any specific Community or UK legislation:

"49.It is the obligation of domestic courts to interpret the VATA 1994 in the light of the wording and purpose of the Sixth Directive as understood by the ECJ (*Marleasing SA* 1990 ECR 1-4135 [1992] 1 CMLR 305) (see, for a full discussion of this obligation, the judgement of Arden LJ in *Revenue and Customs Commissioners v IDT Card Services Ireland Ltd [2006]* EWCA Civ 29 [2006] STC 1252, § § 69-83). Arden LJ acknowledges, as the ECJ has itself recognised, that the application of the *Marleasing* principle may result in the imposition of a civil liability where such a liability would not otherwise have been imposed under domestic law (See IDT § 111). The denial of the right to deduct in this case stems from principles which apply throughout the Community in respect of what is said to be reliance on Community law for fraudulent ends. It can be no objection to that approach to community law that in purely domestic circumstances a trader might not be regarded as an accessory to fraud. In a sense, the dichotomy between domestic and Community law, in the circumstances of these appeals, is false. In relation to the right to deduct input tax, Community and domestic law are one and the same."

12. In the Statement of Case, served on 30 June 2008, the Commissioners allege that Fusion was generally aware of MTIC fraud, and that the due diligence it undertook was inadequate and / or raised negative indicators of fraudulent activity in Fusion's deals which they claim should have resulted in its realising that its transactions were connected with fraud, namely:

a) that the relevant deals were back-to-back, and Fusion was never left with unsold surplus stock

b) that despite the high value of the contracts concerned Fusion did not enter into any written contracts with its suppliers, customers of freight forwarders

c) that the businesses involved in the relevant transactions were all wholesalers; there was no evidence of an end user or retailer

d) that on 17 February 2005 Fusion's bank closed its account "due to the nature of the business being processed through its account", and on 18 October 2006 its replacement bank closed its account for the same reason

13. Before us Fusion was represented by Mr Andrew Young of counsel and the Commissioners by Mr Mark Sutherland-Williams leading Mr Oliver Powell, both of counsel.

14. We took oral evidence from the following witnesses:

- Mrs Judith Elmer, the Commissioners' officer responsible for the affairs of Fusion
- Guy Roderick Stone, a specialist officer of the Commissioners responsible for policy matters, who gave an overview of MTIC fraud at the relevant time and its history

- Miss Laura Elizabeth Hartell, the Commissioners' officer responsible for the affairs of Text XS Ltd

- Douglas Charles Armstrong, the Commissioners' officer responsible for the affairs of KEP 2004 Ltd

- Peter Howard Dean, the Commissioners' officer responsible for the affairs of Rukford Ltd

- Graham Alan Taylor, the Commissioners' officer responsible for the affairs of 4A Developments Ltd, the alleged contra-trader

- Peter Richard Birchfield, an officer of the Commissioners with particular responsibility for matters concerning the First Curacao Investment Bank ("FCIB")

- Ms Rupinder Kandola, the Commissioners' officer responsible for the affairs of Okeda Ltd

- Richard Govan, one of Fusion's two directors

- Christian Govan, the twin brother of Richard Govan and Fusion's other director

15. We also had statements from other officers which were unchallenged. We refer to the evidence of those officers where necessary.

16. The documentary evidence originally put before us consisted of 37 lever arch files, some of which, by agreement between the parties, were later excluded from our consideration. We shall deal with individual files and the documents within them by reference to the file title and relevant page numbers e.g. C4-11 refers to file C4 page 11.

17. It is on the basis of the whole of that evidence that we make our findings of fact.

18. The questions we are required to answer in respect of each of the various deal chains may be expressed in the following way:

1) Was there a tax loss?

2) If so, did the loss result from the fraudulent evasion of VAT?

3) If there was fraudulent evasion, were Fusion's transactions, the subject of the appeal, connected with that evasion?

4) If such a connection is established, did Fusion know, or should it have known that its purchases were connected with the fraudulent evasion of VAT?

19. We are told that everything is in issue in the appeal, so that we are required to answer all of the above questions in relation to each chain. Further, it is common ground that the burden of proof is on the Commissioners.

The facts

20. Mr Richard Govan gave evidence that Fusion's business of wholesale trading in electronic goods began as a partnership between himself and his brother in February 2000, which in the following year turned over some £277,000. Both brothers had previously had experience of dealing in such goods.

21. Fusion itself was incorporated on 28 December 2000, and has throughout its life been controlled by the Govan brothers through a holding company, Excess Holdings Ltd. On 1 April 2001 Fusion registered for VAT, disclosing its business activity in Form VAT1 as "electronic components", and estimating its turnover in the first twelve months of trading as £180,000. It indicated that it would not be making export sales.

22. On 28 March 2003 the Commissioners received a letter from Fusion in which it stated that it had obtained a new contract and needed to make returns monthly. Although not indicated in the letter, it was implicit that the contract concerned involved sales of goods to a foreign customer. The Commissioners acted on the letter and, on 3 April 2003, gave Fusion permission to make monthly VAT returns.

23. Fusion sourced the electronic goods in which it traded from a number of UK companies including Redstar Marketing Ltd ("Redstar"). Its dealings with Redstar started in April 2003 and ended in March 2004. The sales manager of Redstar was one Angela Edwards, and a director of the company, albeit only in a period prior to Fusion trading with it, was Michael Bale. Both those persons feature in the case. On Redstar being sold in 2003 Fusion commenced trading with Silverstar Components Ltd ("Silverstar"). From 11 November 2004 Silverstar was its sole supplier of goods in Fusion's wholesale dispatch/export deals. Angela Edwards was involved in sales at Silverstar and Michael Bale was its director. He was the brother of Angela Edwards and was resident in Dubai, but the brothers claimed to be unaware of those facts.

24. We are satisfied that the Govan brothers worked very closely with Silverstar, and enjoyed a good business relationship with Angela Edwards, whom they had met both socially and at trade fairs. On one occasion when the brothers visited Dubai, she told them that Michael Bale would be there at the same time. Fusion and Silverstar entertained each other in December 2005.

25. Fusion was visited on many occasions by officers of the Commissioners. They paid their first visit, a VAT assurance visit, on 28 April 2003. The visiting Officer, Rolfe, noted the type of goods in which Fusion was trading, and obtained details of its business operations.

26. A second visit followed on 22 May 2003, Officer Pope recording that Fusion had started selling CPUs to customers in Hong Kong. The officer established that Fusion had found its supplier, Redstar, through trade magazines. Mr Pope issued Fusion with a "Redhill" pro-forma letter which advised traders in commodities likely to be the subject of MTIC trading to verify the registration numbers of those with whom they were dealing with the Commissioners' Redhill verification office. He did so to ensure that Fusion did not trade with a supplier using a false, hijacked or deregistered VAT number. The Govan brothers indicated to Mr Pope that they had knowledge of recent budget changes and admitted knowing that input tax repayment claims were likely to be denied if Fusion were found to have been involved in MTIC trading.

27. On 3 October 2003 officer Goulding paid what was described as an "MTIC visit" to Fusion to deal with an input tax repayment claim submitted by it. He highlighted to its directors the risks within Fusion's trade sector, and warned them that if it were found to be concerned in circular trading it might be denied any resulting input tax repayment claims. At that time Fusion was also dealing in other electronic goods, but was not exporting CPUs.

28. From March to September 2004 Mr Richard Govan claimed that "Christian was getting a better idea on the [export wholesale] CPU market before we entered [that market] in October 2004", and was not trading in that market at the time.

29. When Fusion did start trading in the foreign wholesale market in CPUs it obtained supplies from Silverstar, its sole supplier in the transactions with which we are concerned. Although the Govan brothers claimed in evidence that they would telephone other suppliers to make enquiries about the price of products, they explained that, notwithstanding that on occasions they could have purchased CPUs more cheaply than from Silverstar, they determined to use that company for all supplies of CPUs "due to its reliability". No evidence was adduced of Fusion's claim to have made price enquiries of companies other than Silverstar in relation to CPUs.

30. Sometime early in October 2004 Fusion received Notice 726 and the Govan brothers acknowledged having received and read it. They also confirmed having received and read the Notice on 21 April 2005.

31. On 14 March 2005 Fusion's directors obtained a bank overdraft facility from Lloyds Bank plc in the sum of £100,000. That sum was secured on mortgages of the homes of the two directors.

32. Mrs Elmer was appointed the Commissioners' officer responsible for Fusion early in 2005, and first visited the company on 7 April 2005. During the visit she discussed with its directors the need for due diligence on both suppliers and customers.

33. On 23 August 2005 the Commissioners sent Fusion a "veto letter" in respect of Domain Technologies Ltd, ie a letter in reply to a verification request indicating that Domain was not registered for VAT.

34. In response to a request from another EU revenue authority, Fusion was visited by an officer of the Commissioners on 13 January 2006. That visit was carried out because a customer of Fusion in the EU had defaulted on its tax liability with a potential net loss of £49,612 to the foreign authority.

35. Mrs Elmer regularly visited Fusion after her appointment, usually as frequently as monthly. She explained the frequency of her visits as being due to Fusion trading in CPUs, i.e. a product associated with MTIC fraud, and to ensure its VAT compliance. Mr Richard Govan, who accepted responsibility for Fusion's paperwork, maintained that he and his brother welcomed her visits and explained what was discussed on those visits in the following way; "On every visit from officer Elmer, every month Jude [Mrs Elmer] would come to see the deal packs, the transactions we had done that month, and I would have ready for that visit each deal with the documents. Now the documents that I would supply was (sic) a covering deal sheet, letter, the customer invoice, the supplier invoice, the air waybill, proof of payment and the Redhill verifications. Jude would peruse all the documents on the visit, would go through them with me, we would talk about what deals we had done that month, had anything changed, were we still using the same supplier, customers. I would confirm we had. Jude would look through the documents, would be satisfied with those documents. There was never anything that was requested further other than what I had supplied" (transcript 11 October 2010 p.18). We note that the documents to which Mr Govan referred were deal documents, and not documents that covered checks on its supplier and customers. Even though Fusion gave its customers credit, it did not once carry out a credit check, the brothers claiming it to be unnecessary since goods were not released until customers paid for them in full.

36. In evidence Mrs Elmer claimed to have produced Notice 726 on each of her visits and to have "flagged up" the relevant pages and paragraphs with post-it notes. The Govan brothers denied that Mrs Elmer did so produce the Notice, saying that they had never been asked for details of "commercial checks carried out by the company on its suppliers, customers and freight agents". That denial is in complete conflict with a visit report prepared by Mrs Elmer on 6 July 2005 (C26-360) in which she said, " Discussed due diligence checks carried out, confirmed to directors what they were doing was sufficient…reviewed whether there any other checks needed, at this time none, but I would review every month". Even if Mrs Elmer failed to produce Notice 726 on every visit, we are in no doubt that she produced it on a regular basis. As Mr Richard Govan stated in evidence on 11 October 2010, "I was aware of fraud because of Notice 726 and because of visits from Jude Elmer…On the monthly visits we would receive, Jude would refer to Notice 726 and paragraphs within Notice 726". It was, however, clear from the Govan brothers' evidence that they regarded

fraud in the wholesale CPU industry as just another hazard of trade, Richard Govan saying dismissively, "There's fraud in every industry".

37. In our judgment, Mrs Elmer could hardly have "referred to" paragraphs in Notice 726 without having it to hand. And, in relation to a claim by the brothers that they had never been asked for details of due diligence carried out on suppliers and customers, we would simply quote Mr Richard Govan's further evidence on 11 October 2010 when he said, "Jude would say, for example, 'What due diligence have you done?' or 'What have you done on this deal?'", and added that her monthly visits were "to collect and review records". Plainly, Mrs Elmer's evidence is correct, and we accept that it is.

38. That is not to say that we accept Mrs Elmer's evidence unreservedly. Whilst she attempted to deal with every point Mr Young raised in cross-examination, perhaps not surprisingly on occasion she failed to do so. But where she did fail, for example when she claimed that Fusion had signed a non-existent declaration contained in Notice 726 her failure did not detract from what was plainly a very serious effort to explain her part in events fairly and honestly. Except where we state to the contrary, we accept her evidence as the truth. We might add that all the other officers who appeared before us gave their evidence in the same way, so that we take the same view of what they told us.

39. Mrs Elmer ceased to be Fusion's officer in January 2006. As no one was appointed to replace her, we conclude that the Commissioners' monthly visits to Fusion then ceased.

40. On 27 October 2005 Fusion was informed by its bankers, Lloyds Bank plc, that its account would be closed as "the sector in which you operate is no longer one that the Bank wishes to be involved in". Fusion did not challenge that decision, or ask for more information as to why it was made. It was required to make alternative banking arrangements by 31 December 2005, but in the event the account was not closed until 11 January 2006 when a cheque for £306,806.26 was sent to Fusion. That sum was the credit balance on the account. We assume that the security for the bank overdraft referred to above was discharged on closure of the account.

41. On 26 January 2006, Fusion opened a new Business Directplus Account with The Co-Operative Bank (C26-75) and paid to the credit of that account £305,000. When asked in cross-examination what steps Fusion took to open a new business account when its Lloyds Bank account was closed Richard Govan claimed that until it opened a new account with Allied Irish Bank (GB), it relied on an account with Alliance & Leicester Bank and one with Saffron Walden Building Society, neither of which was properly suited to dealing with large trading transactions. In evidence, Mr Govan failed to mention the Co-Op account but it was raised in cross-examination by Mr Sutherland Williams. We find that failure difficult to account for since the closure of the Lloyds Bank account must have caused Fusion considerable difficulty, such that events concerned with the resolution of its banking problem would have been indelibly imprinted in the minds of its directors. It is not a matter of great

import, but coupled with the brothers' admitted failure to challenge the action of Lloyds Bank in closing the company's account and their inadequate explanation as to how they coped with business receipts and payments in the immediate aftermath of the closure, does lead us to question their truth overall.

42. It was through its account with Allied Irish that Fusion paid Silverstar for all the CPUs with which this appeal is concerned, and we are satisfied that that account was the only business account in use in the relevant accounting periods. We so find on the basis of our examination of the three pages of bank statements for that account (C4-16, C4-223 and C5-82 to 84). On 10 April 2006 the credit balance was £9,881.31, and on 2 June 2006 £13,551.29. Between those dates the only sums of any real substance to pass through the account were those relating to the 10 deals concerned in the appeal. The remaining receipts and payments recorded, other than interbank fees of £20, were very largely of sums ranging between £22 and £1,000, and were not indicative of any other trading. Yet the brothers claimed to have a supplier and customer base of over 400 traders.

43. On the basis of the contents of the Allied Irish bank statements, we find that if Fusion was carrying on other business in the period it was on a minute scale, and certainly not on one commensurate with the evidence as to capital and volume of trading described by the Govan brothers. (As appears from the next following paragraph, Fusion's turnover in the year to 31 July 2006 was just over £13 million). The transactions involved in the appeal, covering a period of two months, totalled slightly in excess of £4 million, which would seem to point to them confirming the whole of Fusion's turnover in that period.

44. In the year to May 2002 Fusion's turnover was £393,687. It rose to £2,259,748 in the period ended July 2003; to £4,562,483 by July 2004; to £8,808,298 by July 2005; and to £13,075,741 in the year to July 2006.

45. On more than one occasion, because of its trade in MTIC goods, Fusion had goods detained at Heathrow Airport (C30-179). As the goods were subsequently released, Fusion claimed that detention was merely required to authenticate the goods. We observe that such detentions should have put Fusion on notice of the dangers of trading in MTIC goods.

46. On the Commissioners denying Fusion's input tax repayment claims for the periods 04/06 and 05/06 the company ceased to trade, the whole of its capital being tied up in the claims.

Fusion's trading model

47. Fusion's trading model was explained to us by the Govan brothers. We were told, and accept, that some transactions were supplier led whilst others were customer led. Mr Christian Govan claimed that where Imaani was Fusion's customer, the transactions were initiated by Fusion.

48. Before commencing trade with Silverstar and its own customers, Fusion obtained from them details of their company and VAT registrations, and other basic details. It did not, however, seek trade references of its counterparties or freight forwarder. Further, some of the documents it obtained were in a foreign language, which the brothers could not understand. Fusion carried out no contemporaneous checks on Imaani, relying instead on what the brothers described as their historical knowledge of that company. We accept that the brothers visited Silverstar's premises from time to time.

49. Assuming a transaction to be customer led, on Fusion receiving an enquiry from a prospective customer for CPUs, it would enquire of Silverstar their price and availability. We were told that despite Silverstar being Fusion's chosen sole supplier of CPUs, Fusion would make enquiries of other suppliers of the price they would charge for similar products to ensure that Silverstar's quoted price was in line with that of the market. We were provided with no evidence of its behaviour in that behalf, and in view of the fact that each purchase and associated sale transaction with which we are concerned was completed in a matter of hours, so that it would have had little or no time to make such enquiries, we do not accept the claim. Fusion did not buy stock until it had a customer for it.

50. The brothers admitted, and we find, that Fusion never held the stock the subject of the transactions in point in the appeal; it was always held and handled by the company's freight forwarder. In all the transactions with which we are concerned, with the exception of deal 4, the freight forwarder holding the goods from their arrival in the UK to their leaving these shores was Forward Logistics Ltd ("Forward"). Despite the large value of the stock being traded, the Govan brothers never visited Forward to inspect stock it held for Fusion.

51. The Commissioners claim that Fusion did not obtain any warranty for goods purchased from Silverstar. No evidence was adduced by Fusion to indicate that it did so, but in his closing submissions Mr Young invited us to visit Silverstar's website to obtain confirmation that Silverstar was in the habit of giving a one year warranty on purchases from it. We are not prepared to deal with evidence not properly presented to us, but record that we do not consider the matter of warranties to be particularly important, so that we take little notice of it.

52. Although we were told that Silverstar continues to trade, so that it should have been a simple matter for Fusion to have obtained evidence from it as to the precise terms on which the companies traded, no such evidence was adduced. Fusion points to the evidence of Silverstar continuing to trade as indicating that it was engaged in legitimate trade in 2006. We accept that it may have been engaged in such trade but, viewed against its involvement in the invoice chains to which we refer later in our decision, we are not satisfied that its dealings were entirely legitimate.

53. Frequently Fusion did not submit a purchase order to Silverstar until it had completed a purchase of CPUs. Similarly purchase orders from customers were frequently not received by

Fusion until a transaction had been completed. Fusion maintained that it was not unusual in commercial terms to issue instructions orally and to follow them up with a faxed order. But whether or not Fusion submitted or received a purchase order, it did not enter into a written contract for any of its deals. .

54. Fusion would make enquiry of the Commissioners' Redhill office as to the validity of Silverstar's VAT registration number on making each purchase from that company, but did not await the result before completing the deal. In each letter of enquiry it would also request a "chain check" – a facility which the Commissioners did not provide, as well it knew. The Govan brothers explained that they considered it unnecessary to obtain the result, they having made the same enquiry on many previous occasions, and the outcome having always been the same. On making the enquiry Fusion would also seek verification of its customer's VAT registration, irrespective of the whereabouts of its business base, despite knowing that the Redhill office could verify only EU registrations. The reason for that was given as informing the Commissioners of the name of the company's customer.

55. Fusion instructed its freight forwarder to carry out an open box single chip per tray inspection report of the goods it had purchased to confirm that the chips matched those allocated to it and were in good condition. That necessitated the manufacturers' seals on the boxes of chips being broken. The reports produced as a result showed that almost all of the boxes it inspected were in 'average' or 'poor' condition in that they were pen and knife marked, double labelled, resealed, torn and taped (see e.g. C4-27, C4-153). Imaani International LLC ("Imaani"), a Dubai based company and Fusion's customer in 6 of the 10 deals with which we are concerned, required that chips be "brand new, full package in sealed boxes, clean with no markings or stamps" (C31-10). Quite how that sealing requirement could be fulfilled if open box inspections were carried out was not explained to us. Fusion claimed that Imaani was well aware that it arranged for open box inspections to be carried out, and that that involved breaking the manufacturers' box seals. Had evidence in support of that claim been adduced, we might have accepted it. But it was not. At the same time Fusion instructed the freight forwarder to ship the goods abroad in accordance with its sales invoice, saying that "They must not be released until I have confirmed that I have received payment from my customer and must be held by your agent where they will be confirmed and checked by my customer". We are not satisfied that that instruction was carried out, and deal with the matter in our conclusion. Fusion did not carry out credit checks on its customers as it claimed it was not giving them credit, and further maintained that it did not release goods until it had received payment in full.

56. Although para.3 of Fusion's terms and conditions of trade, as set out on its website, provided that "The passing (sic) in the products shall remain in us until the payment of the total price thereof", the true ownership of CPUs being traded whilst passing through the chains of transactions was unclear from the evidence. It appeared that once a trader had taken possession of them, notwithstanding that it had not paid for them and had no credit agreement in place with its supplier, it claimed to obtain title to them. To quote the brothers (Richard

Govan having adopted his brother's witness statement as his evidence-in-chief), "It's how the market works". But no independent evidence to support the claim was adduced. The Govan brothers offered no evidence as to the transfer of title to the possessor of them, particularly in the light of Silverstar's term of trade that ownership of the CPUs remained with it until it was paid in full. Nor was any evidence adduced to show that even if Fusion obtained a title to the goods as possessor – a matter on which we are anything but satisfied - did that title extend to its being able to transfer them abroad without authority.

57. Despite title to the goods being unclear as their possession passed along a chain of transactions, in every transaction with which we are concerned, Fusion's customer behaved atypically and paid Fusion. Not until Fusion had been paid, and in turn had paid Silverstar, and the payments due under the remaining transactions in the chain had cascaded down the chain, did title, equally rapidly, ascend it. We so find.

58. Although on occasion Fusion paid a deposit to Silverstar for goods it had agreed to purchase, there appeared to be no agreement for such payments or for calculating the amounts paid. Fusion did not pay for the goods, or pay the outstanding balance when it had paid a deposit, until it had itself been paid in full by its customer. Fusion never questioned whether Silverstar was in a position to transact the deals made with Fusion.

59. In its dealings with two of its European customers, Silacom Handels GmbH and Prodisma GmbH, Fusion raised its invoices in US dollars, claiming to have done so at the request of the customers. The Commissioners question why the deals should have been carried out in that currency as both companies were based in Austria so that it might have been expected that the deals would have been conducted in euros or sterling. Fusion had a US currency account with its bankers. As payment for the deals in question was made through New York and would necessarily have resulted in Fusion incurring currency exchange charges, we agree that some explanation of the payment arrangements is warranted, but no satisfactory explanation was forthcoming.

60. The businesses involved in Fusion's transactions were all wholesalers: in none of the transactions with which we are dealing was there an end user or retailer.

61. All Fusion's deals were back-to-back, i.e they involved the same number, make and model of CPUs, so that the company was never left with unsold surplus stock.

62. No value was added to transactions by Fusion; the Govan brothers simply claimed that they were in business to make a profit.

63. The Commissioners adduced evidence showing that in each chain of transactions the profit obtained by Fusion was considerably greater than that obtained by any of the others traders in the chain. Whether Fusion was aware of that fact we cannot say, and we therefore

do not consider the matter further. We might add that each trader in each chain of transactions, as identified by the invoices, succeeded in making a profit on its trades.

Summary of Trading

64. As we have indicated, Fusion's appeal is concerned with 10 deals, the chains relating to 9 of which the Commissioners by their investigations allegedly show as leading to a defaulting trader; and the tenth as leading to a contra trader. We propose to deal first with the nine chains leading to defaulting traders, before returning to deal 4, the contra-trading deal. In each chain of transactions with which we are concerned, the goods involved were of the same make and model throughout the chain.

65. However, we should first record that in his closing submissions, Mr Young made no challenge whatsoever to the invoice deal chains constructed by the Commissioners, or to the identity of the defaulters the chains indicated.

Deal 1

66. The evidence adduced by the Commissioners relating to deal 1 falls into three parts: that essentially revealed by invoices in the Commissioners' possession; that provided by Forward as freight forwarder holding the goods throughout the time they were in the UK; and that revealed as a result of the Commissioners' examination of the records of the bankers of the various companies in the deal chain. We should record that it was not until September 2010 that the Commissioners obtained permission from the French and Dutch authorities to use in civil proceedings computer evidence obtained from the FCIB ("First Curacao Investment Bank") Paris server, so that it was only shortly before the hearing began that much of the banking information with which we were provided was available to them. They then made application for the late inclusion of the documents obtained, which application we granted, but only on the Commissioners paying Fusion's costs of inspecting and analysing the additional documentation.

67. FCIB was a bank widely used by wholesale traders in mobile phones and CPUs throughout the period with which we are concerned. It was based in the Dutch Antilles, and was closed down by the Dutch authorities in the latter half of 2006. The Commissioners frequently rely on the use of accounts by traders with FCIB to allege involvement by them in MTIC fraud; they do so in the present case. We record that neither Fusion nor Silverstar banked with FCIB, and whilst Amaani did so, only in one of its 6 transactions with Fusion did it use its account with that bank to transfer money to Fusion.

68. The invoice chain constructed by Mrs Elmer for the Commissioners, starting with the alleged defaulter, Rukford Ltd, takes the following form.

No.	Trader	Invoice Date	No. of CPUs	Invoice Total	Invoice No.	Exhibit No
6.	Rukford Ltd	20/6/06	4410	£420,239.93	RF2006-3	[C11-61]
5.	UK Communications Ltd	20/6/06	4410	£420,499.01	RES222	[C4-41]
4.	Resolutions UK Ltd	20/4/06 (Or 20/6/06)	4410	£420,758.10	R539	[C4-38*]
3.	Ultimate Wholesale Ltd	20/4/06	4410	£421,017.19	1720	[C4-33]
2.	The Fones Centre Ltd	20/4/06	4410	£422,312.63	719	[C4-20]
1.	Silverstar	20/4/06	4410	£430,085.25	2432	[C4-17]
Broker	Fusion	20/4/06	4410	£381,465.00	2572	[C4 12]
-1.	Imaani Int. Trade (Dubai Airport Free Zone)					

* Said by the Commissioners to have been constructed specifically for the purposes of the chain

69. Ultimate's purchase order to Resolutions is to be found at C4-37 and contains ref. no 1713. It is dated 20 April 2006. Resolutions' corresponding invoice to Ultimate (C4-38) is marked "Purchase Order No 1713". The invoice is dated 20 June 2006, but a manuscript amendment to the date has been made by a person unknown so that it now reads 20 April 2006.

70. Resolutions' invoice to Ultimate is numbered R539, which number corresponds with an identical reference in Resolutions' purchase order to UK Communications, albeit that the invoice is dated 20 June 2006. In turn, UK Communications' invoice to Resolutions also contains Resolutions' reference R539. The Commissioners contend, and we accept, that Resolutions' invoice R539 has been deliberately backdated to 20 April 2006, and that is its true date. From that documentary evidence and the oral evidence of Mr Dean, we infer that the true date of Rukford's invoice is 20 April 2006.

71. An MTIC assurance visit to UK Communications led to its director being interviewed by the Commissioners. In interview, the director stated that Okeda Ltd (a company not involved in this particular deal chain, but concerned in others to which we later refer) and Rukford would pay him a commission for finding customers, and that customers would make payment directly to the supplier, so that no direct payment would be made to UK Communications. The director said that he dealt only with Rukford in the relevant period, so that the Commissioners maintain, and we agree, that there is a strong inference that the supplier was Rukford.

72. The transaction flow chart constructed by the Commissioners using documentation provided by the freight forwarder Forward starts not with Rukford, as one would expect, but with Northcom APS, a Danish company, as importer. It then shows the goods as having been sold by Northcom to The Fones Centre, by The Fones Centre to Silverstar, by Silverstar to Fusion and by Fusion to Imaani, exporting them to that company's base in the Dubai Free Zone.

73. The CMR stamped by Forward shows it as having received the goods at 11.20 on 20 April 2006. Forward was authorised by Northcom to release the goods to The Fones Centre at 15.06. (We accept that the time indicated on the relevant email may have been continental time, and thus have been one hour ahead of British Summer Time). However, The Fones Centre released the goods to Silverstar at 12.05. Other timed transactions show Silverstar as having placed its purchase order with The Fones Centre at 11.32, and the latter having released the goods at 12.45; and Silverstar having released them to Fusion at 15.33. That occurred notwithstanding that Fusion did not place its purchase order with Silverstar until 15.52. Fusion placed the order shipping the goods to Imaani at 15.52, despite not having received the latter's purchase order until 17.06. In our judgment, that evidence points to the documents concerned being anything but commercial records, but rather an example of "window dressing".

74. Turning then to the banking evidence, Silverstar's invoice to Fusion, dated 20 April 2006, shows the latter as liable to pay £430,085.25. Silverstar's bank statements show Fusion as having paid that sum in two instalments, namely:

(a) £49,085.25 on 20 April 2006; and

(b) £381,000 on 26 April 2006

75. The remainder of the evidence relating to deal 1, revealed as a result of the Commissioners' examination of the FCIB and other bank records, shows that on 21 April 2006 Silverstar paid The Fones Centre £422,305.71; The Fones Centre paid Ultimate £421,017.91; and Ultimate paid a third party, Alfa Tradezone of Greece (rather than Resolutions) £419,721.75. The Commissioners' evidence further shows that funds were transferred through 6 further accounts at the FCIB on the same day (including that of Northcom) before £382,567.50 was paid to Fusion's customer, Imaani, on 24 April 2006. Imaani then transferred the sum it had received from its FCIB account to an account with Standard Chartered Bank, and on 25 April 2006 paid Fusion £381,450. Thus, as the Commissioners claim, there is clear evidence of circularity in the payment chain. We might mention at this point that all the bank statements, including those for the remaining 9 deals (but with the exception of one of two aspects of deal 10), were exhibited. It is therefore unnecessary for us to list their exhibit references in our decision.

76. On the basis of that evidence, the Commissioners claim, and we accept, that the invoice chain does not represent the true position in relation to deal 1; the invoices were falsified. Resolutions and UK Communications never expected to receive funds for the goods they are shown as having invoiced. We find that the invoice chain above Ultimate was artificially constructed.

77. In relation to deal 1 the tax loss identified by the Commissioners totals £62,588.93 (C2-18, C11-54, 58 and 61), and was traced to a company calling itself Ruckford Ltd. The invoice it raised shows the name of the company to be that we have just indicated, but it

contained no VAT registration number. Following investigations by the Commissioners, they were satisfied that the entity purporting to be Ruckford Ltd had in fact hijacked the identity of a genuine company in the construction industry called Rukford Ltd. (The real Rukford Ltd was deregistered on 12 April 2006 and was dissolved on 27 June 2006.) The defaulter officer for the latter company, Mr Dean, calculated the missing tax in relation to the hijacked trader Rukford as £4,069,663.78. An assessment at C11/58 in that sum has not been paid or appealed. (The tax was assessed in June 2006 as the invoice indicated the transactions took place in that month.) We accept that the entity purporting to be Ruckford Ltd hijacked the identity of Rukford Ltd in an attempt to defraud the revenue, and are satisfied that the tax loss identified by the commissioners did occur.

Deal 2

78. In deal 2 the defaulter identified in the invoice chain prepared by Mrs Elmer was KEP 2004 Ltd, which, according to the defaulter officer, Mr Armstrong, was also a hijacked entity and operated from the director's home in Newcastle-on-Tyne.

79. The invoice trail constructed by Mrs Elmer in relation to deal 2 takes the following form:

No.	Trader	Invoice Date	No. of CPUs	Invoice Total	Invoice No.	Exhibit No
7.	KEP 2004	7/4/06	4410	£416,353.61	07001	[C4-178]
6.	Time Corporates	7/4/06	4410	£416,612.79	R69	[C36--268]*
5.	Resolutions UK	7/4/06	4410	£416,971.79	R060	[C4-177]
4.	Ultimate Wholesale	7/4/06	4410	£417,130.88	1380	[C4-170]
3.	Bluestar Trading	7/4/06	4410	£418,426.31	07.04-6	[C4-167]
2.	The Fones Centre Ltd	7/4/06	4410	£419,721.75	715	[C4-162]
1.	Silverstar	7/4/06	4410	£427,390.74	2411	[C4-156]
Broker	Fusion	7/4/06	4410	£378,819.00	2567	[C4-152]

-1. Imaani Int. Trade (Dubai Airport Free Zone)

80. * The original invoice was not included in the documents before us. Rather the Commissioners rely for its existence on information recorded in their computer database consisting of an electronic folder for each taxpayer or on their VISION system. The contents of both are set out in Schedule 1 to our decision. Exhibit C36-268 is a deal log constructed by officers of the Commissioners based on the two computer systems. Mrs Elmer explained how deal logs are constructed: "The officers of HMRC would use information as received or obtained from a variety of sources. These sources could include, amongst others, the traders,

purchase invoices, and so on. In some instances, traders would send their own version of the deal log directly to officers who would capture them onto the departmental system. That is why there are different styles of logs".

81. Mr Young submits that we should not accept as evidence information held or constructed on the basis of such information on either computer system, first, because the Commissioners will not allow appellants access thereto so that it cannot be checked and, secondly, because the information on the systems has been input by unidentified officers in some cases on the basis of evidence from traders themselves, and it is impossible to check its correctness or otherwise. In any event he claims the evidence to be hearsay and inadmissible. Mr Young further submits that the evidence of fraud must be cogent. He maintains that it cannot possibly be said that a deal log produced for documents which have not been disclosed is cogent evidence, particularly as the deal log relied upon may have been based on the records of a trader implicated in fraud. He further contends that any argument put forward by the Commissioners that, despite their best efforts, they have not been able to produce all the documents must fail; they have not displaced the burden on them to prove losses.

82. Mr Sutherland-Williams observes that by the very nature of MTIC fraud, the tribunal should not consider it unusual for the Commissioners to have been unable to obtain or retain every single piece of the deal chain evidence. He adds that frauds involve subterfuge, and to require the Commissioners to produce every aspect of the evidence imposes too great a burden on them. The task of the Commissioners is to demonstrate that the evidence upon which they rely is more likely than not to be correct. He submits that, in the circumstances, we can be satisfied that the burden has been made out. Mr Sutherland-Williams particularly relies on the fact that there is what he maintains is compelling evidence that in a number of the deal chains the invoices were created in order to facilitate or perpetrate a fraud against the Commissioners. Further, evidence from the freight forwarders in some of the deals illustrates that the goods were imported by traders not appearing in the invoice chain. In those circumstances, Mr Sutherland-Williams submits that the value of the physical invoices and purchase orders is considerably diluted.

83. There is some justification in Mr Young's submissions, but we accept Mr Sutherland-Williams' claim that we should not consider it unusual for the Commissioners to have been unable to obtain every piece of the deal chain evidence. In any event, we may "admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom", rule 15(3)(a) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. We have therefore taken the greatest care to accept from the Commissioners' computer records only that information which is entirely consistent with the remaining documentary evidence before us and which thus appears to us to bear all the hallmarks of truth and correctness. We have determined to accept the contents of the database in relation to invoice R69. The same point arises for decision in relation to invoices in others of the chains in point in the appeal. We propose to adopt the same approach to them as we have to invoice R69.

84. Again, the freight forwarder chain, as provided by Forward, indicates artificiality in the invoice chain. The CMR, stamped by Forward on 7 April 2006, shows that it related to 4410 Intel P4 CPUs imported by Immanse SARL, a French company. Release notes, all dated 7 April 2006, show the back-to-back nature of all the transactions, the CPUs passing through, in order, Bluestar, The Fones Centre, Silverstar, and finally to Fusion. Fusion's CMR then shows the CPUs as being destined for Imaani.

85. The Commissioners' analysis of the banking records relating to deal 2 starts with a payment by Imaani to Fusion of £378,804 on 11 April 2006. It then shows that the sum of £427,390.74 owed by Fusion to Silverstar was paid in two instalments:

(a) £107,390.74 on 10 April 2006; and

(b) £320,000 on 12 April 2006

86. The Commissioners' further analysis, covering the remaining payments and the FCIB records, shows that Silverstar paid The Fones Centre £419,714.19 on 7 April 2006. Three days later, on 10 April, The Fones Centre paid Bluestar £418,426.31, Bluestar paid Ultimate £417,130.88. Ultimate then paid Alfa Tradezone, again as a third party, £415,835.44, Alfa Tradezone paid Asset Online (which traded as Imanse, a company that also featured in deal 2) £410,350.50, Asset Online paid Bluestar £410,130, and Bluestar paid Imaani £405,720.

87. On the basis of that evidence, the Commissioners claim, and we accept, that the invoice chain does not represent the true position in relation to deal chain 2. Further, they maintain that the presence of Resolutions, Time Corporates and KEP 2004 in the invoice chain is misleading as the evidence indicates that they never received funds in relation to the deal. The Commissioners also claim, and yet again we accept, that there is complete circularity in the payment chain.

88. The Commissioners further claim, and once more we accept, that the invoice chain above Ultimate was artificially constructed rather than real. The payment by Ultimate to Alfa Tradezone implies that the invoice from Resolutions to Ultimate (which purported to charge VAT) was false. The Commissioners rely on the following evidence for the purpose:

(a) that Ultimate failed to provide any paperwork for its April 2006 deals when requested so to do, and stated that it had always made third party payments, its income consisting solely in receipt of commission;

(b) that when their officers visiting Resolutions were told by its director, Mr Hussein, that it had received only commission for participating in deals between Ultimate and Time Corporates, and that the latter would release stock direct to Ultimate;

(c) that Time Corporates' director stated that it did not trade on its own account, but merely passed payment instructions from KEP 2004 to the customers concerned and received a commission for its trouble; and

(d) KEP 2004 informed the Commissioners that it merely acted as "middleman" between a German supplier, Panmax, and its sole UK customer, Time Corporates. Amongst the documents before us is a KEP 2004 invoice to Time Corporates dated 7 April 2006 for 4410 CPUs. As KEP's bank statements show it as not having traded in April 2006, the Commissioners submit, and we accept, that the invoice is either false, or they were otherwise misled.

89. Further, the freight forwarder documents provided by Forward indicate that the CPUs in deal 2 purportedly passed from Imanse (Asset Online appearing in the FCIB evidence relating to that chain using Imanse as its trading name) direct to The Fones Centre, and then to Silverstar. The Commissioners maintain, and yet again we accept, that there is evidence to confirm that the deal documents relating to deal 2 were falsified in an attempt to defraud the revenue, and that the parties which dealt in the chain were known to each other.

90. Officer Armstrong attributed a tax which appeared to have acted merely as an intermediary, i.e. as KEP 2004's agent. We accept the loss identified by Mr Armstrong and his attribution of it to KEP 2004: the loss was unused against any other trader.

Deal 3

91. The defaulting company identified in Mrs Elmer's invoice chain covering deal 3 was Text XS Ltd. It was registered in Longton, Stoke-on-Trent, but operated from Gatsby's Wine Bar in the Ironmarket, Newcastle. Text XS was originally established to arrange promotions by text messages.

93. The invoice chain prepared by Mrs Elmer in relation to deal 3 takes the following form:

No.	Trader	Invoice Date	No. of CPUs	Invoice Total	Invoice No.	Exhibit No
2.	Text XS	11/4/06	1260	£115,849.13	APR06/08	[C4-227]
1.	Silverstar	11/4/06	1260	£117,847.80	2416	[C4-224]
	Broker Fusion	11/4/06	1260	£104,814.89	2569	[C4-219]
-1	Silacom Handels	11/4/06	1260	£153,090.00	S604002	[C4-260]

94. The banking evidence shows that Silacom paid Fusion £104,821.61 on 12 April 2006. Fusion then paid Silverstar in two instalments:

(a) £47,847.80 on 12 April 2006; and

(b) £70,000 on 13 April 2006

95. Silverstar made payment before it itself was paid by Fusion, but not to Text XS, as would have been expected, but rather to Voltrex Options Ltd, a company which appears to have been a foreign exchange provider to Text XS.

96. The freight forwarder documents obtained by the Commissioners from Forward show that the CPUs were released to Text XS by a Spanish company, IT Ventures SL. As the sale by Text XS was intra-UK it was liable thereon for VAT of £17.254.13, but the company made nil returns and remains liable to the Commissioners for that tax.

97. Ms McDonald confirmed that Text XS was a missing trader and was assessed to tax in excess of £1.3 million. The assessment has neither been appealed nor paid. Text XS's director Graham McCullough was disqualified as a director, being regarded as unfit to act due to MTIC risk. Again, we accept that the Commissioners have established that there was a tax loss in the deal chain, and that the invoice chain represents an attempt to defraud the revenue.

Deal 5

98. EP 2004 was also the defaulter identified by Mrs Elmer in relation to deal 5. Once more we have the benefit of an invoice chain she prepared. It shows:

No. Trader	Invoice Date	No. of CPUs	Invoice Total		Invoice No.
6. KEP 2004	28/4/06	6300	£604,044.00	28436	[C4-503]
5. Time Corporates	28/4/06	6300	£605,894.63	R259	[C36-267]*
4. Resolutions UK	28/4/06	6300	£604,784.25	R240(1)	[C36-164]
3. Red (WM)	28/4/06	6300	£605,154.38	29A	[C37-6]
2. The Fones Centre	28/4/06	6300	£607,005.00	721	[C4-495]
1. Silverstar	28/4/06	6300	£618,330.83	2462	[C4-491]
Broker Fusion	28/4/06	6300	£548,100.00	2573	[C4-487]
-1. Imaani Ltd	28/4/06	6300			

* Again there is no invoice in the exhibits, and we therefore rely on and accept the Commissioners', ie Mrs Elmer's, interpretation of their electronic folder records.

99. The Commissioners maintain, and we accept, that the deal chain above Red WM was artificially constructed for the bank records show that Red WM made a payment out of the UK to Alfa Tradezone, once more acting as a third party, on 2 May 2006, having received payment from The Fones Centre, which in turn had been paid £606,998 by Silverstar on the same day.

100. The bank records further show that, after the payment to Alfa Tradezone, the payments continued through to Imaani (including passing through Northcom). Imaani then made payment to Fusion of £548,082.12 on 3 May 2006, completing a circular payment pattern taking the following form:

28 April 2006	Fusion to Silverstar	£260,000
4 May 2006	Fusion to Silverstar	£358,330.83
2 May 2006	Silverstar to The Fones Centre	£606,998.11
2 May 2006	The Fones Centre to Red (WM)	£605,154.38
2 May 2006	Red (WM) to Alfa Tradezone	£603,303.76
2 May 2006	Alfa Tradezone to Asset Online	£600,390
2 May 2006	Asset Online to Northcom	£600,075
3 May 2006	Northcom to Harris Trading FZE	£593,775
3 May 2006	Imaani to Fusion	£548,087.12

101. Again the Commissioners obtained evidence from Forward, as freight forwarder. It shows that the goods were imported by Northcom, which did of course also feature in the payment chain, to The Fones Centre. They rely on that evidence to claim that the invoice documents produced in relation to deal 5 were falsified, and that the invoice chain represents an attempt to defraud the revenue. We accept both those claims.

102. The tax in KEP 2004 invoice 28436 of £89,964 was included in an assessment made against that company [C23-110]. The assessment has not been appealed, nor has it been paid. A Mr Vasey was the director of KEP 2004 and, since he was employed by BMW Motors, was not considered by the Commissioners to be trading. He was interviewed and confirmed that it was his practice to sign blank release notes for goods. Deal 5 was one of what the Commissioners believed to be 830 deals by KEP 2004 with a total value in excess of £291 million. Whilst the invoice chain appears to show that Time Corporates was purchasing from KEP 2004 until 8 May 2006, the evidence indicates that the chain represented constructed rather than actual trading. Once more we are satisfied that the Commissioners have established a tax loss in the chain. In any event, their evidence of such loss was not effectively challenged by Mr Young.

Deal 6

Mrs Elmer's invoice chain for deal 6, which again starts with Text XS, shows:

No.	Trader	Invoice Date	No. of CPUs	Invoice Total	Invoice No.	Exhibit No
2.	Text XS	2/5/06	2205	£215,042.63	MAY/06/01	[C5-40]
1.	Silverstar	2/5/06	945	£93,327.02	2473	[C5-37]
Broker Fusion		2/5/06	945	£82,765.91	2575	[C5-23&24*]
-1	Prodisma GmbH					

*C5-24 is identical to C5-23 except that the prices are quoted in US dollars.

103. In relation to deal 6, the Commissioners were able to extend the invoice chain beyond Text XS to a Spanish supplier, IT Ventures, and thence to an Estonian company, Electronic Devices. As in deal 3, Silverstar did not make payment to Text XS, but rather c/o Voltrex Optics Ltd.

104. The payment pattern revealed by the bank records shows:

3 May 2006	Prodisma to Fusion	£82,765.91
4 May 2006	Fusion to Silverstar	£93,327.02
2 May 2006	Silverstar to Voltrex	£215,042.63

105. In relation to deal 6, the Commissioners made an assessment against Text XS for the VAT due on its sale to Silverstar (C22-138). That assessment has not been appealed, nor has it been paid. It thus represents a loss to the revenue.

106. Ms McDonald identified the tax loss attributable to the deal as £32,027.63 (C5-40, C22-11 and C22-139). Her evidence was not challenged, and so again we accept that the loss she identified occurred, and was unused against any other trader.

107. As we mentioned in relation to deal 3, Text XS was a missing trader and was assessed to tax of £1.3 million. The assessment having neither been appealed nor paid, we are satisfied that the invoice chain for deal 6 represents an attempt to defraud the revenue.

Deal 7

108. At the head of the invoice chain prepared by Mrs Elmer in relation to deal 7 is Okeda Ltd, a company which the Commissioners were informed by undated letter from Time Corporates (C4-205) had "taken over" from KEP 2004 on 9 May 2006. Mrs Elmer's chain shows:

No.	Trader	Invoice Date	No. of CPUs	Invoice Total	Invoice No.	Exhibit No
6.	Okeda	9/5/06	6300	£564,070.50		[C36-273]
5.	Time Corporates	9/5/06	6300	£563,330.25		[C36-267]*
4.	Resolutions UK	9/5/06	6300	£604,784.25	R273	[C37-14]
3.	Red (WM)	9/5/06	6300	£605,154.38	36	[C37-12]
2.	The Fones Centre	9/5/06	6300	£607,005.00	730	[C5-61]
1.	Silverstar	9/5/06	6300	£617,886.68	2501	[C5-56]
Broker	Fusion	9/5/06	6300	£547,974.00	2583	[C5-51]
-1.	Imaani	9/5/06	6300			

* Again the Commissioners do not hold the invoice, and rely for its existence on the contents of their electronic folder. We have examined the contents of the folder carefully and are satisfied that the chain constructed by the Commissioners, in so far as it relies on the folder entries, is complete.

109. The FCIB and other bank evidence, as disclosed in part by Mr Birchfield, shows:

(a) payment by Silverstar to The Fones Centre of £607,005 on 11 May 2006

(b) payment by The Fones Centre to Red WM of £605,154.38 on 11 May 2006

(c) payment by Red WM to Alfa Tradezone (once more as a third party), totalling £603,303.76 on 11 May 2006

(d) there were then sequential transfers through three further non-UK companies' FCIB accounts (including that of Northcom) until payment through Harris Trading FZE to Imaani totalling £593,800 on 12 May 2006. (Harris Trading and Imaani share the same director).

110. On 15 May 2006 Imaani paid Fusion £547,974. Fusion paid Silverstar a deposit of £165,000 on 9 May 2006, and the balance of £452,886.68 on 16 May 2006. Consequently, again there is circularity in the payments in the chain.

111. In our judgment, it is significant that the payment chain in relation to deal 7 is almost, but not quite, a replica of that in relation to deal 5. Certain sums are identical, whilst others vary to a very minor extent. We regard the similarity in the chains as adding to the evidence of orchestration of the deals provided by the circularity in the payment pattern.

112. The information provided by Forward indicates once more that the goods were imported by Northcom which sold direct to The Fones Centre. The Commissioners again rely on that evidence to claim that the invoice documents obtained in relation to deal 7 were falsified, and the invoice chain represents an attempt to defraud the revenue. We accept both those claims.

113. Miss Kandola identified the tax loss attributable to deal 7 as £83,854.13. The Commissioners claim, and we accept, that Okeda hijacked the registration number of Jools Ltd – a company dissolved on 5 April 2005. The signatory on Jools Ltd's Form VAT1 was that of Mr Anjula Perera, who was also said to be the director of Okeda. Miss Kandola made enquiries about Okeda and found that it had left rented premises in Harrow, Middlesex, before January 2006 owing rent, and left no forwarding address. Yet again there was no effective challenge to the evidence as to loss, and we accept that the loss calculated by Miss Kandola occurred. The loss was unused agai9nst any other trader.

Deal 8

114. Once again Okeda appears as defaulter in Mrs Elmer's invoice chain:

No.	Trader	Invoice Date	No. of CPUs	Invoice Total	Invoice No.	Exhibit No
6.	Okeda	17/5/06	6300	£596,641.50	4747	[C36-274]*
5.	Time Corporates	17/5/06	6300	£597,011.63		[C36-156]*
4.	Resolutions UK	17/5/06	6300	£597,381.75	R310	[C36-165]
3.	Red (WM)	17/5/06	6300	£597,751.88	40	[C37-9]
2.	Fones	17/5/06	6300	£599,602.50	734	[C5-93]
1.	Silverstar	17/5/06	6300	£607,005.00	2520	[C5-78]
Broker	Fusion	17/5/06	6300	£537,390.00	2585	[C5-66]
-1.	Imaani	17/5/06	6300			

* Again the Commissioners rely on the evidence of their electronic folder in the absence of the invoices themselves. We are content to rely on that evidence as the truth.

115. The evidence of Mr Birchfield, which we accept, shows the payment chain to have taken the following form:

i. Fusion paid Silverstar £90,000 on 17 May 2006, and made a further payment of £517,005 on 19 May 2006

ii. Silverstar paid The Fones Centre £509,655.31 on 17 May 2006, and £89,993.58 on 22 May 2006

iii. The Fones Centre paid Red WM £509,655.31 on 18 May 2006, and £88,082.96 on 23 May 2006

iv. Red WM paid Alfa Tradezone in two instalments, the first on 18 May 2006 and the second on 23 May 2006. The instalments then each moved through three FCIB accounts (including that of Northcom) before reaching Imaani on the same dates

v. Imaani paid Fusion £537,372.22 on 19 May 2006

That evidence plainly indicates circularity in the payment chain relating to deal 8.

116. Forward provided a freight forwarder's release note from Northcom to The Fones Centre, thus confirming, in the Commissioners' submission, an overall fraudulent picture. We accept that submission, and find that there was a tax loss of £88,861.50. Once more the loss in question was unused against any other trader.

Deal 9

117. Yet again the invoice chain prepared by Mrs Elmer shows Okeda at its head:

No. Trader	Invoice Date	No. of CPUs	Invoice Total	Invoice No	Exhibit No
7. Okeda	23/5/06	7790	£661,371.00		[C36-171]*
6a. UK Communications	23/5/06	1000	£85,000.00		
6b. UK Communications	23/5/06	7790	£662,150.00		[C36-171]
5a. Resolution	23/5/06	1000	£94,500.00	R252	[C36-166]
5b. Resoultion	23/5/06	7790	£662,150.00		[C36-166]
4a. Ultimate Wholesale	23/5/06	7790	£662,539.50	1615	[C5-135]

4b. Ultimate Wholesale	23/5/06	1000	£94,550.00		
3a. Bluestar Trading	23/5/06	7790	£664,097.50	40	[C5-131]
3b. Bluestar Trading	23/5/06	1000	£94,750.00	734	
2. Tradex Corporation	23/5/06	1290	£129,975.56	Silverstar 05006	[C5-125&127]
1. Silverstar	23/5/06	1290	£131,567.10	2523	[C5-116]
Broker Fusion	23/5/06	1290	£116,909.81	2591	[C5-110&111]

-1. Prodisma GmbH

* Once more we accept the evidence contained in the Commissioners' electronic folder as that of the existence of the invoice.

118. The evidence of Mr Birchfield showed the payment details above Ultimate Wholesale to be different from the invoice chain prepared by Mrs Elmer. The payment chain, with exhibit references where more than one payment was made on the same day, initially took the following form:

Prodisma to Fusion	26/05/06	£116,908.81	
Fusion to Silverstar	26/05/06	£111,567.10	
	31/05/06	£20,000	
Silverstar to Tradex	23/05/06	£129,975.56	
Tradex to Bluestar	23/05/06	£80,000	(C5-147)
	23/05/06	£200,000	(C5-149)
	23/05/06	£290,000	(C5-151)
	24/05/06	£160,000	(C5-153)
	24/05/06	£119,645.81	(C5-155)
	24/05/06	£42,000	(C5-158)
Bluestar to Ultimate	23/05/06	£80,000	(C5-148)
	23/05/06	£200,000	(C5-150)
	23/05/06	£290,000	(C5-152)
	24/05/06	£160,000	(C5-154)

	24/05/06	£119,645.81	(C5-156)
	25/05/06	£39,934.35	(C5-157)
Ultimate to Alfa	23/05/06	£1,148,452.66 part	(C24-90) Tradezone
	23/05/06	£290,000	(C24-107)
	24/05/06	£160,000	(C24-107)
	24/05/06	£119,648.81	(C24-107)
	25/05/06	£596,215.80 part	(C24-107)

119. We observe that the two payments made by Ultimate on 23 May 2006 were again made to Alfa Tradezone, as a third party, and not to Resolutions. The moneys so paid were in turn paid to other non-EU company accounts held at the FCIB, including those of the traders Northcom, Imanse and Tradex, which feature in others of the transactions with which we are concerned. As the payments so made did not involve Resolutions, UK Communications or Okeda, the alleged defaulter, the Commissioners maintain, and we accept, that the invoices and any associated documents produced in the chain above Ultimate Wholesale were false, and represented an attempt to defraud the revenue.

120. The tax loss assessed on Okeda, which has neither been appealed nor paid, was £115,739. In the absence of any challenge to the loss claimed, we accept that it occurred and was unused against any other trader. We might add that the Commissioners identified a further loss in the chain in relation to the UK Communications (C4-133).

Deal 10

121. Deal 10 was unusual in being a split deal, but Mrs Elmer's invoice chain shows that the primary consignment of 6300 CPUs originated from Okeda.

No. Trader	Invoice Date	No. of CPUs	Invoice Total	Invoice No. Exhibit No
7b. Okeda	23/5/06	7425	£646,476.19	JNA0022 [C5-241]
6b. UK Communications	23/5/06	7425	£646,912.41	RES022 [C5-170]
5b. Resolutions UK	23/5/06	7425	£647,348.63	R351 [C5-168]
4b. Ultimate Wholesale	23/5/06	7425	£647,784.84	1613 [C5-232]
3b. Bluestar	23/5/06	7425	£413,614.69	23.50-2 [C5-213&214]
2b. Leisure Communications	23/5/06	1575	£141,572.81	1506047 [C5-201]

1. Silverstar

6a. Okeda	25/5/06	6300	£589,239.00	JNA0041	[C5-162]
5a. UK Communications	25/5/06	6300	£589,609.13	RES041	[C5-173&238]
4a. Resolutions UK	25/5/06	6300	£589,979.25	R368	[C5-171]
3a Red WM	25/5/06	6300	£590,349.38	45	[C5-164]
2a. The Fones Centre	25/5/06	6300	£592,200.00	740	[C5-167]
1. Silverstar	25/5/06	7875	£745,801.88	2538	[C5-183]
Broker Fusion	25/5/06	7875	£661,893.75	2592	[C5-178]
-1. Imaani					

122. On the basis of the banking evidence of Mr Birchfield, we find that:

i. In relation to the "A" aspect of the chain

(a) Silverstar paid The Fones Centre £592,193/14 on 29 May 2006

(b) The Fones Centre paid Red WM £590,349.38 on 30 May 2006

(c) Red WM paid the third party Alfa Tradezone £588,498.76 on 30 May 2006

(d) The payments were then distributed to various FCIB accounts held by non-UK companies before a payment was made to Imaani of £579,600 on 30 May 2006

ii. In relation to the "B" aspect of the chain

(a) Silverstar paid Leisure Communications £141,572.81 on 24 May 2006

(b) The Commissioners believe, but are unable to prove, that Leisure Communications made a payment to Bluestar

(c) Bluestar paid Ultimate Wholesale £587,944.40 and £50,000 on 23 May 2006

(d) Ultimate Wholesale paid the third party Alfa Tradezone £585,481.40 and £50,000 on 23 May 2006

(e) Payments of funds were then made to various FCIB accounts held by non-UK companies

123. Once more the payment pattern was circular, at least in relation to the A aspect of the chain, Imaani paying Fusion in two instalments, one of £299,987.19 on 25 May 2006, and the other of £361,875.89 on 30 May 2006. In turn, Fusion paid Silverstar in two instalments, the first of £315,000 on 25 May 2006 and the second on £340,801 on 31 May 2006.

124. Dealing with both aspects of the invoice chain, the banking evidence shows that the documentation produced in relation to the deals above Red WM, in part A, and above ultimate, in part B, was constructed. As we mentioned in relation to deal 7, Okeda hijacked the VAT registration number of another company and failed to account for the tax for which it was liable. The tax losses attributed to deal 10 were £87,759 and £96,283.69, neither of which figures was unused against any other trader. We are satisfied, and find, that the loss of tax was connected with the fraudulent evasion of VAT..

Deal 4 – the contra deal

125. In relation to deal 4, Mrs Elmer's invoice chain relating to the clean chain, shows:

Clean chain

No.	Trader	Invoice Date	No. of CPUs	Invoice Total	Invoice No.
7.	International Trading	5/4/06	3465	£270,963.00	IT.05.001.04 [C4-307]
6.	4A Developments	5/4/06	3465	£596,641.50	01/050406 [C4-303-305]
	(Contra trader)				
5.	Chatterbox Comms	5/4/06	3465	£597,011.63	050406A [C4-297]
4.	Eldonstows	5/4/06	3465	£597,381.75	ELDINV [C36-376]* 050406A
3.	DP Resources	5/4/06	3465	£597,751.88	DPINV [C4-320&321] 050406A
2.	International Business	5/4/06	3465	£599,602.50	DL134/112 [C4-289&322]
1.	Silverstar	5/4/06	3465	£607,005.00	2406 [C4-286&291]
Broker	Fusion	5/4/06	3465	£537,390.00	2556 [C4-281&282]
-1.	Prodisma				

* Once more the invoice was not produced, and the Commissioners rely for its existence of the contents of their electronic folder. We accept their evidence as proof of its existence.

126. The stock involved in deal 4 is said to have been offered to Fusion by Silverstar on 20 or 21 March 2006. At that time it is aid to have been held by Forward. It is then said that the stock was moved to the premises of another freight forwarder, Peat Logistics Ltd, where it was inspected by Christian Govan on 24 March 2006. He claimed to have made a special trip to inspect the stock as Fusion had never previously dealt with Peat. For reasons which were not explained, the transaction was not taken further.

127. There matters rested until 5 April 2006. On that date 4A Developments placed a purchase order for what Fusion accepts were the same goods as those referred to in the last preceding paragraph. The purchase order is at C4-306, and shows the vendor company to be International Trading SRL of Rome. International Trading invoiced 4A Developments on 5 April 2006, the invoice showing no VAT. On the basis of an absence of VAT on the invoice, the Commissioners claim that we can be satisfied that the stock was imported on 5 April 2006, and not earlier: they say that the documentary evidence clearly shows that the stock could not have been in Silverstar's ownership before that date.

128. In Mr Young's closing submissions, he attempted to disprove the Commissioners' claim that the goods were only imported on 5 April 2006. He did so in part by reference to a schedule prepared by the Govan brothers to which no reference was made when they gave evidence and which Mr Young admits to being a Fusion internal document not intended for use in tribunal. In the circumstances, we ignore the document for evidential purposes. We do not accept that the goods were imported on 5 April 2006.

129. The schedule is, however, of interest to us in another context. In evidence the Govan brothers claimed to have little, indeed no knowledge, of the contents of the many documents obtained by the Commissioners, saying that they had not examined them. Yet in the schedule to which we have just referred, reference is made to every exhibit relevant to its contents. Clearly, the brothers' evidence was untrue.

130. The payment chain for the clean chain, as explained by officer Birchfield, started on 6 April 2006 when Prodisma paid Fusion, which in turn paid Silverstar, and that company then paid International Business Focus. The last named company, which is now in liquidation, did not make payment to DP Resources until 21 April 2006, whereupon the money flowed through the remainder of the chain on that date.

Dirty chain

131. Officer Graham Taylor was responsible for the affairs of 4A Developments. To cover the tax claimed by Fusion in the clean chain, he allocated £48,905 of a VAT input tax repayment claim made by 4A Developments totalling £233,885.40 in respect of a supply of 1864 camcorders purchased from LTH Ltd and sold to Handels GmbH of Austria. Mr Taylor explained that he had allocated the tax losses to a particular broker chain on a value basis, and

that Fusion's input tax claim had been allocated to the nearest tax loss that exceeded its input tax claim by the lowest possible sum, and which loss was unused.

132. Details of their transactions are as follows:

1.	LTH	11/5/06	1864	£1,570,373.40	04/110506
Broker	4A Developments	11/5/06	1864	£1,574,753.80	04/110506

-1 Handels GmbH

133. 4A Developments was liable to VAT of £47,600.44 in respect of its deal in the dirty chain, but maintained that it was not liable to the Commissioners for the VAT received because it had made input tax repayment claims to offset that liability. The Commissioners claim that the input tax repayment claims were themselves connected to fraudulent tax losses, and accordingly 4A Developments was not entitled to offset.

134. As we have already explained, the goods concerned were held by Peat. The latter company had a director called Martin Monster, a Dutch national. Subsequent to the relevant deal, on 1 December 2006 to be precise, he made a far reaching statement to the Dutch revenue authorities admitting his knowledge of and involvement in MTIC fraud, albeit with companies other than Peat (C37-57).

135. On the basis of the evidence of officer Taylor, we find that in its quarterly accounting period 06/06 4A Developments made 118 deals in which it acquired goods from Europe and sold them on to UK customers, charging VAT in the process. Those acquisitions led 4A Developments into a VAT liability in excess of £14.3 million. In order to off-set its liability, 4A Developments entered into 68 broker deals in the same period selling goods to Europe in zero-rated sales, thus putting itself in a position to reclaim the input tax on its purchases. The Commissioners traced 49 of the 68 broker deals back to a tax loss. To a company called Woodworks Ltd they traced a £2.3 million loss, to one called LTH an £8.6 million loss, to C&B Trading a £1.2 million loss, and to Open Line Trading a £2.6 million loss. The remaining 19 deals they traced back to Highbeam Ltd, itself a contra-trader. Highbeam carried out 18 broker deals in the relevant period, all of which led back to Open Line Trading Ltd, and to a tax loss (C2-309). The tax loss was unused against any other trader. The input tax claimed by 4A Developments in the period totalled £14,775,940.

136. We are satisfied on the balance of probabilities that the input tax of £48,905 identified by officer Taylor in the dirty chain represents a loss of tax by the Commissioners, and is connected to the fraudulent evasion of VAT.

Questions 1, 2 and 3 (see [18] above)

137. We have found a tax loss in each one of the 10 deal chains with which we are concerned, and have also found that in each deal chain the loss resulted in the fraudulent evasion of VAT. Consequently, we answer questions 1 and 2 in relation to each deal in the affirmative. And, in the table setting out the invoice chain for each deal, as produced by Mrs Elmer, for each of deals 1 to 3 and 5 to 10, and that for the clean chain in deal 4, we have clearly indicated that each of Fusion's transaction formed part of a contrived chain of transactions, the purpose of which was to effect a fraudulent loss to the revenue connected with the evasion of tax. We therefore also answer question 3 in relation to each deal in the affirmative.

Question 4

138. Having dealt with the first three of the issues before us we then turn to consider the fourth and last: did Fusion know that its transactions were connected to the fraudulent loss of VAT elsewhere in its transaction chains or should it have known that they were so connected?

139. The law we must apply in answering that question is to be found in the ECJ decision in *Kittel*, and in the decision of the Court of Appeal in *Mobilx*. In *Kittel*, the ECJ refused a claim by the appellant company to repayment at the end of an accounting period of the excess of its input over output tax. The questions in that case posited "a recipient of a supply of goods who has entered into a contract in good faith without knowledge of a fraud committed by the seller". The referring Belgian court also wished to know if the answer of the ECJ would have been different had the taxable person known or should have known that by his purchase he was participating in a transaction connected with the fraudulent evasion of VAT. Having reiterated that a trader's right to deduct in respect of a transaction was unaffected by other transactions, whether previous or subsequent, the ECJ confirmed at [51] that "traders who take every precaution which could reasonably be required of them to ensure that their transactions are connected with fraud, be it the fraudulent evasion of VAT or other fraud must be able to rely on the legality of those transactions without risk of losing their right to deduct the input VAT…" The ECJ then dealt with the converse case stating, inter alia:

a) where the tax authorities find that the right to deduct has been exercised fraudulently, they are permitted to claim repayment of the deducted sums retroactively (see [55]);
b) in the same way, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with the fraudulent evasion of VAT, must be regarded as a participant in that fraud (see [56]) that is because in such a situation the taxable aids the perpetrators of the fraud (see [57]).

140. The ECJ concluded by determining that "…where it is ascertained, having regard to objective factors, that the supply is to a taxable person who knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of

VAT, it is for the national court to refuse that taxable person entitlement to the right to deduct" (see [61])

141. In *Mobilx* the Court of Appeal considered the *Kittel* judgment in some detail and, from the leading judgment of Moses LJ, the questions we must ask in reaching our conclusion emerge as:

1) whether the Govan brothers, as owners and directors of Fusion, exercised due diligence, or did enough to protect Fusion; and
2) "whether he should have known that the only reasonable explanation for the circumstances in which his transaction took place was that it was connected to fraudulent evasion of VAT" (see [74] and [75] of the judgment).

142. At [111] of his judgment in *Red 12 Trading Ltd* v HMRC [2009] EWHC 2563 (Ch) Christopher Clarke J explained that:

> "…in determining what it was that the taxpayer knew or ought to have known the tribunal is entitled to look at the totality of the deals affected by the taxpayer (and their characteristics), and at what the taxpayer did or omitted to do, and what it could have done, together with the surrounding circumstances in respect of all of them."

143. Direct evidence of knowledge or means of knowledge is not to be expected, rather we must rely on inferences drawn from primary facts – see for example, *Dadourian Group International Ltd v Simms* [2009] EWCA 169 (Ch) where, at para 89, the Court of Appeal dealt with a submission to the contrary:

> "At times [counsel] came close to suggesting that fraud can only be established where there is direct evidence. If that were the case, few allegations of fraud would ever come to trial. Fraudsters rarely sit down and reduce their dishonest agreement to writing. Frauds are commonly proved on the basis of inviting the fact-finder to draw proper inferences from the primary facts."

144. It is against that jurisprudential background that we turn to consider the submissions of the parties.

Submissions of the parties

145. Mr Young's closing written submissions ran to 81 pages; those of Mr Sutherland-Williams to 49 pages, later supplemented by a further 25 pages. We have considered all the submissions most carefully, and have based our conclusion on them all. However, we observe that whilst Mr Sutherland-Williams' are focused on particular points, those of Mr Young are more of a "broad brush" variety attacking the Commissioners' assertions, and are largely based on factual matters. Consequently, our summary of Mr Young's submissions is much

shorter than that of Mr Sutherland-Williams since a great many of the former's points have been taken into account in our findings of fact.

Submissions for Fusion

146. Mr Young submits that the Commissioners have failed to adduce any evidence that begins to satisfy the means of knowledge test, that they have failed to adduce any evidence that Fusion decided to participate in any transaction connected with fraud, and that they have "not begun to establish that [Fusion] was directly and knowingly involved in the fraudulent evasion of VAT". He observes that the material presented to us was the result of years of *ex post facto* reconstruction by the Commissioners using extensive statutory powers which only they possess; Fusion knew only the parties with which it traded, and its knowledge or means of knowledge must be considered as at the time of transactions in question. Whilst some of Fusion's deals were back-to-back, others were not. Back-to-back trading was not unusual and should not be regarded so. Where transactions were not back-to-back, and customers did not require precisely the quantity of stock held by Fusion, that was evidence of their legitimacy. It was not enough for the Commissioners to assert that Fusion was likely to have known that there was a missing trader somewhere in a chain of transactions: they must demonstrate that, at the time of entering into the transactions, Fusion knew, or had the means of knowing, that its transactions were (as opposed to likely to be) connected with fraud.

147. The Commissioners assert that the transactions in point were planned. Mr Young asks, by whom? Was Fusion aware of the planning? Was Fusion a party to those plans? He maintains that, in inviting the tribunal to conclude that Fusion knew the transactions were not legitimate, the Commissioners rely on subsequently discovered links between apparently separate and distinct parties, subsequent events surrounding the FCIB, subsequent events regarding Fusion's trading parties or, even more remotely, businesses in supply chains in which Fusion was not involved. Effectively, and absenting any allegations of conspiracy, the Commissioners are inviting the tribunal to make a decision that could only be based on hindsight.

Submissions for the Commissioners

Knowledge

148. Mr Sutherland-Williams submits that Fusion knew from the pattern of transactions it entered into that they were not legitimate; it may not have known the identities of the defaulting traders, but it was likely to have known that there was a missing trader somewhere in the chain. The chains of transactions were planned and we should infer that Fusion, as a participant, had actual knowledge of the fraud.

149. He also maintains that the fact that the transactions appeared too good to be true should have raised concern. In support, Mr Sutherland-Williams relies on Fusion's experience in the market, the ease with which transactions came about (one supplier, one freight forwarder), and the significant mark up Fusion obtained.

150. The evidence suggested that the Govan brothers were willing to overlook shortcomings in the transactions and ignored warning signs because, in Mr Sutherland-Williams contention, they knew the transactions in which Fusion participated were connected to fraud. The examples he offered were an absence of warranties, and the fact that some of the goods dealt in were potentially damaged.

151. Mr Sutherland-Williams further submits that the nature and pattern of Fusion's deals gives rise to a clear inference that Fusion must have been a knowing participant in an overall scheme to defraud the revenue because:

1) it was able to participate in very high turnover deals with but one supplier, a very small customer pool and with minimal effort.

2) it took little or no commercial risk in its transactions in that it often made a first part payment followed by payment of the balance only after the transaction had been completed

3) its bank statements showed little activity on its account in the relevant period, beyond the transactions in dispute (C4-16, C4-223 and C5-82 to 84).

4) it was unlikely that traders involved in pre-determined and artificially structured transactions carried out to facilitate a fraud would have involved an unwitting accomplice with the risks and problems that may have caused.

152. Other evidence which Mr Sutherland-Williams points to as lending itself to knowledge includes Fusion's payment of but lip service to the checks it carried out. Before dispatching goods, it did not await the results of VRN checks, and dispatched goods on the dates deals were carried out notwithstanding that payment for them had not been made. Bearing in mind the environment in which Fusion traded, the fact that it did not 'shop around' when purchasing goods to obtain the best market price also indicated knowledge of fraud. And notwithstanding the number of traders involved and volumes of goods, the chains of deals themselves were usually completed within a matter of hours yet all the individual deals were said to have been carried out following negotiation. In Mr Sutherland-Williams' submission, such negotiations as were carried out must have been completed very quickly to facilitate the trade; the documentary evidence revealed chains of deals completed in a couple of hours, and others where paperwork was put together only after the event.

153. In its deals with Silacom Handels and Prodisma, Mr Sutherland-Williams observes that Fusion received payment in US dollars. No explanation was offered for such receipt, which appeared most odd since both supplier and customer were in Europe and dealing principally in £ sterling and €.

154. Against that background, Mr Sutherland-Williams submits that Fusion's transactions were without commercial substance and appeared contrived; the Govan brothers were fully aware of the risks involved in trading in substantial quantities of CPUs, and of the fraud in that industry.

Means of Knowledge

155. In dealing with Fusion's means of knowledge of a connection with fraud, Mr Sutherland-Williams first emphasises that from the outset the Govan brothers accepted having had a general knowledge of fraud within their trade sector at the relevant times. He maintains that their level of knowledge would have been increased by a number of other factors, namely visits they received from the Commissioner's officers, a lack of due diligence, receipt of Notice 726 and certain other signals, and by an absence of credibility in their evidence. Mr Sutherland-Williams submits that the due diligence undertaken by Fusion was unconvincing, largely consisting of basic checks at the start of trading and site visits to freight forwarders and Silverstar. He further contends that Fusion carried out very few, if any, external checks, and in particular did not carry out credit checks on customers. In the judgment of the Commissioners Fusion was given "warning signs"; it would have to be extra vigilant as a result of its trading activities, and take extra care because of the risk of fraud within its trade sector. Mr Sutherland-Williams claims that the Govan brothers refused to accept those signals as warnings. Instead, there was something of a "light touch" in Fusion's due diligence and commercial checks, against which background Mr Sutherland-Williams invites us to conclude that that was by design, either by turning a blind eye or because Fusion knew what was going on, and saw no purpose in making thorough checks.

156. Mr Sutherland-Williams also notes that the speed at which Fusion's deals were carried out appeared to have left little time for it to have carried out any business checks such as checking the authenticity of the goods, warranty checks, and checks as to the source of the supply. He submits that failure to make such checks meant that potentially as purchaser Fusion would have been left holding stock – a matter that did not appear to have concerned the Govan brothers.

157. In Mr Sutherland-Williams' submission, Fusion failed to rebut the Commissioners' case in a number of respects which were relevant to the credibility of its evidence:

a) it was plain that Fusion was working closely with Silverstar in order to facilitate the deals in question;

b) no evidence was provided by Silverstar or by Angela Edwards, Silverstar's manager;

Conclusion on question 4 – Knowledge or means of Knowledge

158. Mr Sutherland-Williams submits that there was a great deal of evidence to suggest that Fusion:

a) should have known from the circumstances that surrounded its transactions that they were connected to a fraudulent evasion (Mobilx, para 5a);

b) chose to ignore obvious inferences from the facts and circumstances in which it was trading (Mobilx, para 61);

c) chose to ignore that the only reasonable explanation for the circumstances in which its transactions took place was that they were connected to a fraudulent evasion of VAT (Mobilx, paras 75 and 82);

d) chose to ignore circumstantial evidence and the obvious explanation as to why it was presented with the opportunity to make a large and predictable reward over a short period of time (Mobilx, para 84);

e) taken together, the facts amounted to a series of warning signals which could have caused any honest trader in Fusion's position to ask the most searching questions about the propriety of the transactions in which it was engaged (para 74).

Deal 4 – The Contra Deal

159. We consider it necessary to set out Mr Sutherland-Williams' submissions on deal 4 in full. He claims that the tax loss in chain 4 is made out by the involvement of 4A Developments which acted as both a broker and acquirer from the EU in relation to its quarterly accounting period 06/06. He submits that the *Kittel* test , which "is simple and should not be over-refined" (*Mobilx* at [59]), establishes that

a) a taxable person who knows or should have known that the transaction which he is undertaking is connected with the fraudulent evasion of VAT is to be regarded as a participant (*Mobilx* at [43])

b) if a taxpayer has the means at his disposal of knowing that by his purchase he is participating in a transaction connected with the fraudulent evasion of VAT, he loses his right to deduct (*Mobilx* at [52], *Brayfal* at [4])

c) a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion.

160. He also claims that those principles apply whether the chain in point is 'dirty' or 'clean' (but forms party of a contra-scheme); the essential elements of the tests remain those we set out at [?] above.

161. Mr Sutherland-Williams maintains that the simplicity of the test can be applied to deal 4, and that we may answer all the questions it raises in the affirmative:

a) we can be satisfied on the balance of probabilities that there was a tax loss in the dirty chain: that 4A Developments was acting both as a broker and a UK acquirer with a view to generating tax losses to the Commissioners could be in little doubt
b) equally, the overall purpose of that contra scheme could only reasonably concluded to be fraudulent
c) there could be little doubt that deal 4 was connected with the fraudulent evasion of VAT: the invoices and other evidence show a clear chain through 4A Developments to Fusion
d) the ultimate question in relation to the contra-deal was whether Fusion knew or should have known that the transaction it was undertaking was connected with the fraudulent evasion of VAT.

162. Mr Sutherland-Williams contends that the contra-deal reveals the complicity of Fusion in terms of the overall fraud taking place. The company was playing the same part as it did in the defaulter chains, namely acting as broker. He maintains that we should infer that Fusion must have known what was taking place in relation to deal 4, and the role it would be playing in it. It did not matter whether Fusion knew precisely what aspect of the chain would be involved in the fraud. The primary test of knowledge
or means of knowledge was that the transaction was going to be used to facilitate a fraud; "it cannot matter a jot" whether the fraud/tax evasion took place at the time or afterwards (*Mobilx* at [62]):

> "If the circumstances of the purchase are such that a person knows or should have known that his purchase is or will be connected with fraudulent evasion, it cannot matter a jot that the evasion precedes or follows that purchase. The trader's knowledge brings him within the category of participant. He is a participant whatever the stage at which the evasion occurs."

163. Whilst in *Brayfal* at [20] the question was phrased in terms of whether the trader knew or ought to have known that the contra-trader was a fraudster, Mr Sutherland-Williams submits that Kittel does not require that degree of knowledge. He relies for the purpose on the judgment of Briggs J in *Megtian Ltd v Commissioners of Revenue and Customs* [2009] EWHC 18 (Ch) where the learned judge held:

"37. In my judgment, there are likely to be many cases in which a participant in a sophisticated fraud is shown to have actual or blind-eye knowledge that the transaction in which he is participating is connected with that fraud, without knowing, for example, whether his chain is a clean chain or dirty chain, whether contra-trading is necessarily involved at all, or whether the fraud has at its heart merely a dishonest intention to abscond without paying tax, or that intention plus one or more multifarious means of achieving a cover-up whilst the absconding takes place.

38. Similarly, I consider that there are likely to be many cases in which facts about the transaction known to the broker are sufficient to enable it to be said that the broker ought to have known that his transaction was connected with a tax fraud, without it having to be, or even being possible to be, demonstrated precisely which aspects of a sophisticated multifaceted fraud he would have discovered, had he made reasonable enquiries…"

164. Mr Sutherland Williams further submits that what is required is evidence of the taxpayer having knowledge or the means at his disposal of knowing that by his purchase he was participating in a transaction connected with the fraudulent evasion of VAT, wherever that evasion may lie in the chain. As Christopher Clarke J observed in *Red 12 Trading Ltd v Commissioners of Revenue and Customs* [2009] EWHC 2563:

> "The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole." (adopting *Hall v Lorimer* [1992]STC 599)

165. Unlike the case of *Blue Sphere Global Ltd v Commissioners of Revenue and Customs [*2009] EWHC 1150 (Ch), Mr Sutherland-Williams maintains that the present is not a case where Fusion had no knowledge at all of what was taking place. He maintains that in the light of the evidence presented by Fusion, the Commissioners are entitled to say that it must have been aware that it was involved in a scheme to defraud the Commissioners, or at the very least had the means of knowing and chose to "turn a blind eye" when Silverstar came back to it with what appeared to have been a repeat offer of stock: the tribunal was entitled to look at the factual matrix of deal 4.

166. Whilst accepting that both the judgments in *Blue Sphere* and *Commissioners of Revenue and Customs v Livewire Telecom Ltd* [2009] EWHC 15 (Ch) referred to the concept of conspiracy as a requirement in contra-trading cases, and that the statement of case in the instant case contained no allegation that Fusion was a "dishonest conspirator", Mr Sutherland-Williams also submits that it did not follow that Fusion's appeal must succeed in relation to deal 4.

167. He contends that it is unclear from those judgments which definition (and sometimes in which context) the word 'conspiracy' is being employed. There can be both civil and criminal conspiracy, a simple conspiracy, and an unlawful means conspiracy. Equally, there is dishonest assistance and the tort of conspiracy, which many regard as being distinct. Similarly conspiracy

can be used in a non-legal context, e.g. a conspiracy of silence. Mr Sutherland-Williams submits that it is perhaps for that reason the courts have more recently tended to adopt the more general "participation" test. The Commissioners have always maintained that Fusion was a participant, and that it either knew or ought to have known what was going on. Per *Kittel* : "57. This is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice."

168. Consequently, Mr Sutherland-Williams yet further submits the decision at [101] to [103] in *Livewire*, where Lewison J appears to have suggested that in the case of alleged contra-trading the taxable person has to be aware of:

a) the dishonest failure to account for VAT by the defaulter or missing trader in the dirty chain, or
b) the dishonest cover-up of that fraud by the contra-trader

must now be read in the light of the subsequent Court of Appeal judgment in *Mobilx* and its present approach to *Kittel.*

169 Equally, he contends that the Chancellor's comments in *Blue Sphere* must also be read in the light of the fact that the Court of Appeal judgment in *Mobilx* imports no such requirement. Unlike *Blue Sphere*, the Commissioners do maintain that Fusion was a participant (as defined) in what was going on and, in such circumstances, the answer to the Chancellor's question, "How could [Fusion] have known of any fraud before it happened?" became obvious if the tribunal accepted that Fusion knew that deal 4 was contrived to facilitate a fraud on the Commissioners. Equally, he adds, in such circumstances Fusion could be a participant and have knowledge of the fraud before it took place.

170. Mr Sutherland-Williams concluded his submissions on deal 4 by maintaining that the tribunal is entitled to examine the trading pattern and circumstances in which the trading occurred in determining Fusion's state of knowledge, be it active or constructive.

Conclusion on deals 1-3 and 5-10

171. In reaching our conclusion, we should first point out that we did not find the Govan brothers' evidence credible, particularly when they sought to reject that of the Commissioners as to the pattern and extent of the fraudulent trade in MTIC goods. Richard Govan's evidence, in particular, proved most unhelpful. He prevaricated throughout his cross-examination. He refused – a word we do not use lightly – to answer questions put to him, but rather chose to reframe them and answer them as reframed. Having adopted his brother's witness statement as his evidence-in-chief, he then proceeded to disclose that he did not have personal knowledge of many matters the statement contained. As a result, we consider very little of his evidence to be reliable.

172. It is common ground that there is a genuine grey wholesale export market in CPUs, but we are satisfied that Fusion's disputed deals were not part of it. In our judgment, the Govan brothers must have known that the company was not dealing in the legitimate wholesale market as all the deals were back-to-back, i.e. involved the same number, make and model of CPUs, the company was never left with surplus stock following a deal, and the transactions were carried out with unexplained and unnecessary haste. Further, it did not require payment for the goods it supplied until after the transactions were completed, despite the customer having entered into no credit agreement, and never having had its credit worthiness checked. Additionally, Fusion never paid in full for CPUs before supplying them to its foreign customers. On most occasions it did, however, pay a deposit to Silverstar, the amount thereof seemingly being determined by the amount of cash it had available at the time, rather than on any other basis. All the indications are that when deposits were paid, they were paid voluntarily, and we so find. In making payment as it did, Fusion took a limited commercial risk, as Mr Sutherland-Williams submitted. That was at least an indicator to the brothers that the company was engaged in fraudulent trading.

173. Not only were all the deals the subject of the appeal completed in the course of a single day, whilst the CPUs were in the UK they remained in the possession of a single freight forwarder. As we have said, no reason for the haste in completing the deals was offered, the Govan brothers simply saying that it was an agreed term of trade. That haste alone would, in our judgment, have put any legitimate trader on notice that a deal was not an ordinary commercial transaction. Despite each deal being completed so quickly, there was then a delay before the customer made payment to Fusion. We regard that delay as further evidence of uncommerciality, and indicative of pre-arrangement of the deals.

174. As Fusion made no credit checks on its customers and obtained no trade references from them, it was unable to say whether the customers constituted a high failure risk. In our judgment, in failing to obtain references of any sort, Fusion clearly demonstrated that the checks it did in fact make were superficial and designed mainly to give the impression that the company was taking proper precautions. We consider the matters referred to in this and the last preceding paragraph clearly to indicate that Fusion became knowingly drawn into VAT fraud.

175. We might add at this juncture that the Commissioners also rely on the fact that every company involved in every chain of transactions, as constructed from the invoices, made a profit on its own deals as proof of Fusion's knowledge of its transactions being connected with fraud. Mr Young, rightly in our judgment, submits that there was no reason why Fusion should have known the profits achieved by other traders in the various chains. Consequently, we do not take that matter into account in reaching our conclusion.

176. We accept Mr Sutherland-Williams' submission that the chains of transactions concerned, as revealed by the invoices, were planned; indeed we believe that eventually Mr Young accepted that to be the case. We agree with Mr Sutherland-Williams that Fusion must also have

known from its participation in very high turnover deals which it had insufficient cash itself to finance, but one supplier, a very small customer pool, and its part in events required minimal effort, that they were not legitimate. We do not accept that the deals were negotiated and carried through as the Govan brothers claimed, for the time available, taking account of the business checks required, such as checking the authenticity of the goods, warranty checks, and the preparation of the paperwork associated with the export of goods, was simply insufficient for the purpose. For example, in deal 1 a mere 4 ½ hours elapsed between the goods arriving in the UK, i.e. at Forward, and Fusion giving the order for their shipping abroad. In that period the invoice evidence shows that no less than 7 purchase and related sale transactions were negotiated from scratch and carried through to completion. As we earlier indicated, at [?], the email evidence relating to the various deals in the chain indicated that the transactions were not commercial, but rather were an example of "window dressing". Fusion must have been aware that the paperwork for its own part in the chains was anything but in order, and indicative of the pre-arrangement of its deals.

177. In our judgment, no legitimate trader with the knowledge that the Govan brothers had of the computer industry in general and the wholesale market in CPUs in particular would have used the trading model they described. They provided no explanation for the model, which we consider to have been devoid of commercial reality. Had they carefully considered the transactions in which Fusion was involved, they would have found it impossible to conclude that the deals were other than contrived and connected with fraud. We so find for a variety of reasons, none of which involves our looking at matters with hindsight.

178. First, a trader operating in a legitimate market in goods worth hundreds of thousands of pounds would not have dealt with other traders without first satisfying itself that its suppliers could supply what they had contracted to supply, and its customers could purchase what they had contracted to buy. Whilst Fusion could derive some comfort from its knowledge of Silverstar that that company would comply with its contractual obligations, in the absence of any checks on its customers beyond basic registration details, it had no information to satisfy itself that the customers could pay for goods ordered. Fusion was altogether too eager to place purchase orders with Silverstar without having any assurance that it would itself be paid for goods ordered, or without obtaining any payment guarantee. We agree with the Commissioners, and infer from all the evidence adduced, that Fusion knew that Silverstar and its customers would not let it down, for all the transactions had been pre-arranged and were part of a contrived scheme.

179. There is then the evidence adduced as to how title to CPUs passed from one trader to another in a chain of transactions. The brothers' evidence on the point was vague; it was also unconvincing. They invited us to accept that, although the indications were that each trader in a chain retained title to the goods until it was paid in full, on the documentary evidence indicating that a transaction was complete, the supplier did in fact transfer title to its customer, so that the

customer could then trade them to its own customer. As has been said in other cases of a similar nature to the present one, it defies both logic and commercial reality that each trader in a chain, having claimed by means unsupported by evidence acquired a title of some sort to extremely valuable goods, not merely released possession of them, but did so before receiving payment for them, or without obtaining any security to assure payment. Alternatively, the brothers claimed that, even if Fusion did not obtain a title to goods prior to payment for them, its supplier gave permission for the goods to be exported to a foreign country. No independent evidence of the transfer of title or of the grant of export permission was adduced, nor was any reason for the granting of such permission provided. We regard the matters referred to in this paragraph as compelling evidence that the Govan brothers knew that the transactions into which Fusion entered were connected with fraud.

180. Nor would any legitimate trader have provided goods worth hundreds of thousands of pounds to another trader knowing that it would be paid only if each trader in the chain, each link, made payment. It is impossible to believe that such a show of trust would have existed between legitimate traders where locating the goods after they had passed along a chain of transactions of unknown length would have been virtually impossible.

181. The position of Fusion's customer at the other end of the chain is equally unbelievable; that trader unilaterally decided to pay Fusion. No evidence was adduced as to why that trader, alone in the chain, would have taken such a risk. Further, we are invited to accept that the trader made payment despite the fact that Fusion, almost if not certainly to its knowledge had no title to the CPUs, and would never obtain title unless and until payments made their way through an unknown number of traders. No motive for such largesse was adduced and, in an industry rife with fraudsters, any trader in the chain could have prevented title being transferred. In our judgment, the matters referred to in this and the last preceding paragraph also provide compelling evidence of the Govan brothers knowing that Fusion's transactions were connected with fraud.

182. As we noted at [56] above, Fusion's terms and conditions of trade provided for goods to remain in its ownership until paid for in full, and it claimed to have instructed its foreign agents not to release goods until it had in fact been paid. Silverstar had a term of identical effect as to its ownership of goods. The brothers maintained that they gave full effect to Fusion's own term despite it not appearing on its invoices, so that it was not required to carry out credit checks on its customers as it did not allow them credit. At the same time they asserted that Silverstar did not give effect to its own term, Fusion obtaining title to goods immediately on taking possession of them, notwithstanding that it had not made payment for them. We see no reason why, in the absence of any documentary or other evidence, particularly from Silverstar itself, we should accept that one term was fully enforced whilst the other was totally ignored. Indeed, we doubt that Fusion's customers were aware of its term. In our judgment, the evidence clearly points to both companies' terms having been ignored by everyone concerned, the transactions having been pre-arranged, contrived and uncommercial. It is yet another piece of

compelling evidence of the brothers knowing that Fusion's transactions were connected with fraud.

183. Other evidence adduced which we have taken into account in reaching our conclusion in part overlaps that relating to Fusion's trading model. We now proceed to deal with it. The evidence as to damaged boxes which emerged during the hearing clearly indicated to us that Fusion was not dealing with boxes of CPUs that had only recently emerged from the manufacturer's factory, wherever that might have been. We accept Fusion's claim that damaged, or marked, boxes did not necessarily indicate damaged CPUs, but the state of most of the boxes, as revealed by Forward's inspection reports, was such that any conscientious trader would not only have queried whether the CPUs contained in them were new, but would also itself have inspected them to ensure that they were. It is a factor that should at the very least have put Fusion on notice that it was not dealing in the ordinary commercial market.

184. As we earlier found, for the period with which we are concerned, Fusion's bank statements clearly reveal no business activity with the exception of the disputed deals. As all those transactions, with the one exception of deal 4, were traced back to a defaulter in the invoice chains, and deal 4 itself was traced to what we find to have been a contra-trader, we are satisfied that the deals were contrived and without commercial substance, as the Govan brothers must have been well aware. In any event, we earlier found a number of the invoice chains to have been artificial.

185. The brothers sought to persuade us that the monthly visits of Mrs Elmer to the company were nothing out of the ordinary and were welcomed. They must have known that visits of such frequency by Customs' officers were rare and were carried out only in very unusual circumstances, such that the Commissioners had grave concerns about the protection of the revenue. In our judgment, Fusion could have been given no more serious warning by those visits that it was dealing in a market in which fraud was not merely prevalent, but rife, and that it must take the greatest possible care in all its dealings.

186. We also accept that the lack of written contracts with its supplier, customers and freight forwarder in a market in very high value goods must have indicated to Fusion the uncommercial nature of the transactions into which it was entering. Again, we infer that the evidence indicates pre-arrangement.

187. Of the brothers' claim to have been unable to carry out checks on any of the counterparties in the transactions with which we are dealing, other than Silverstar as supplier and the company's immediate customers, we observe that it was plain from the evidence, beyond obtaining basic registration documents, they made no attempt whatsoever to obtain any information about other traders' involved in the transactions concerned. They could, for instance, have asked Forward how long goods had been in the UK, or asked Silverstar whether it owned the CPU's it was supplying and, if it did not, it had authority to transfer possession of

them to third parties. In neither case would Forward have been required to break a confidence. Such checks as Fusion did carry out were casually undertaken and negative indicators were ignored because, in truth, they were unnecessary. The Govan brothers knew perfectly well that Fusion's supplier and customers would not fail in their obligations, for the transactions were pre-arranged and contrived.

188. We should have expected Fusion to have queried why Silverstar made such attractive offers of credit to it: any trader in the ordinary commercial market would have anticipated questions to be put to ensure that it was a suitable trader to which to give credit. The absence of questions should have been an indicator to Fusion that it was not dealing in the ordinary commercial market. In itself, that indicates to us pre-arrangement and contrivance.

189. Although the brothers argued that Mrs Elmer did not produce Notice 726 on each of her visits, as she claimed, they did acknowledge having received the Notice in 2004 and being aware of its contents. The Notice describes MTIC fraud as a "systematic criminal attack on the VAT system", and Floyd J in *Mobilx Ltd (in administration) v Revenue and Customs Commissioners* at first instance [2009] STC 1107, having agreed with counsel that observation of its recommendations was "equally applicable to the avoiding of challenges to repayment of VAT", at [10] of his judgment noted that it contained "chilling warnings about the prevalence of MTIC fraud" in the mobile phone and CPU markets. He continued, "In several places the document [Notice 726] makes it clear that the obligation on the trader is to ensure the integrity of his supply chain"; and at [87], "…the company has to exercise independent judgment, not delegate its judgment to HMRC." Thus, the brothers could not rely on Mrs Elmer's judgment as to the integrity of Fusion's transactions, but rather had to make their own judgment as to each one. That was particularly so early in 2006 – the time with which we are concerned - for Mrs Elmer's appointment as the officer responsible for Fusion ended in January of that year, and no one was appointed to replace her. In our judgment, the brothers made no attempt to act upon the recommendations contained in Notice 726.

190. We accept that Fusion may not have known the identities of the individual defaulters in invoice chains but, in all the circumstances, and particularly the back-to-back nature of the chains and the apparent ease with which the transactions came about, in our judgment, it was likely to have known that there was a missing trader in each chain.

191. The evidence indicated circularity of payments where Imaani was Fusion's customer. As we earlier observed, that clearly indicated orchestration of the deals. In order for the money to circulate as the banking evidence showed, Imaani would have needed to ensure that Fusion purchased goods from a particular supplier. We accept that Fusion may not have been aware of those matters. However, in our further judgment, it was beyond coincidence that Fusion always purchased from Silverstar and sold to a very small pool of customers. We are satisfied that it was aware of the contrived nature of the trading, and also of pre-arrangement of the deals.

192. We accept that Fusion never dealt with a defaulter but, since the company made no checks on its suppliers (and customers), we can only assume that that was due more to its good fortune than anything else.

193. We might add that we accept the correctness of Mr Sutherland-Williams' submissions on means of knowledge, but find it unnecessary to deal with them individually. All we need say is that they fortify our decision based on actual knowledge.

194. Our overall conclusion, based on Fusion's admitted knowledge of the prevalence of fraud, the deficiencies we have identified in its due diligence, and its failure to take the necessary precautions in dealing with its supplier and customers, is that the Govan brothers did not take every reasonable precaution required of them to ensure that Fusion's transactions did not involve it in participation in VAT evasion. Applying [61] of *Kittel*, that finding is justification for our holding that the brothers "…knew that by his [i.e. Fusion's] purchase, he was taking part in a transaction connected with the fraudulent evasion of VAT". The high standard required of a trader meant that Fusion was under a positive duty to take precautions, including the carrying out of due diligence and other checks when indications of risk were presented to it. The Commissioners have proved that Fusion's state of knowledge was such that its purchases were outside the scope of the right to deduct input tax (see [81] of the judgment in *Mobilx*). We therefore dismiss its appeal in connection with deals 1-3 and 5-10. In so doing, we might add that we accept Mr Sutherland-Williams' own conclusion on knowledge as set out at [158] above.

Conclusion on deal 4

195. As we indicated earlier, Mr Young's submissions on deal 4 were almost exclusively focused on factual matters. We do, however, infer from certain observations he made that he relies substantially on [55] of the decision of the Chancellor in *Blue Sphere* that, in a contra-trading case, for the Commissioners to succeed, it is necessary for them to prove that the trader concerned is a co-conspirator with the fraudster:

> "55. In my view, it is an inescapable consequence of contra-trading that for HMRC to refuse a reclaim by E [the exporter in the clean chain] it must be in a position to prove that C [the contra-trader] was party to a conspiracy also involving A [the defaulting trader]. Although the fact that C is party to both the clean chain with E and dirty chain with A constitutes a sufficient connection it is not enough to show that E ought to have known of the fraudulent evasion of VAT involved in the subsequent dirty chain. At the time he entered into the clean chain there was no such dirty chain of which he could have known, nor was the occurrence of such dirty chain inevitable in the sense of being pre-planned."

196. We have set out Mr Sutherland-Williams' submissions in relation to deal 4 *in extenso* as it could be argued that the High Court and the Court of Appeal have adopted a somewhat

different approach to the co-conspiracy question. In the High Court in *Brayfal* Lewison J appears to have followed the line taken by the Chancellor, whereas Briggs J in *Megtian* opined that *Kittel* does not require knowledge that the contra-trader was a fraudster.

197. In *Mobilx*, the Court of Appeal considered three disparate types of case: actual knowledge, means of knowledge and, specifically in relation to *Blue Sphere*, the additional considerations that arise in contra-trading cases. At [68] to [76], Moses LJ dealt with *Blue Sphere*. He observed at [74] that whether the company, by its director, had exercised due diligence or done "enough to protect himself" was not the only question to be answered. He continued,

> "75. The ultimate question is not whether the trader exercised due diligence but rather whether he should have known that the only reasonable explanation for the circumstances in which his transaction took place was that it was connected to fraudulent evasion of VAT."
>
> We might add that it matters "not one jot" whether Fusion's transactions in the clean chain preceded or followed 4A Developments transactions in the dirty chain (see [62] of the judgment in *Mobilx*).

198. Taking into account our conclusion in all the deals other than deal 4 as also being applicable to that deal, we infer that Fusion did know what was taking place in deal 4, and are satisfied that by the Govan brothers it should have known that the only reasonable explanation for the circumstances in which the deal took place was that it was connected with the fraudulent evasion of VAT. It follows that we also dismiss the appeal in relation to deal 4.

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

DAVID DEMACK
TRIBUNAL JUDGE

Release Date: 5 August 2011

THE SCHEDULE

Deal Logs

1. Electronic Folder ('EF') is an application that allows HMRC to capture and record customer specific information in respect of VAT in an electronic format.

2. It is effectively a document management system.

3. The nature of the correspondence stored is determined by the lifecycle and behaviour of the customer.

4. Each customer has their own folder within the system.

5. The document storage facility is used to hold: electronic copies of documents, such as registration and deregistration documentation; correspondence from customers; HMRC correspondence; schedules (including deal logs); and other HMRC generated documentation relating to a customer's VAT affairs, such as: customer contact details; business activity reports; annual account extracts; and VAT audit reports.

6. Users can amend, index and retrieve documents (if they have access permission).

7. 'Capturing' a document effectively means saving a document into 'EF'.

8. When a document is 'captured' it is assigned a version number.

9. A person who has access permission to 'EF' can view a document which has been 'captured'.

10. A document may be changed in 'EF'; this is done through use of the edit function.

11. Each time a document is edited, a consequential version number is assigned to the document.

VISION:

VISION is an acronym for 'VAT Information System Inter-Office Network'. The VISION system allows authorised HMRC users to inspect the details of VAT registered traders that are held on the VAT mainframe database. The database contains details of all live traders and also stores some information about traders who have recently become deregistered.