[2012] UKFTT 202 (TC)

TC01897

Appeal number: MAN/2007/1040

VAT – MTIC – appellant knew transactions connected with fraud – appeal dismissed.

FIRST-TIER TRIBUNAL
TAX

VANTAGE LINK CORPORATION LIMITED **Appellant**

- and -

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

TRIBUNAL: Judge Richard Barlow
Susan Stott FCA

Sitting in public in Manchester on 18 to 21 April, 26 to 28 April, 3, 4 and 27 May 2011.

Michael Soole QC and William Hansen for the Appellant

Vinesh Mandalia and James Puzey for the Respondents

DECISION

1. This is the appeal of Vantage Link Corporation Limited against decisions of the Commissioners for Her Majesty's Revenue and Customs (HMRC) conveyed by letters dated 30 July 2007 and 13 August 2007 by which HMRC denied the appellant's claims for input tax for the three monthly periods April, May and June 2006 in a total of £10,388,531.13. The grounds for the refusal contended for by HMRC are that the transactions giving rise to the claimed input tax were connected with fraudulent evasion of VAT and that the appellant either knew or should have known of that fact.

2. By way of introduction only, we mention that the appeal is what is called, in the jargon that has become well known through other appeals, an MTIC case and the appellant's transactions are what are known as dirty chain broker transactions in which recovery of input tax is denied on the basis that those transactions are connected with fraudulent transactions as part of chains of transactions leading back to traders who had defaulted dishonestly in failing to account for VAT output tax or by "blocking" that is to say by concealing the identity of the fraudulent traders and the appellant either knew or should have known of that connection. In using the terms dirty chains and broker, blocker or defaulter we do so only for convenience and, as has been pointed out before by the Tribunal (see the Decision in *Totel Distribution Ltd*), use of those terms, although now well understood, cannot be allowed to prejudge or influence the Tribunal's decision one way or the other as to the correct legal and factual position.

The transactions.

3. The input tax in dispute arose from 38 transactions in all of which the appellant acted as a broker which means that it dispatched goods to an EU country which it had purchased from another UK trader. These 38 transactions represent most of the appellant's trade in the three tax periods in question.

4. We will refer to the dispatches as exports for convenience. In each case the appellant paid its UK supplier a tax inclusive price which is tax the appellant would normally be entitled to deduct as input tax but the export would be a zero rated supply with the consequence that HMRC would normally be required to credit the input tax without a corresponding positive output tax liability arising. If the value of the export transactions exceeded the value of any transactions giving rise to output tax liabilities arising in the same period then HMRC would normally have to make a payment of the amount by which the input tax exceeded the output tax, if any, to the appellant. Whether such a credit and payment should be made is the principal issue in this case.

5. In each of the 38 transactions the trader that supplied the appellant had itself bought the goods from another UK trader and a chain of transactions led back through other traders. In 34 of the transactions the chains lead back to a Cypriot company called Macdelta Ltd. In the remaining four cases the chains lead back to a company called JD Telecom UK Ltd, whose supplier is not known, though as the goods in those chains are mobile phones not manufactured in the UK, there must have been a

foreign supplier at the start of those chains as well. In fact, HMRC allege that the evidence allows an inference to be drawn that the original supplier would have been Macdelta in those chains as well.

6. The goods in all the deals were high technology goods, mainly mobile phones, of various models with varying prices. Five different UK based suppliers supplied the appellant and it sold the goods to four different customers. Thirty-one transactions were with two French companies, six were with a German company and one with a Dutch company.

7. In all 20 transactions in April 2006 the appellant achieved a mark up of 2% allowing for rounding (we will deal with this in more detail hereafter). The value of the individual deals varied between £5,517,500 and £84,125. The value of units of goods sold in those deals varied between £693.50 and £158.25 and the quantities involved in individual deals varied between 10,000 units and 500 units. Those deals involved five different suppliers and four different customers. Those deals included the biggest and smallest of the 38.

8. The mark up achieved by the appellant in the May and June deals was 1%, 1.5%, 2% or 2.5% allowing for rounding.

9. Other traders involved in the transactions achieved lower mark ups, typically between 25p and £1.00 per unit, mostly but not all expressed in figures that were round to a multiple of 25p.

10. The appellant would not or will not have made a profit on any of the deals unless its claim for input tax is successful in this appeal. The tax inclusive price the appellant paid to its supplier always exceeded the tax exclusive price charged to its customer.

11. In every one of the 38 chains of transactions there is a trader who has not accounted for output tax and the Commissioners allege that those traders dishonestly failed to account for it. They had not just failed to account because of some misfortune having struck their businesses. It follows, if that is correct, that if the Commissioners are obliged to refund the input tax in dispute, they will have lost money, ie they will not just have failed to collect tax that was due. The commissioners will have funded the defaults of the defaulting traders by paying input tax to the appellant enabling it to pay its suppliers the tax inclusive price and which suppliers have then paid the money up the chain of transactions to the defaulting trader (or as it turned out to other parties altogether – as to which see under FCIB evidence below). Equally, of course, if the appellant is unsuccessful in this appeal it will have funded the defaulting trader's fraud in the same way.

12. The Commissioners cannot disallow the input tax simply by showing that there has been a dishonest default in the chains of transactions. The appellant is still entitled to reclaim its input tax in principle even if there has been such a default. However, where they can prove that the appellant knew or should have known that its transactions were connected with fraud that right is lost or has not been acquired.

13. We will set out the applicable legal principles and then deal with the evidence before making our findings.

The legal issues.

14. In *Kittel –v- Belgium* [2008] STC 1537 the ECJ held that on the one hand, at [60], where a recipient of a supply buys goods and "did not and could not know that the transaction concerned was connected with fraud" then the Member State in which the recipient is registered for VAT cannot provide, by its domestic law, that such a transaction is void because of that connection and cannot provide that input tax is not claimable on the transaction. On the other hand, at [61], the ECJ held 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 person entitlement to the right to deduct".

15. At [51] the ECJ had also held that a trader who has taken every precaution to ensure that his transaction is not connected with fraud, must be allowed to claim input tax. At [52] the Court held that a person who "did not and could not" know that his transaction was connected with fraud would be entitled to claim input tax despite a connection between his transaction and a VAT fraud. In this case the appellant has placed considerable emphasis on advice it took from professional people and claims that having acted on that advice it has taken every precaution in the relevant sense. We note that the ECJ did acknowledge that a person can only rely upon having taken every precaution where he did not know that his transactions were connected with fraud. Actual knowledge will always supersede precautions however elaborate.

16. The Court did not explain specifically what it meant by "should have known" but [51] and [52] of the judgment suggest that a trader should take, at least, reasonable precautions to avoid being involved in a transaction connected with fraud. Taken literally "every precaution" and "could not know" might suggest that the test is a very strict one. But bearing in mind [56] to [58] of the judgment we do not read it in that way. The Court used the word "should" for the first time in paragraph [56] and explained the rationale of the rule it then set out at [61]. It said that the rationale was that a person who either knew or should have known of the connection with fraud is to be "regarded as a participant" and that he "aids the perpetrators"; which appears to suggest a degree of blame that would not have attached to a person simply for overlooking a precaution that he might have taken or who could have known of a connection but only in some obscure way.

17. The Court also explained the underlying rationale of the rule in terms of its being for the better prevention of fraud.

18. We also note that at [60] the Court referred to the fact that the national law of Belgium, which was in issue, caused the taxpayer to lose the right to deduct input tax and then at [61] it used the neutral phrase that the national court should 'refuse entitlement' to deduct without further elaboration. Advocate General Ruiz-Jarabo Colomer had also referred to the loss of a right to deduct at [62] of his opinion. It

seems unlikely to make any difference whether the right to deduct is lost or never arose where the taxpayer knew of the fraud or should have known of it but the loss of the right to deduct appears to be what the European Court considered was the correct analysis.

19. It is well established that the right to deduct input tax is exercisable immediately when a transaction occurs and the ECJ emphasised this in *Kittel*. One consequence of that is that the applicable circumstances known to the appellant at the time of a transaction and the actions taken by the appellant at or before the time the transaction occurred are the relevant facts and that information acquired by the appellant subsequently will be irrelevant. Actions taken by the appellant after a transaction will also be irrelevant as such but, of course, they may shed light on what the appellant knew at the time if, for example, they appear to amount to attempts to cover up the true circumstances applying at the time of the transaction.

20. The Court of Appeal judgment in *Mobilx and others –v- Revenue and Customs Commissioners* [2010] STC 1436 considered in detail the issues raised in cases of this sort and Moses LJ elaborated on the meaning of the "should have known" concept. He held that it is not enough for HMRC to prove that the circumstances were such that it was more likely than not that a transaction in question was connected with fraud and that what they must prove is that the transaction was connected with fraud.

21. Moses LJ specifically held that it matters not if the input transaction in question precedes the transaction which gives effect to the fraud. He held that if the taxable person is proved to have entered into a transaction that he knew or should have know, at the time of entering into it, was at that time connected with fraudulent evasion or would be so connected later; that is sufficient to deny recovery of input tax.

22. Moses LJ also held that, where an issue arises about what a person should have know, it is relevant to consider whether the only reasonable explanation for the circumstances surrounding the transaction is that it is connected with fraud. He also stressed the relevance of circumstantial evidence generally.

23. Mr Soole argued that, as the Commissioners have alleged that the appellant knew the transactions were connected with fraud, they are not entitled to rely on the alternative allegation that the appellant should have known that they were connected.

24. Citing *Revenue and Customs Commissioners –v- Livewire* [2009] EWHC 15 (Ch) Mr Soole pointed out that where a taxpayer has taken all reasonable precautions to avoid being involved in transactions that are connected with fraud he has an impenetrable shield against being made liable for the consequences of a fraud by others. The appellant's case is that it did take all such precautions and so the respondents must prove that it actually knew its transactions were connected with fraud. It is an issue in this case as to whether the appellant did take all reasonable precautions.

25. We do not agree that the fact that the respondents have alleged actual knowledge of the connection with fraud precludes them from relying alternatively on

an allegation that the appellant should have known of the connection. The issue whether the appellant had an "impenetrable shield" will then arise. Indeed even if the appellant is found not to have taken all reasonable precautions we do not think it necessarily follows that it should have known of the connection with fraud. A taxpayer who has taken some precautions but not all reasonable precautions may or may not then be said to be a person who should have known of the connection. That seems to us to be still an issue that needs to be addressed because Lewison J only referred in *Livewire* to the constructive knowledge test as analogous to the should have known concept and in *Mobilx* Moses LJ cautioned against over reliance on the degree of due diligence as proof of what a person should have known.

26. The European Court clearly put forward the concepts of actual knowledge and what a taxpayer should have known as alternatives to each other and we cannot discern any such principle as that contended for by Mr Soole by which HMRC should be precluded from alleging both in the alternative in any of the authorities that were cited to us nor that any principle of the law of England and Wales would require us to act on that basis.

27. The Tribunal was urged by Moses LJ not to over elaborate the tests set out in *Kittel* and if we have here done so it is only to make it clear that we have addressed Mr Soole's detailed submissions.

The factual issues.

28. The appellant took a neutral stance as to whether the defaulting traders had been dishonest. Its case is that it had no dealings with those traders and so is not in a position to judge whether they had acted dishonestly. The commissioners served their evidence and the appellant could have taken a view about it but cannot be compelled to do so and so we will address that issue though bearing in mind that the evidence is not challenged, we will do so fairly briefly.

29. The appellant accepts that the persons concerned in the chains of transactions, the goods traded and the prices charged are as stated in the deal sheets produced by the respondents which summarise those facts.

30. 30. The other issues relating to the appeal are then whether the appellant took all steps reasonably open to it so as to have the impenetrable shield referred to in the authorities, subject only to a question of actual knowledge, and alternatively whether the evidence shows that the appellant had that actual knowledge or should have known the transactions were connected with fraud.

The evidence about the defaulting traders.

31. There are eight alleged dishonest defaulting traders in the relevant chains of transactions.

32. The Flooring Centre Limited was involved in four chains relevant to this appeal.

33. Originally the company had been involved in supplying and fitting flooring and it had a modest turnover. On 8 March 2006 new directors, Shofik Miah and Akber Osman were appointed and between 30 March 2006 and 5 April 2006 the company's turnover was £148,000,000 having traded 390,000 units of which 7,876 were mobile phones which feature in this case. The company had only started to trade in mobile phones on 31 March 2006. Customs officers visited the company on 6 April 2006 and issued a notice requiring it to make a return on 7 April 2006 which it failed to do and trading ceased. The company has failed to account for VAT assessments totalling £36,867,552.77. Mr Miah gave an undertaking not to act as a director of any company for twelve years from 24 November 2008 by reason of his having caused or allowed the company to undertake a method of trading which gave rise to the risk of losses due to the Revenue and Customs by MTIC fraud.

34. On that evidence we have no hesitation in finding that the defaults, which included defaults in respect of goods which the appellant ultimately sold for £1,815,146, were dishonest.

35. Apollo Communications Centre Limited was involved in thirteen chains relevant to this appeal.

36. Customs officers visited the company on 21 April 2006 and took up files relating to its trading between 7 April and 19 April 2006 and directed the company to make a return for the period ending 23 April and issued a notice of de-registration. They also issued an assessment for VAT in the sum of £50,907,724 based on the documents collected on 21 April. The company then made a return declaring output tax of £4,038.89 claiming that it had cancelled the deals giving rise to the assessment. The company has not appealed against the assessment and its director, Ali Rahman, has undertaken not to act as a director for 13 years beginning on 31 March 2008 on the ground that his conduct of the company had given rise to the risk of fraudulent losses by HMRC.

37. On that evidence we have no hesitation in finding that the defaults, which included defaults in respect of goods which the appellant ultimately sold for £19,778,781.75, were dishonest.

38. Colston Associates Limited was involved in three chains relevant to this appeal.

39. The company's VAT return for the period ending 28 February 2006 was returned to HMRC marked "gone away". On 25 April 2006 HMRC received a phone call from a caller who only gave his name as Richard to give a change of address for the company. Evidence from freight forwarders suggested to HMRC that the company was still trading and an officer telephoned the company and spoke to someone purporting to be Richard Marsh, a director, who was only prepared to say that the company was located "somewhere in Kent" and who then admitted he was not Richard Marsh but rather was Mohammed Latif. Later the same day one Azim Khan telephoned saying he was calling on behalf of the director and later still Richard Marsh telephoned to say the company was now operating from his home in

Peterborough but then put the phone down without having given a full account of himself or the company.

40. An assessment for £30,768,172 was raised which has not been paid or appealed. That assessment includes sums due in respect of the three chains in which the appellant was involved.

41. On that evidence we have no hesitation in finding that the defaults, which included defaults in respect of goods which the appellant ultimately sold for £6,441,500, were dishonest.

42. I-Sales London Ltd was involved in two chains relevant to this appeal.

43. The company was visited on 22 May 2006 as a result of information obtained at freight forwarders' premises. When the company had registered for VAT in February 2006 it had said it did not intend to buy or sell goods from or to EU countries but between 17 May 2006 (when it began trading) and 22 May 2006 (when the company was de-registered by HMRC) it had bought goods worth £61 million from Macdelta, the Cypriot company that was the source of the goods in at least 34 of the deals which feature in this case. Most of the payments from I-Sales' customers for those goods were not made to I-Sales but were made to Macdelta or another company called Multimode Limited.

44. The company has failed to pay or to contest a VAT assessment for £11,589,040 and its director, Vital Anthony Gately-Biebuyck, gave an undertaking not to act as a director for thirteen years beginning on 15 May 2008 as a result of its trading between 17 and 19 May 2006.

45. On that evidence we have no hesitation in finding that the defaults, which included defaults in respect of goods which the appellant ultimately sold for £5,063,950, were dishonest.

46. Linkline Electrical Limited was involved in eight chains relevant to this appeal.

47. The company registered for VAT as an electrical installation business with effect from its date of incorporation which was 7 February 2006 and it was operated from the lounge of a residential property by its director, Janette Robinson. Between 22 and 24 May 2006 the company carried out 30 transactions with a total value of £56 million all of which were purchases from Macdelta. Payments for all of the transactions were made by the company's customers and at its request in two tranches, the larger part by far of each payment being made direct to Macdelta and the small remainder being to the company.

48. HMRC served a notice on Mrs Robinson in person requiring a return to be made on 24 May but she claimed to be too busy to complete it. Two assessments totalling £9,744,789.69 have not been paid nor have they been disputed.

49. Whilst it might, just, be argued that taken individually the phenomenal increase in business, the third party payments and the fact that the business was not of the type

described in the application to register do not prove dishonesty; we find that the cumulative effect of the evidence is that the transactions are proven to have been conducted dishonestly. There is a possibility that Mrs Robinson was used by someone else but, even if we assume she was naïve rather than dishonest, the company should be judged by the standards of a properly run company and no properly run company could seek to rely on naïveté to that extent. On that evidence we find that the defaults, which included defaults in respect of goods which the appellant ultimately sold for £17,451,287.50, were dishonest.

50. Udeil Solutions Ltd was involved in two chains relevant to this appeal.

51. The company's trade between 26 September 2005 (its date of VAT registration) and 30 April 2006 amounted to a turnover of £14,731. In the two weeks from 25 May 2006 to 8 June 2006 its turnover was £51,516,188 according to documents obtained by HMRC on 12 June and an assessment was issued for £6,642,463 for that period. Further sums came to light later and the total assessed was increased to £7,672,682.25 which has neither been paid nor disputed. Payments for goods supplied by the company were made in two tranches being small amounts paid to it and large third party payments to Macdelta. The company's director Leonardo Udeh undertook not to act as a director for 12 years from 31 May 2007 as a result of his conduct between 25 May and 8 June.

52. On that evidence we have no hesitation in finding that the defaults, which included defaults in respect of goods which the appellant ultimately sold for £1,037,000, were dishonest.

53. Universal Appliances Ltd or a taxable person purporting to be that company was involved in two chains relevant to this appeal.

54. The company was registered for VAT on 22 May 2006 and customs officers attempted to visit it on 14 June because its VAT registration number had been checked by a company called Novaphone (UK) Ltd and that company had documents suggesting that Universal Appliances Ltd should have accounted for VAT of £1,007,351.07 in June 2006 but it made no return for that period. No contact was made with anyone from the company but a notice of de-registration was left at its premises.

55. Asdullah Riaz, the director of Universal Appliances Ltd, wrote to HMRC on 24 August stating that the company was not trading and on 11 January 2007 he telephoned HMRC and claimed that his company's VAT number had been used by someone else.

56. On that evidence we have no hesitation in finding that the defaults, which included defaults in respect of goods which the appellant ultimately sold for £953,250, were dishonest. That is because either Mr Riaz's denials that the company made the supplies was a dishonest statement which can only have been made as a result of the transactions being dishonestly undertaken or, if he was telling the truth,

the company's identity had been used by an unknown party which would have been a dishonest act.

57. A person purporting to be JD Telecom UK Ltd was involved in four chains relevant to this appeal.

58. HMRC accepted JD Telecom's assertion that the transactions were conducted by a hijacker which is clearly a dishonest course of conduct.

59. On that evidence we have no hesitation in finding that the defaults, which included defaults in respect of goods which the appellant ultimately sold for £4,023,975, were dishonest.

60. We note that in each case, except possibly the person purporting to be JD Telecom, the defaulting trader is also the importer of the goods and therefore the person dealing directly with Macdelta.

61. Thereafter the goods passed through various parties' hands until reaching the appellant, which exported them. A number of the other parties appear in chains which started with different importers but there is no set pattern that is discernable.

62. We note that, although Macdelta are the known source of all the goods, except possibly those dealt with by the person purporting to be JD Telecom, each of the defaulting traders has acted in sequence. Each has engaged in transactions relating to this appeal only for a short period of time and has then ceased to be involved in any further transactions in any chain leading to the appellant. It appears therefore that Macdelta, or some other unknown party, had a hand in controlling the ultimate destination of the goods in the UK. Otherwise it might have been expected that the sales by the defaulting traders would have come to the appellant at different times and not in a sequential pattern related to the original and defaulting party.

63. We do not assume that proves that the appellant knew anything about the chains of transactions leading to it. These facts are however further evidence that there were deliberate defaults in all the chains leading to the appellant and that those defaults were dishonest.

The FCIB evidence.

64. The appellant banked with the First Curacao International Bank as did most, if not all, of the persons involved in the transaction chains in question in this appeal. The commissioners rely on evidence relating to the bank and the accounts held by persons concerned in the chains of transactions as evidence that the transactions were contrived and orchestrated is such a way as to prove that those transactions were part of a fraudulent scheme. Although this evidence is part of the commissioners' case it is convenient to deal with it separately here as it relates specifically to the question of the dishonesty and fraud of the defaulting traders.

65. In its application to open its account the appellant stated that Mr Khaliq was the director and beneficial owner of the company but Saboor Ashraf was the signatory to

the account. As the account was operated online no physical signature would be required and so Mr Khaliq could presumably access it without difficulty. In addition the secret question and answer (which we take to be security measures) were the same for the appellant's account and that of a company owned by Mr Ashraf.

66. The commissioners suggested it was odd, indeed suspicious, that Mr Khaliq was prepared to allow this to happen especially as the appellant company and Mr Ashraf's company were in competition for the same type of business. They allege that it was evidence of collaboration between the companies. Mr Khaliq said that the reason for these facts was that Mr Ashraf, who was a friend from schooldays, had helped him to set up the account as he was more familiar with the operation of online services. We do not attach a great deal of significance to these facts and find the explanation given by Mr Khaliq about the signatory and secret question and answer is credible.

67. The commissioners produced evidence from FCIB records that the money circulated in 13 out of 14 chains of transactions selected for examination from the 38 in issue in the appeal. We should say that in some cases the sums that circulated were not precisely the same amounts going round in the circular movement of funds from one party to the next but we are satisfied that the payments into accounts and onward payments to others are related in the manner alleged by the commissioners. In particular, the banking information provided corroboration of the respondents' initial conclusions that the payments were related, when additional information became available in which account holders had labelled the transactions with notes which were added to the account statement details.

68. The circulation of funds means that no genuine underlying economically justified reason for the transactions appears to exist with the consequence that the extraction of money from the UK Treasury appears to have been the real reason for the transactions, as described in paragraph 11 above.

69. Although the payments of funds relating to the appellant's transactions circulated in the way described, the acquirers at the start of the UK transactions who, as we have already held were dishonest defaulting parties, were not the recipients of any of the funds. The circulating transactions bypassed or omitted to pass through those parties' accounts. It appears therefore that not only did those parties not account for the output tax due on their transactions but also that they were unlikely to have ever been in a position to do so. That is of course yet further evidence of contrivance and dishonesty on their part.

70. Another feature of the banking evidence is that all the payments were made within a very short period which was far too short to have been achieved without some overall co-ordination by a controlling mind. As the respondents pointed out in their closing submissions, the evidence unequivocally shows that the appellant received payment for the goods it sold at varying lengths of time after its transactions had been concluded and therefore paid its suppliers at unpredictable lengths of time after the transactions had been concluded. It appears that the other parties in the chains of transactions and in the circulation of funds were awaiting the receipt of

those funds in the hands of the appellant's suppliers before any of them could make their payments but then did so virtually immediately.

71. The commissioners contend that the fact that the payments, including those to and from the appellant, are part of the sequence occurring in that short time proves that the appellant must have been knowingly involved in the fraudulent scheme because it would have to have known when to make the payments so that the other parties involved could act as quickly as they did.

72. We do not find that argument convincing. There is no direct evidence that the appellant triggered the actions of the other parties or was told when to make its payments. It is possible at least, that the appellant was unwittingly the trigger for the sequence of payments rather than their knowing instigator and in the absence of evidence we are not prepared to hold that the appellant was knowingly involved in arranging or setting in train those payments.

73. The banking evidence does however prove that there was an overall scheme to defraud that must have been controlled by someone.

The commissioners' evidence.

74. The commissioners' evidence was mostly not disputed. As already explained, the evidence relating to the defaulting traders was not disputed, rather the appellant did not feel able to accept the conclusions that they had been dishonest and left it to the tribunal to consider whether the undisputed evidence proved that to be the case. Witness statements dealing with that were read but no witnesses were called.

75. The FCIB evidence was not disputed and Mr David Young, customs officer, gave evidence explaining that evidence but was not challenged as to the correctness of it.

76. Much of the rest of the commissioners' evidence was concerned with the production of documents and the history of the appellant's dealings with HMRC.

77. The only other witness called by HMRC was Ms Farzana Malik. She was the customs officer who had dealt with the decision that led to this appeal. Much of her evidence was not disputed but Mr Soole cross examined her about some comments or opinions she had given in her witness statement. We ignore the opinions of witnesses about the appeal and the facts relating to it and so we need not deal with those points in detail.

78. Mr Soole was able to satisfy us from cross examination of Ms Malik that any criticism HMRC had made against the appellant about some goods that they claimed had been exported twice by the appellant (a so-called carousel), was entirely unjustified. The goods had been returned to the UK and then re-exported but there is no evidence to suggest that that was other than part of a single exportation. The goods had been returned for entirely innocent reasons. Those goods were in any event not relevant to this appeal.

79. Mr Soole also established that the appellant had ceased to supply IMEI numbers to HMRC only after it had become apparent to the appellant that they were not examining the numbers. In that context it also appeared that the documents relating to the IMEI numbers had been removed from the folders in which the deal documents were kept lending support to the appellant's contention that there may have been more documents sent to HMRC than those produced at the hearing.

The appellant's evidence.

80. The appellant called three witnesses: Mr Tazarat Khaliq who was the director and shareholder of the appellant at the relevant times, Mr Paul Taylor a VAT consultant who was employed by the VATease consultancy at part of the relevant periods and Ms Michelle Hurst, the proprietor of VATease.

81. We propose to deal with the appellant's evidence in the following order. First, the history of the appellant company and Mr Khaliq's involvement in business and his knowledge of the existence of MTIC fraud. Secondly, the due diligence enquiries made by the appellant under which heading we will also deal with the evidence of Mr Taylor and Ms Hurst. Thirdly, the appellant's method of trading. Fourthly, the evidence about the FCIB bank. Finally, we will refer to the 38 deals.

82. Mr Khaliq studied ophthalmology and obtained a degree in that subject before qualifying as an optometrist. He practised as such and developed a business consisting of several opticians practices. He diversified by starting a business which consisted of the wholesale purchase and the sale by retail and by wholesale of equipment for opticians' practices.

83. Mr Khaliq attended a technology trade fair and it occurred to him that there might be a business opportunity for him to buy second hand mobile phones and to sell them in Pakistan where he and his family already had useful contacts. However, he later realised that it would be difficult to source sufficient second hand phones to make a worthwhile enterprise.

84. Mr Khaliq said that his researches did reveal that there was what he described as a vibrant wholesale market in new phones and he saw a business opportunity in buying phones in the UK and selling them to Dubai simply by trading without adding any value to them.

85. Mr Khaliq described how he had become aware of the existence of trading portals which were internet sites which would enable him to contact potential counterparties.

86. A company called Optics 20/20 (UK) Ltd owned and operated by Mr Khaliq was his vehicle for buying and selling phones and it quickly became very successful having a turnover of £72.8 million in the period ending March 2003 (we will refer to tax periods as, for example, 03/03). That was the first period in which that company traded in mobile phones, it having been dormant for some time before that as is shown by the fact that it declared no output tax in its VAT returns for the preceding periods. However, Optics 20/20 ceased to trade in May 2003 after a bad debt arose when a

customer failed to pay for goods for which the company had already paid its supplier and the company was liquidated.

87. The appellant was incorporated in 1994 and traded as an estate agency under an earlier name which it changed on 19 January 2004 to Vantage Link Corporation Limited shortly after Mr Khaliq had became a director on 2 December 2003. Under his directorship the appellant has not traded as an estate agency. The appellant was already registered for VAT and notified the commissioners of its change of name on 27 January 2004 at which time it also changed its address and notified the commissioners that its trading activities would be general wholesale including "computer monitors, keyboards, white kitchen goods etc". Mr Khaliq admitted in evidence that he had acquired the estate agency company in order to avoid a delay that might have occurred in obtaining a VAT registration for a newly formed company.

88. In the year ending December 2004, the appellant's first year of trading under Mr Khaliq's management and in its new market, the turnover was £88,680,396 with a profit of £800,539 in draft accounts and Mr Khaliq said that the turnover in the final accounts was about £92,000,000 and the profit was £650,000. Mr Khaliq said in evidence that in 2005 the turnover was £112,900,000 and the company made a loss of about £100,000 but that was after he had been paid a bonus of between £1,400,000 and £1,600,000.

89. Mr Khaliq said in evidence that most of the transactions the appellant conducted in the three months with which this appeal is concerned were of the type for which input tax has been denied and, as we have already noted, the details of the transaction chains are not disputed.

90. Mr Khaliq also agreed in evidence that he was aware of the existence of MTIC fraud saying in his witness statement that he had been made aware of it. He stated specifically that it was accepted that the appellant "was on notice of missing trader fraud in the mobile phone industry" and went on to say that it had "acted reasonably and proportionately on advice given by HMRC and its VAT consultants to guard against the risk". In his oral evidence Mr Khaliq specifically agreed with a suggestion put to him by Mr Mandalia that there was fraud in that sector of the economy.

91. Despite that evidence Mr Khaliq had denied being aware of the MTIC problem when he was visited by an officer of the respondents on 13 May 2004. That officer explained the risks to him and advised the need for caution. Mr Khaliq agreed that a number of other letters or visits had further emphasised the need for him to be aware of fraud and the need to avoid becoming involved in it.

92. Mr Khaliq had been warned against making third party payments and, although he was cross examined about one such payment he had made while running Optics 20/20 after being so warned, we do not regard that as relevant. It did not relate to any transaction relevant to this appeal and we accept that Mr Khaliq may have misunderstood what was meant by third party payments. He claimed to have thought that third party payments were where he had made a payment to someone other than

his supplier whereas what happened was that his customer made a payment to someone other than his company. However, the warning about third party payments was given in the context of warnings about fraud in general and was yet further evidence of knowledge of the prevalence of such fraud.

93. As already noted, the appellant claims that its consultation of VATease was as a result of a desire to avoid being caught up in fraud. In this context the 'due diligence' enquiries made by the appellant need to be considered. It is a major part of the appellant's case that having carried out what it claims was adequate, indeed very good due diligence, it has the defence of the so called impenetrable shield already referred to.

94. Mr Khaliq said that due diligence was conducted in order to ascertain the status of a company with which his company was intending to trade and to establish its bona fides in order to protect his own company to ensure it received payment and to avoid any involvement with fraud. He said that he had consulted VATease for assistance in his dealings with HMRC and for advice about what they expected of him.

95. When Mr Taylor gave evidence he said that he had given advice to the appellant about what requirements HMRC were placing on the company and about what checks it should carry out but, so far as due diligence was concerned, he did not review individual enquiries made by the appellant but rather he gave general advice about what the nature of its enquiries should be. He said that he did not recall examining the appellant's written terms of business or that he had checked that transactions were carried out in accordance with any such terms. He said that it was his opinion that the appellant was a genuine business in a genuine market and that it was not contrived. He also said that VATease had acted as the point of contact between the appellant and HMRC.

96. We find that Mr Taylor's evidence was truthful and that his actions were as he stated them to be so far as due diligence was concerned namely that he had advised in general terms but had not supervised or reviewed the actual due diligence carried out by the appellant. We find that he had not checked the appellant's terms of business or whether its transactions accorded with any such terms. His opinion about the genuineness of the business and the market in which it traded is in no sense binding on us. Assuming that that opinion was conveyed to the appellant expressly or by implication that might have some bearing on the appellant's state of mind at the time.

97. Mr Khaliq's evidence about the nature of due diligence checks undertaken was as follows. The checks were intended to make sure the suppliers were trading and were registered for VAT. The registration for VAT was confirmed through the Commissioners' Redhill Office which provided a service of checking that traders were registered. Credit checks through such organisations as Dun and Bradstreet and Creditsafe further confirmed the VAT registration and the address of suppliers and customers.

98. In the case of suppliers Mr Khaliq claimed to have carried out site visits to their premises and to have taken up trade references. The UK Freight Forwarders, who

were storing the goods on behalf of the suppliers and who would ship them for the appellant, were important elements in the due diligence according to Mr Khaliq because they or their sub-contractors were required to inspect goods and certify to the appellant that they were in accordance with what was required by the appellant and its customers before a transaction was completed. They also provided the appellant with IMEI numbers which are numbers given to mobile phones which the appellant passed on to HMRC until it formed the opinion that they were doing nothing with them after which it first reduced the extent of the examination of the numbers it required and then ceased to supply them. Mr Khaliq also claimed to have relied upon the freight forwarders, in part at least, in considering whether the suppliers were genuinely the owners of the goods they were selling. He also relied upon them to deal with the purchasers' freight forwarders and to ensure that they knew that the goods were not to be released to the customers until they had paid the appellant for them.

99. We find that the credit references taken up by the appellant were capable of confirming that the companies in question existed and were trading though in many cases they were such as to raise serious questions about how those companies were likely to be capable of supplying goods on credit to the values they were offering or to be able to supply them at all in the case of suppliers and about how they would be able to afford to pay for the goods in the case of the customers.

100.The appellant bought goods worth over £11 million from a company called Technology Plus Limited (Trading as Microtec). The first relevant deal was on 5 April 2006 and was for a tax inclusive price of £407,041.25. By 5 April the appellant had obtained documents that confirmed that company's address, its VAT registration number and a Dun and Bradstreet report which said so far as credit was concerned "maximum credit: seek suitable assurances or guarantees before extending credit" and as far as capital was concerned "risk indicator 4 represents significant level of risk". A later Creditsafe report referred to a credit limit of £9,000 for Technology Plus.

101.Mr Khaliq pointed out that his company was not giving Technology Plus Limited credit but he had to accept that it appeared that whoever supplied Technology Plus Limited must have given it credit. In view of the limited capital referred to in the report and the fact that the appellant was not going to pay for the goods until it was paid by its customer we find that there was evidence known to Mr Khaliq that should have raised some doubt in his mind about how that company could afford to deal in the goods it was selling. He said that the appellant had a history of dealing with that company and that, as Technology Plus were successfully transferring title to the goods to the appellant (at least that was his understanding) before the goods were shipped, there was no risk to the appellant despite the negative advice in the report. We find that the fact that Technology Plus did transfer the goods to the appellant does not answer the question about how it afforded to deal in them.

102.Mr Khaliq showed himself to be interested in his own company's position as a purchaser, as is to be expected, but to be unconcerned about the wider issue of how Technology Plus could have been involved in the transactions. That question is one that ought to have been of some concern to him in light of the evidence that he accepts he knew there was a good deal of fraud in the economic sector in which his

company was dealing and his contention that he wanted to avoid becoming involved in it.

103. As far as other due diligence was concerned Mr Khaliq relied on a site visit he had made to Technology Plus on 24 November 2004. Elsewhere in his evidence he claimed he tried to visit suppliers every six months but he admitted that the November visit had been the last one to that company before the April 2006 deal.

104. On its invoices Technology Plus states that its standard terms of business apply and when Mr Khaliq was asked about those terms he said he had dealt with that company on the basis that the appellant's standard terms would apply and that Technology Plus would have signed a set of the appellant's terms to acknowledge that fact. When it was pointed out that those documents were not in the deal packs produced for the Tribunal Mr Khaliq at first said that they must have gone astray and then that they had been in the packs when they were submitted to HMRC but were not there when the packs were returned.

105. The appellant contends that a number of documents had been omitted when the deal packs were returned. HMRC do not have sufficiently detailed records of what was received and what was returned to be able to determine what, if any, documents were received but not returned. We can make no finding on that issue and will have to proceed on the basis that the appellant did have those documents though, as will become apparent later in this decision, the deals were not conducted in accordance with any written terms so the presence or absence of those particular documents is not really relevant.

106. The appellant's dealings with Futuristic Electronics as a supplier of goods in April 2006 involved the appellant buying goods worth £6.1 million from that company which had been trading for less than two years and about which a Creditsafe report obtained by the appellant said it could give "no credit limit". Again Mr Khaliq said that he dealt with that company despite that report because the goods they were selling actually existed, as certified by a freight forwarder, and that his company was therefore taking no risk in buying the goods. He again emphasised that he was satisfied that there was no risk to his company in dealing with Futuristic Electronics because the goods existed and his company was not going to pay for them until they had been delivered and paid for.

107. Mr Khaliq described a site visit he had made to Futuristic Electronics but he admitted that did little more than confirm that its address was correct and did little to explain how it could have traded in the volume it did.

108. As far as trade references are concerned he claimed to have taken these up on the telephone but when asked where the records of the references were he said that he did not record each and every call made as "to do so would leave us no time to carry out our business". We find that answer to be wholly untrue. It is entirely possible to make at least a rudimentary note of a telephone call while making the call and as the appellant transacted only a handful of deals every month and had staff working for it as well as Mr Khaliq himself we are satisfied that at least some sort of note of the

calls could have been made. It is a feature of this case that other trade references were alleged to have been taken up by telephone calls but are unrecorded. In deed it is also the case that many other instructions and queries are supposed to have been dealt with by unrecorded telephone calls and, where that is the case, the explanation given was repeatedly the same one about pressure of work and the same points about the implausibility of that explanation apply in the other cases as well.

109.In respect of the appellant's dealings with the Export Company Mr Khaliq elaborated a little on the question of trade references. He said that often he wrote to referees put forward by the proposed counterparties but the referees would not reply in writing and he would telephone them. He admitted he could not produce any copies of letters or faxes he had sent seeking such references.

110.The Creditsafe report on the Export Company was that it had good creditworthiness but the limit of credit suggested was £40,000 which the appellant's deals, amounting to £15 million, exceeded by a wide margin. In respect of the record of a visit Mr Khaliq made concerning a site visit to the Export Company it was pointed out that some of the documents Mr Khaliq claimed to have received were not produced by HMRC in the documents they said he had submitted to them. Again he said they had been submitted but HMRC must have lost them. It was then pointed out by Mr Mandalia when he was cross examining Mr Khaliq that the record of the visit did not contain ticks in boxes relating to such documents and it was suggested that they had never been produced. Mr Khaliq said he had not ticked the boxes to indicate what documents he had because of time constraints and that he made two or three site visits in a day. We find that answer to be wholly untrue. Ticking a box at the time a document is produced is obviously an action that can be carried out as the document is produced and no time constraint is involved.

111.In respect of Excel Solutions with which the appellant traded to the extent of nearly £26 million in April and May 2006 Creditsafe suggested no credit limit (possibly because it was a fairly newly formed company) and Mr Khaliq said he was unconcerned by that for the same reasons as with other companies. He also said he was unconcerned about the fact that the nature of the business was given as sale and maintenance of motorcycles because companies can change the nature of their business, which is of course true, though for a former motorcycle sale and repair business to achieve a turnover of £26 million in two months in mobile phones relatively shortly after its creation is a fact that should have raised some concern for Mr Khaliq.

112.A site visit report purporting to relate to a site visit carried out on 4 December 2005 by Mr Khaliq was signed by a director of Excel Solutions but the signature appears to be dated 18 July 2006 which was after the deals in question had been completed. Mr Khaliq claimed he had added the date but he was unable to explain why the date was incorrect.

113.Owl Limited supplied goods worth £9.2 million to the appellant in April 2006. A Dun and Bradstreet report suggested a credit limit of £2,495 and gave an opinion that the risk of business failure was high. Mr Khaliq said that he relied upon their

supplier's declaration as proof that they owned the goods the appellant was offering to buy.

114.The appellant sold £6.2 million worth of goods to URTB. The appellant's business model, as described by Mr Khaliq, was that it sold goods to a trader on terms that the ownership of the goods would not pass to the purchaser until it had paid for the goods and that in the meantime although the goods were shipped to the customer's freight forwarder the shipment was "on hold" and the goods were to be held by the freight forwarder until it received instructions to release them, which would be given only after the goods had been paid for.

115.Mr Khaliq was well aware of the risks of allowing a customer to have goods delivered to them without his company having been paid for them as that was the cause of the insolvency of his previous company (Optics 20/20). It is also clear that there is always a commercial risk in despatching goods to a customer before it has paid for goods as, at the very least, there will be costs involved in recovering the goods if the deal falls through. Also, as Mr Khaliq claimed the market in which he was dealing was a fast moving market with rapid fluctuations in price, there was always a risk that even if recovered after a failed sale the goods would have reduced in value.

116.A Dun and Bradstreet report on URTB had stated there was insufficient information to offer a credit opinion and that there was a significant level of risk. That level of risk was based on URTB trading as a restaurant which was a fact Mr Khaliq admitted he knew. Mr Khaliq responded when those facts were put to him in the same way as he had responded so far as his suppliers were concerned, namely that he was not giving credit to URTB.

117.Mr Khaliq claimed that as well as sending the goods on ship on hold terms he also asked the UK freight forwarder whether they had previously sent goods to URTB. He admitted that that enquiry was made verbally in an unrecorded telephone call. In answer to a question why he had not recorded that conversation Mr Khaliq described the enquiry as one of the minute details amongst several phone calls he would make within a day. We do not believe Mr Khaliq when he says he considered the creditworthiness of his customer to be a minute detail. His experience in Optics 20/20 makes that statement incapable of being believed.

118.The appellant sold goods worth over £32 million to GTC. A Creditsafe report gave its credit rating as high risk and Dun and Bradstreet referred to a significant level of risk.

119.The appellant sold goods worth £19.4 million to Opal 53 which had a Dun and Bradstreet credit rating of €2,576 though it had a low risk which presumably means a low risk of default but within that credit limit.

120.The appellant sold goods worth £2 million to Sigma 60 which had a tangible worth of €17,497 and for which Dun and Bradstreet advised no credit should be given.

121. Mr Khaliq's evidence about the other customers was similar to that about URTB.

122. We will next deal with the evidence about the appellant's method of trading.

123. Mr Khaliq said he decided he wanted to avoid a repeat of the sort of problems he had had with Optics 20/20 and so he instructed a firm of solicitors to draft terms of business which he claimed he got customers to sign, once, before trading began. However it became clear that the appellant did not trade in accordance with those terms of business which Mr Khaliq described as legal speak and which he admitted he did not understand. For example the terms of business required a 10% deposit to be paid by customers before goods would be allocated but Mr Khaliq admitted that that term was never applied.

124. Although the terms included a term that title to the goods would not pass until payment, there was also a term which allowed a customer to use the goods in the ordinary course of its business provided that it sold them at full market value "on the account of [the appellant]". Mr Khaliq said that the goods would not be released to the seller until payment which would preclude that term from applying. He said: "The goods are released by way of verbal instruction, fax instruction. Only at that point do they have title to the goods and it is at that point that they can do what they want with them". Mr Mandalia pointed out to him that on at least one occasion Opal sold goods to another company before they had paid for them which appears to have been a surprise to Mr Khaliq but which he then explained by saying the goods would still have been at the buyer's freight forwarder and would have been under the control of the appellant until the point of release.

125. The supplier's declaration and the purchase order from the customer and invoice issued to the customer were the documents Mr Khaliq claimed established the terms of the deals and a document to the freight forwarder which asked it to allocate the goods was claimed to be the shipping instruction although Mr Khaliq admitted it did not specify that the goods were to be shipped as opposed to being allocated to the buyer. Many of the documents produced appear to have been issued by the respective parties before other documents on which they depended had been issued. Mr Khaliq asserted that such inconsistencies in the documentation were explained by the fact that verbal instructions or agreements had been given but he admitted that such instructions or agreements had not been noted.

126. One particular aspect of the terms of business as described by Mr Khaliq is that the appellant relied entirely on the supplier declaration and some sort of assurance from the supplier's freight forwarder for proof that the supplier was entitled to supply the goods and held title to them. He also claimed that the supplier declaration passed title to the goods from the seller to the appellant but the terms of the supplier declaration were that title "will pass" apparently at some later time. Equally, the appellant relied on the purchaser's freight forwarder not to release the goods to the purchaser until payment had been made.

127. As the actual terms of business were either not spelled out in the documents or were different from those envisaged in the documents, Mr Khaliq was pressed for an

answer as to how he was able to be satisfied that the various parties knew what the actual terms were. He said that it had always been understood that the deals would be done in the way he described. He failed to make it clear to our satisfaction how those vital understandings arose. He said that when he started to trade in this business a freight forwarder had described to him that an allocation note would amount to shipping instructions. On the other hand he also claimed to have made site visits to the UK freight forwarders where unrecorded verbal agreements were reached with each one to that effect. He made no site visits to the overseas customers' freight forwarders and claimed that the UK freight forwarders were responsible for ensuring that the customers' freight forwarders knew how the trade operated.

128. The descriptions of the phones in the deal paperwork are in every case limited. Mr Khaliq claimed that the customers relied on their inspections of the phones to satisfy themselves that they were what had been ordered. He said that the customers had an opportunity to inspect the phones while they were still in the UK and, although that may be correct, there is no evidence that any of them actually did so and the time scale involved between the agreements to buy and the shipping of the goods appear to be too short to allow that to have happened in practice. As those inspections therefore appear, if any were carried out, to have been carried out after the phones arrived in the overseas countries where the buyers were based it seems that if any details were agreed beyond the limited details on the paperwork that they must have been agreed by yet further unrecorded verbal agreements. At an earlier stage in his evidence Mr Khaliq had said that he faxed copies of his inspection reports to the buyers who may have ordered their own inspections but if the inspections carried out in the UK were faxed to the buyers they would not have given more than limited detailed descriptions of the phones.

129. For the transaction known as deal 11 in this appeal which involved 1,690 phones worth £913,445 the purchase documents held by the appellant refer to the purchase of Nokia 8810 phones as did the sales invoice but the inspection report given to the appellant refers to Nokia 8800 phones, which is a different model. Mr Khaliq referred to this as a typographical error in the inspection report but it was then pointed out that the appellant's customer had also requested 8800 model phones in its purchase order. Mr Khaliq claimed this was also a typographical error. Whilst we accept that typographical errors can occur it is surprising, at least, to see no correspondence correcting the error in a deal worth nearly £1million.

130. Similar discrepancies arose in respect of deal 13 which was worth £426,250 except that in that case the inspection company had referred to the wrong model and then the freight forwarder had referred in the CMR to the wrong model in respect of some only of the phones. Again, Mr Khaliq simply said these were typographical errors.

131. Mr Khaliq's evidence about the negotiations leading to the deals was that the discussion with the counterparties would include discussions about the languages in which the phones would operate, the specification of the phones and the types of charger plugs being supplied. No records were kept relating to these details of the negotiations.

132.Mr Khaliq also specifically referred to the negotiations of price and he was questioned in detail about that aspect of the business. He described how prices were negotiated with both the potential buyer and the seller and he specifically agreed that he wanted to agree a price that was as high as possible and to maximise the profit. He also specifically said that he negotiated each deal individually.

133.It was put to Mr Khaliq that every one of the 20 April deals had achieved a 2% mark up allowing for rounding to the nearest 5 pence. The Tribunal pointed out that the 2% was achieved by rounding to the nearest multiple of 25 pence. In fact in two of the April deals the rounding was to the next nearest multiple of 25 pence. Mr Khaliq denied that this was evidence of contrivance but we find that he had no satisfactory explanation of how that result came about if he was negotiating with both counterparties as he claimed. At first he said it was just a coincidence but then he said that he had worked towards a threshold or target that must have been 2% at that time. It is clear from his evidence that Mr Khaliq was not saying that he had been presented with a fait accompli about the prices he bought and sold at but his evidence about how the end result for the April deals was consistently 2%, allowing for rounding is, we find, wholly unconvincing having been inconsistent as his evidence progressed. He changed back and forwards between asserting that there had been full negotiations and that there had been a target dictated by current market conditions. On any view, given that he claimed always to have wanted to maximise his profit, it is inconsistent with that aim that every deal was done in a multiple of 25 pence.

134.The deals in May and June, with two exceptions, all also led to prices in multiples of 25 pence and round percentages allowing for rounding albeit that the percentages themselves varied.

135.We find that Mr Khaliq did not tell the truth about the negotiations concerning prices and that there must have been some contrivance about the prices at which the deals were done. Two possibilities appear to us to exist. One is that Mr Khaliq was simply told what to charge or what percentage he would be allowed as his company's mark up and the other is that he was manipulated into agreeing prices with mark ups which were worked out by a formula rather than by normal negotiations.

Our findings

136.We reject the appellant's contention that it took all precautions reasonably open to it and therefore we reject its contention that it has the defence referred to as the impenetrable shield.

137.The enquiries the appellant made about the counterparties in its transactions were perfunctory. The enquiries simply established that those parties were in existence, were trading and were registered for VAT. The appellant undoubtedly ignored facts which should have alerted it to the serious possibility that those parties could not have afforded to be involved in the transactions in question. No further enquiries were made to satisfy itself of what explanation there was for their being able to afford to deal in goods worth large sums despite their very limited credit ratings.

138.In so far as the appellant visited the counterparties it is clear from Mr Khaliq's attitude to the keeping of records about those visits that they were regarded by him as formalities. Trade references taken over the telephone in unrecorded conversations are indicative of the appellant's attitude to its enquiries.

139.We find that the appellant should have known that its transactions were connected with fraud.

140.The facts known to the appellant about its counterparties should have raised doubts about the ability of those counterparties to trade on the scale on which they were trading. Mr Khaliq's repeated assertion in evidence that the limited credit ratings given to the counterparties were because they were recently established companies that had insufficient trading history to be given a better rating simply raises a different question. It must have been obvious that a question arose as to how new entrants to the market could legitimately build up such huge amounts of business so quickly.

141.The appellant dealt with the counterparties on terms entirely different from its terms of business and in many cases different from their terms.

142.The appellant claimed to have dealt with those parties on terms that were understood by all concerned but Mr Kaliq was unable to explain to our satisfaction how those understandings had come about. He said that a freight forwarder had explained to him about ship on hold terms. But he had no explanation of how his supplier knew and agreed that it would only be paid after the appellant had been paid or that his customer knew and agreed it would be expected to pay the appellant as soon as possible. When pressed for an explanation Mr Khaliq claimed these terms were explained and agreed in telephone calls of which no record was kept. We find it to be most unlikely that such important details of the deals would be dealt with by telephone calls without confirmatory correspondence and we find it to be totally incredible that the appellant would not even make a note of the calls for its own records. We reject Mr Khaliq's explanation. The only other likely explanation of the absence of properly recorded agreed terms is that everyone involved did indeed know how the transactions were intended to be completed and that they bore little relationship to normal business practices.

143.The appellant was well aware of the existence of MTIC fraud and claims to have been alert to the need to avoid becoming involved in it but it must have been obvious to Mr Khaliq and therefore to the appellant that a business in which all parties knew how the transactions were to be conducted and that they could be conducted in ways contrary to the parties terms of business were just the type of transactions that were ones connected with fraud. That such significant departures from normal trading practices occurred in deals worth millions of pounds was a very clear indication that the transactions were connected with fraud.

144.We find that the evidence shows that Mr Khaliq should have known that the transactions were connected with fraud and that therefore the appellant should have known.

145.We find that Mr Khaliq knew that the transactions were connected with fraud for the reasons stated in the following paragraphs.

146.In this context the criticisms we have already made about the appellant's trading methods and the fact that danger signs were ignored are relevant but not sufficient to justify a finding that he actually knew the transactions were connected with fraud.

147.We have already found some parts of his evidence to be untruthful and clearly it is very relevant to our finding that he did know of the connection with fraud that we have found him to be an unreliable and untruthful witness. We observed Mr Khaliq giving evidence for over four days and we observed that when challenged his evidence frequently changed so that an explanation would be given about something but when he was further questioned about it he would give a different and inconsistent explanation.

148.We also regard it as particularly relevant that the appellant was able to enter into the transactions themselves remarkably easily. Suppliers and purchasers were found from the same trading websites. The appellant was allowed to transport goods for which it had not yet paid to foreign destinations on the understanding that its suppliers would be paid as and when the appellant was paid. That was despite the fact that the transactions were arranged, as the appellant admitted, within a day or two in what was described as a volatile market. Both the appellant and its supplier were apparently prepared to take the risk that the foreign purchaser would not be able to complete the deal and the goods would have to be returned involving expense and potentially losses to both the supplier and the appellant. This was particularly significant as Mr Khaliq had had a previous catastrophe caused by just such a failure to pay by a customer in his previous company. All parties were prepared to deal with goods worth very large sums on the vaguest of descriptions. These and other similar facts must have been obvious to Mr Khaliq who gave extensive evidence and whom we consider to have shown himself to be an intelligent man who not only should have realised the significance of these facts but we are sure did realise them.

149.We also consider it is particularly relevant that the mark ups achieved by the appellant appear to be based on a formula including rounding and discernible, albeit varying, percentages. Those facts are completely inconsistent with Mr Khaliq's assertion that he negotiated the prices with his supplier and customer with a view to making the best profit he could. It is so unlikely that all the April deals would have achieved the 2% mark up after rounding in the way we have described that we can reject any argument that that consistency can be a coincidence. Similarly, the deals in May and June appear to follow a similar pattern in that they are capable of being calculated as having been rounded to a similar degree but with mark ups of different percentages having played a part in the calculations.

150.The simplest explanation for the consistency of mark ups referred to above is that the parties to the deals knew there was to be a formula and knew how to work it. The only other explanation that comes to mind is that Mr Khaliq was somehow manipulated into reaching agreements with the appellant's counterparties which had the effect of achieving that mark up. We note that it would appear necessary for both

counterparties to have acted in concert to achieve that manipulation. The first explanation is obvious evidence that all concerned knew of the fraud. Although the second explanation would not necessarily prove knowledge of fraud on the appellant's part it is entirely inconsistent with the appellant's evidence about how the deals were negotiated.

151.As we have found that the appellant knew that its transactions were connected with fraud and that, even if we were wrong so to find, in the alternative that the appellant should have known that they were connected with fraud; the appeal is dismissed.

152.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.

RICHARD BARLOW

TRIBUNAL JUDGE

RELEASE DATE: 28 February 2012