[2013] UKFTT 344 (TC)

TC02747

Appeal number: MAN/2007/1441, MAN/2008/0138 & MAN/2008/0034

VALUE ADDED TAX- – MTIC-sale of mobile phones and CPUs – appellants' three repayment claims by Unistar Group Limited for the periods 04/06, 05/06 in the sums of £391,628.65, £937,723.15 and in relation to period 05/06 in the sum of £126,781.20 and in relation to Unistar Trading Limited for the period 04/06 in the sums of £604,939,14 and £328,514.91 - allowed on grounds that the appellants neither knew nor ought to have known that the transactions were part of an MTIC fraud–appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

UNISTAR GROUP LIMITED **Appellants**
UNISTAR TRADING LIMITED

- and -

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

TRIBUNAL: JUDGE DAVID S PORTER
ALBAN HOLDEN

Sitting in public in Manchester on 6, 7, 8, 9, 13, 15, 16, 17 February and 9 November 2012

Mr Ian Bridge, of counsel, instructed by Barringtons Chartered Accountants, appeared for the Appellants.
Mr Vinesh Mandalia, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

1. Mr Ruarri Spurgeon (Mr Spurgeon), Managing Director of both companies, appeals on behalf of Unistar Group Limited (Group) and Unistar Trading Limited (Trading) (together referred to as the Companies) against the decisions of the Respondents (HMRC) contained in three letters two dated 7 December 2007 and one dated 24 January 2008, refusing to repay VAT. Mr Spurgeon says that the VAT repayments are due to the Group for periods 04/06 and 05/06 amounting to £391,628.65, £937,723.15 and £126,781.20 and due to Trading for the period 04/06 and 05/06 amounting to £604,939.14 and £328,514.91 respectively. He says that he has been trading in mobile phones since May 2001 and that he neither knew nor ought to have known on behalf of the Companies that the transactions in which the Companies were involved were connected with fraud. HMRC say that in light of the Companies poor due diligence and the fact that many of the transactions were connected with fraud Mr Spurgeon must have known, or ought to have known, on behalf of the Companies that the transactions were connected with fraud.

2. Mr Vinesh Mandalia, of counsel, appeared for HMRC and produced 37 bundles of evidence consisting principally of the workings of the officers from HMRC. He called the following witnesses who gave evidence under oath:-

- Roderick Guy Stone, who gave evidence with regard to MTIC fraud in general

- Paul Christopher, an officer of HMRC's missing trader team at Oxford, who gave evidence as to the Companies' dealings

- Simon Japes, an officer of HMRC's missing trader team at Reading, who gave evidence as to the Companies dealings in the First Curacao International Bank (FCIB) in the Dutch Antilles.

3. Mr Ian Bridge, of counsel, appeared for the Companies, produced a bundle of documents and called Mr Spurgeon who gave evidence under oath.

4. We were referred to the following cases:

Axel Kittel and another v Belgium [C-439/04]

Blue Sphere Global Ltd v HMRC [2009] EWHC 1150 Ch,STC 2239

Calltel Telecom Ltd; and another v HMRC [2007] UKVAT V20266

Calltel Telecom Ltd; and another v HMRC [2009] EWHC 1081 (Ch)

Livewire Telecom Ltd; and another v HMRC [2009] EWHC 15 (Ch)

Mobilx Ltd (in administration) v HMRC [2009] EWHC 133 (Ch)

The Commissioners for Her Majesty's Revenue and Customs v Brayfal Limited FTC/53/2010

Red 12 Trading Ltd v HMRC [2009] EWHC 2563 (CH)

POWA (Jersey) Ltd v HMRC [2012] UKUT 50 TCC

JDI Trading Limited v The Commissioners for Her Majesty's Revenue and Customs TC 02309

Mahageben C-80/11

Peter David C-142/11.

Preliminary issues

5. Both Counsel raised various issues during the hearing, which we propose to deal with initially. The Tribunal under Rule 5 of the Tribunal Procedures (First-tier Tribunal) (Tax Chamber) Rules 2009 may:-

"5(1) Subject to the provisions of the Tribunals, Courts and Enforcement Act 2007…. regulate its own procedures
(2)….
(3) ….
(d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or to a party
(e) deal with an issue in the proceedings as a preliminary issue
(f) ……
(g) decide the form of any hearing.

- Mr Bridge objected to Mr Christopher expressing opinions about the consequences of his findings. He submitted that Mr Christopher had no experience as a businessman and was not an expert. Judge Porter allowed Mr Christopher's expressions of opinion to remain in his witness statement. Mr Christopher had been working for HMRC since 2004 and had experience as an inspector of various businesses. He had dealt with several MTIC cases and had experience with regard thereto. The Tribunal noted that opinion was not fact and that it would take notice of such opinion as it thought appropriate

- Mr Bridge objected to the introduction of Mr Hussey's criminal conviction for theft. He stated that the offence was spent by 1991 and that it was an offence for Mr Christopher to introduce the same into his witness statement under section 9 of The Rehabilitation of Offenders Act 1974. Mr Mandalia pointed out that sub-section 2 of section 9 allowed such an introduction when introduced by Mr Christopher in his capacity as an officer of HMRC. Judge Porter indicated that in those circumstances the matter could be introduced, but that he doubted that the Tribunal would take any notice of it considering Mr Hussey was 18 at the time of the offence and the fine appeared to have been £200.

- Mr Bridge wished to introduce evidence of video recordings made at the time of the inspections. Mr Spurgeon had arranged for such video's to be taken and due to their age he had arranged for them to be recorded on DVD. Judge Porter allowed the videos to be introduced, subject to HMRC having the opportunity to view the same. The DVDs were made available to Mr Mandalia for that purpose.

- During Mr Stone's evidence Mr Mandalia sought to introduce details of the financial circumstances of the present appeal so that Mr Stone could advise whether it followed the scheme of a typical MTIC case. Mr Bridge objected as he had not had the opportunity to consider the documentation and he understood that Mr Stone's evidence was generic in content and that he had not been involved in any of the matters giving rise to this appeal. Judge Porter agreed with Mr Bridge and refused the introduction of such an opinion.

- Mr Bridge also sought to require HMRC to produce details of the IMEI numbers ostensibly contained on a computerised list sent to HMRC during discovery. Mr Bridge was unable to produce the email sending that listto HMRC nor could he produce the list at the time of this request. He indicated that it was hoped that it might be possible to recover the list from the computer, but he thought this might prove difficult, in view of the time lapse since its production. Judge Porter refused to make an order requiring HMRC to produce the list. He considered that this was evidence provided by Mr Spurgeon and that Mr Spurgeon had had adequate time to ensure that the IMEI lists could be made available during discovery and that it was too late and unreasonable to expect HMRC to do that for him now.

- Mr Mandalia had sought to introduce evidence with regard to Trading's turnover from May 2001. Mr Bridge objected on the basis that the earlier trading was not the subject of this appeal and it was not appropriate to allege dishonesty with regard thereto. Judge Porter agreed that as there was no evidence that Trading's earlier deals were connected with fraud therefore it was not appropriate to consider them. He confirmed, however, that Mr Spurgeon had not disputed the turnover figures as follows:

1 May 2001 to 30 April 2002	£161,365,685
1 May 2002 to 30 April 2003	£122,856.432
1 May 2003 to 30 April 2004	£ 56,540,482
1 May 2004 to 30 April 2005	£ 48,014,164
1 May 2005 to 30 April 2006	£ 50,704,328
Total	£439,481,091 *3% = £13,184,432,73

Mr Spurgeon had agreed that Trades gross profit was in the region of 3%. Judge Porter asked why, in view of the fact that Trading appears to have achieved a profit in excess of £11,000,000 over the earlier period, it had been necessary for the Companies to borrow any money. Mr Spurgeon replied:-

"I didn't need to, no. It would have made more sense not to borrow the money, not to pay all the interest. But again, that is hindsight".

- At the end of the hearing Mr Bridge sought to introduce details of the emails which passed between Mr Spurgeon and HMRC and details from Hawk, the Companies freight forwarders, as to the supply of IMEIs. The evidence had been prepared by Sandro Placidi, a Solicitor, instructed by Mr Spurgeon during the hearing. The Tribunal was satisfied from the evidence that some IMEI numbers had been produced.However, due to the lateness of the application, and the fact that Sandro Placidi had not been involved in the hearing, Judge Porter refused the application.

6. Most readers of this decision will be familiar with the way in which Missing Trader Fraud operates. Christopher Clarke J has helpfully explained the position of the "classic way" that MTIC fraud works in *Red 12 Trading Limited v HMRC* at paragraph 2:-

> "2… Trader A imports goods, commonly computer chips and mobile phones, into the United Kingdom from the European Union (EU). Such importation does not require the importer to pay VAT on the goods. A then sells the goods to B, charging VAT on the transaction. B pays the VAT to A, for which A is bound to account to HMRC. There is then a series of sales from B to C to E (to more). These sales are accounted for in the ordinary way. Thus C will pay B an amount which includes VAT. B will account to HMRC for the VAT it has recovered from C, but will claim to deduct (as an input tax) the output tax that A has charged B. The same will happen, mutatis mutandis, as between C and D. The company at the end of the chain E will then export the goods to a purchaser in the EU. Exports are zero rated for tax purposes, so that trader E will receive no VAT. He will have paid input tax but because the goods have been exported he is entitled to claim it back from HMRC. The chain in question might be quite long. The deals giving rise to them may be affected within a single day. Often none of the traders themselves take delivery of the goods which are held by a freight forwarders.
> [----]
> 5. A jargon has developed to describe the participants in the fraud. The importer is known as "the defaulter". The intermediate traders between the defaulter and the exporter are known as "buffers" because they serve to hide the link between the importer and exporter, and are often numbered buffer1, buffer 2 etc. The company which exports the goods is known as "the broker".

As to the common variant of contra-trading, this is summarised in paragraph 7 as follows:-

> "7… Goods are sold in a chain ("the dirty chain") through one or more buffer companies to (in the end) the Broker ("Broker 1") which exports them, thus generating a claim for repayment. Broker 1 then acquires (actually or purportedly) goods, not necessarily of the same type, but of equivalent value from an EU trader and sells them, usually through one or

> more buffer companies, to Broker 2 in the United Kingdom for a mark up. The effect is that Broker 1 has no claim for repayment of input VAT on the sale to it in the dirty chain, because any such claim is matched by the VAT accountable to HMRC in respect of the sale to Broker 2. On the contrary a small sum may be due from Broker 1 to HMRC. The suspicions of HMRC are, by this means, hopefully not aroused. Broker 2 then exports the goods and claims back the total VAT. The overall effect is the same as in the classic version of the fraud; but the exercise has the effect that the party claiming the repayment is not Broker 1 but Broker 2, who is, apparently, part of a chain without a missing trader ("the clean chain") Broker 2 is party to the fraud."

7. The case law, subject to the decision in *Peter David*, which we discuss later in this decision, has developed through *Moblix Ltd (in administration); and others*, which provided that an exporter will not be innocent if he knew or ought to have known that his transaction was connected with the fraudulent avoidance of tax.

8. Mr Stone, in his witness statement, states that carousel fraud was rife from 2003 up to 2007, when the reverse charge was introduced. Any loss to the exchequer only occurs when the input tax is refunded on a repayment claim. HMRC had been repaying substantial sums of money, in many cases well in excess of £10,000,000. The total loss to HMRC during those years amounted to in excess of £15 billion. It appears that many of the frauds have been financed by third parties outside of the various transaction chains. In evidence, he stated that the difference between 'an acquisition fraud' and 'a carousel fraud' is that in the former the goods end up with a domestic consumer, a trader retaining the VAT and in the latter the fraud is a financial fraud as the goods and the money are circulated and recycled for the purposes of being reused in the fraud and do not reach an end consumer. The loss crystallises when HMRC make the repayment. He also confirmed that, in the main, in most of the MTIC cases to date it is the dispatcher, in the Companies' position, which has its VAT repayment refused. No cases have been taken forward under the 'joint and several' liability. He confirmed that the implementation of the 'reverse charge' has removed the fraud from the United Kingdom.

9. We think it would be helpful to set out how the money flows in such schemes. Mr Stone has stated that an MTIC 'carousel' fraud is a financial fraud and is an abuse of the VAT system that results in the fraudulent extraction of revenue from the United Kingdom Treasury. He further states in his witness statement that the fraud predominantly involved computer chips and mobile phones. The finance for the deals is often provided from an outside source and is introduced to the chain when the Broker is paid by his European customer. It then cascades down the chains, each trader withdrawing their agreed profit and paying their appropriate amount of VAT. That VAT is often very small (apart from the Brokers repayment claim) because the intermediate Buffers can set off their input tax against their output tax. The money is then returned to the original funder.

10. The participants in the chain are all seen to make a small profit. Mr Stone has indicated that this amounts to 3% of the sale price for the intermediary Buffers and 6% of the sale price for the Brokers, who take the risk of not receiving a

repayment. Apart from the defaulter, who ostensibly purchases the goods from Europe, each of the traders thereafter makes appropriate VAT payments to the Revenue. However, they do not necessarily pay each other the correct amounts, either under the apparent contracts, or of VAT. The participants are required, if the transactions are fraudulent, to make an initial contribution to the scheme. In the example below only half the VAT liability due to their supplier has been paid, so that the participants carry some of the risk and thereby reduce the risk of the fraudsters not receiving the VAT. When the repayment is obtained by the Broker, he will have sufficient money to repay the VAT he was required to introduce, receive his profit and to pay his outstanding VAT liability to his supplier or in the alternative, the loan he has taken to pay the VAT. That supplier will then be in a position to pay his outstanding VAT to the defaulter, who will then receive all the VAT he should have paid to HMRC, but which he intends to keep, less the contribution to the profits and VAT down the chain. A variation on the theme is for the VAT to be introduced as a loan in addition to the initial money being provided. As a result the loan is effectively repaid when the VAT loaned is returned to the person who made the loan. This may well explain why the loans are not pursued once the repayment has been refused. The vast majority of these transactions were handled by the FCIB in sterling although the participants were, in part, European. The transactions are dealt with in sterling because the United Kingdom VAT repayments are made to the Brokers in sterling. It appears from the unique numbering of each transaction in the FCIB that the cash transfers are affected in a very short time. The shortness of the time suggests that the payments are orchestrated by the fraudsters, as it is unlikely that the several traders in a chain would be available at their computer consoles to make the payments in the time scales suggested. The outsider, who financed the transaction from the beginning, is presumably repaid his original investment and the loan (if any) plus any agreed interest or charges.

11. **Example**

The participants are “E” the customer in Europe.

“D” the broker, who will seek the repayment from HMRC and who sells the goods to “E”

“C” a buffer who sells the goods to “D” having purchased them from “B” and who pays the net VAT to HMRC.

“B” the defaulter, who purchases the goods from Europe and charges VAT on the sale to “C”, but does not account for the VAT to HMRC.

“A” the trader in Europe sells the goods to “B” in the United Kingdom (the defaulter) and receives the money back from “B” which he or the fraudsters introduced into the chain in the first place.

12. Many of these transactions took place through the FCIB which was based in the Dutch Antilles, it appears to have been the bank of preference and has since been closed down by the Dutch Authorities. All the money appears to take a significantly short time to pass through the account, so that the initial payment, in the example £1,124,544 is only at risk for a brief period. It would appear that the account may well be manipulated by one person as all the accounts appear to be internet accounts prefaced by the number 801, which can be accessed by an agreed password. The example below indicates the way in which the fraud is constructed, but it does not represent any of the deals in the chains the subject of this appeal.

A (in the EU) sells the goods to B (the Defaulter) for		£1,000,000
B sells the goods to C (the Buffer) with a profit of 3 % for		£1,030,000
plus VAT on £1,030,000 at 17.5 %		£ 180,250
		£1,210.250
C sells the goods to D (the Broker) with a profit of 3% for		£1,060,900
Plus VAT on £1,060,900 at 17.5%		£ 185,657
		£1,246,557
D sells the goods to E (in the EU) with a profit of 6% (but without VAT) for		£1,124,554
As a result:		
E pays the full price to D		£1,124,554
(being the money introduced by the fraudsters)		
D has to introduce some of his own funds to pay C amounting to £122,003 (i.e. £1,246,557 - £1,124,554) to pay the to C *		£1,246,557
On receipt of the VAT refund of £185,657 D can then		
Repay the funds introduced	£122,003	
and take his 6% profit	£ 63,654	
C then pays B		£1,210.250
and pays HMRC VAT of (£185,657 -£180,250)	£ 5,407	
and take his 3% profit	£ 30,900	
B then pays A		£1,000,000
keeps his 3% profit	£ 30,000	
and defaults on the VAT of	£180,250	

* If D does not have any funds to introduce then he may part pay the amount owing to C and pay the balance when the VAT refund is obtained.

13. The money introduced by the third party can take various forms. It can fund the entire transactions, so that all the VAT to be reclaimed is included in the first payment by the European Buyer, even though no VAT is payable by that Buyer. Some, or all, of the necessary funds can be lent to the Broker, selling to the buyer in Europe, by one of the traders in the deal chains or a third party involved in the scheme. When the repayment is made the broker repays the loan, which represents the VAT needed to make the deals look commercial. It would seem that the VAT introduced as a loan is returned to the fraudsters as in most of these cases the lenders do not insist on the repayment of their loans. This must arise because they have already received the money back. Much of the original monies in an MTIC fraud are introduced by a third party. So long as that party is participating in the fraud, in one way or another, it is inconsequential how the money is introduced, because all his money will be repaid to the introducer as the trading occurs. The repayment

represents all, or a proportion of, the VAT, which the defaulter intends to keep. As Mr Stone identified, it is not until the repayment is made that the fraud is completed and that HMRC lose the VAT. As these are financial frauds, once the financial shape of the deals has been worked out, it is simple to design the deal sheets and to confuse HMRC by a random payment of the various amounts due since the fraudsters know how much is due to each deal.

14. HMRC indentified a counter measure introduced by the fraudsters in July 2005 and as a result HMRC introduced a more robust verification system. In a contra-trade the fraudsters, instead of making repayment claims in excess of £10,000,000, inserted another chain (an apparent 'clean chain'), and the Broker appears in the new chain as well as the dirty chain. In that way the Broker was able to set off its VAT liability as described by Mr Justice Clarke above. This case relates to the Companies deals in April and May. The Companies have conceded that there are tax losses arising from all the transactions and it accepts that those losses were fraudulent. It does not accept, however, that its deals were connected to those transactions. We have not considered the other defaulter chains in detail other than to satisfy ourselves that the losses have arisen as agreed by the parties.

The Legislation.

15. In view of the decision in *Moblix Ltd (in administration)* and *Peter David* we think it would be helpful, before considering the evidence, to identify the law as we understand it. The right to deduct is contained in sections 24 -29 of the Value Added Tax Act 1994 (the Act). Section 25 requires such a person to account for and pay any VAT on the supplies of goods and services which he makes and entitles him to a credit of so much of his input tax as is allowable under s 26: see s 25(2). Section 26 gives effect to what is now Article 168 of EC Council Directive 2006/112 (the VAT Directive) and allows the taxable person credit in each accounting period for so much of the input tax for that period as is attributable to supplies made by the taxable person in the course or furtherance of his business: see s 26(2).

16. These provisions are in mandatory terms. If a trader has incurred input tax, which is properly allowable, he is entitled, as of right, to set it against his output tax liability or to receive a repayment if the input tax credit due to him exceeds that liability. He is required to hold evidence to support his claim (see article 18 of the Sixth Directive and regulation 29(2) of the Value Added Tax Regulations 1995 (SI 1995/2518). As a result, the right to deduct or the right to a repayment is absolute, and no element of discretion is conferred on the tax authority, save that the authority may accept less evidence than normally required; it has no right to demand more evidence than that prescribed by article 18. The right is also immediate, that is it may be exercised "when the deductible tax becomes chargeable". The only limitation is the practical one that, although deductibility is determined on a transaction by transaction basis, the mechanical process of deduction or repayment is affected by reference to prescribed accounting periods.

The Case law

17. The case law has developed from *Optigen Ltd* where it was decided that a repayment must be made to a trader, who is innocent of the fraud, even though the transaction did not amount to an economic activity, through *Axel Kittel and another* which extended the concept of knowledge to include a trader, who ought to have known that there was a fraud, to *Moblix Ltd (in administration)*, which refers to the various cases and has refined the concept of knowledge and the evidence required to prove it. In the light of that decision, we do not think it is necessary to trace the development of the concept through all of the cases we have been referred to, but rather to refer to Lord Justice Moses' observations in the Court of Appeal. Moses LJ stated;

> "…The scope of VAT, the transactions to which it applies, and the persons liable to the tax are all defined according to objective criteria of uniform application. The application of those objective criteria are essential to achieve:-(see *Kittel* para 42, citing *BLP Group* [1995] ECRI/983 para 24) the objectives of the common system of VAT of ensuring legal certainty and facilitating the measures necessary for the application of VAT by having regard, save in exceptional circumstances, to the objective character of the transaction concerned." [Paragraph 24]

> "In Kittel after §55 the Court developed its established principles in relation to fraudulent evasion. It extended the principle, that the objective criteria are not met where tax is evaded, beyond evasion by the taxable person himself to the position of those who knew or should have known that by their purchase they were taking part in a transaction connected with fraudulent evasion of VAT… It extended the category of participants who fall outwith the objective criteria to those who knew or should have known of the connection between their purchase and fraudulent evasion. Kittel did represent a development of the law, because it enlarged the category of participants to those who themselves had no intention of committing fraud, but who, by virtue of the fact that they knew or should have known that the transaction was connected with fraud, were to be treated as participants. Once such traders were treated as participants their transactions did not meet the objective criteria determining the scope of the right to deduct…"[paragraph 41]

> "A person who has no intention of undertaking an economic activity, but pretends to do so in order to make off with the tax he has received on making a supply, either by disappearing or hijacking a taxable person's VAT identity, does not meet the objective criteria which form the basis of those concepts which limit the scope of VAT and the right to deduct (see Halifax § 59 and Kittel § 53). A taxable person who knows or should have known that the transaction which he is undertaking is connected with fraudulent evasion of VAT is to be regarded as a participant and, equally, fails to meet the objective criteria which determine the scope of the right to deduct"; [paragraph 43].

18. The European Court of Justice in *Optigen Ltd* has made it clear that a trader can recover his output tax even though the transaction is outside the VAT scheme.

Both *Kittel* and *Moblix* confirm that where a trader meets the objective criteria for compliance with the VAT regime, it is not open to the Authorities to withhold any tax repayment. If, however, a trader does not comply with the objective criteria, because there is a fraud, that trader cannot recover any tax. Moses LJ at paragraph 30 states:

> 30. "The Court (The European Court of Justice when considering *Optigen*) rejected the United Kingdom's argument that unlawful transactions fell outside the scope of VAT. Fiscal neutrality prohibits the distinction between lawful and unlawful transactions; such a distinction must be restricted to transactions concerning products which by their very nature may not be marketed, such as narcotic drugs and counterfeit currency (see paragraphs 49 and the Advocate General's Opinion paragraph 40). By its rejection of the United Kingdom argument, the Court made it clear that the reason why the fraud vitiates a transaction is not because it makes the transaction unlawful but rather because where a person commits fraud he will not be able to establish that the objective criteria, which determine the scope of VAT and the right to deduct, have been met."

And at paragraph 52:

> 52. "If a taxpayer has the means at his disposal of knowing that by his purchase he is participating in a transaction connected with fraudulent evasion of VAT he loses his right to deduct, not as a penalty for negligence, but because the objective criteria for the scope of that right are not met. It profits nothing to contend that, in domestic law, complicity in fraud denotes a more culpable state of mind than carelessness, in the light of the principle in Kittel. A trader who fails to deploy means of knowledge available to him does not satisfy the objective criteria which must be met before his right to deduct arises";

19. As the Advocate General stated at paragraph 40:

> 40. "As becomes clear from the Commissioners own description of what they consider to constitute carousel fraud, its characteristic is that it makes use of lawful economic channels in order to facilitate the retention of money paid as VAT"

At paragraph 59

> 59."The test in Kittel is simple and should not be over-refined. It embraces not only those who know of the connection but those who "should have known". Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have known **that the only reasonable explanation** (our emphasis) for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should

have known of that fact. He may properly be regarded as a participant for the reasons explained in Kittel";

At paragraph 61

61, "A trader who decides to participate in a transaction connected to fraudulent evasion, despite knowledge of that connection, is making an informed choice; he knows where he stands and knows before he enters into the transaction that if found out, he will not be entitled to deduct input tax. The extension of that principle to a taxable person who has the means of knowledge but chooses not to deploy it, similarly, does not infringe that principle. If he has the means of knowledge available and chooses not to deploy it he knows that, if found out, he will not be entitled to deduct. If he chooses to ignore obvious inferences from the facts and circumstances in which he has been trading, he will not be entitled to deduct";

20. Moses LJ also expressed concern that HMRC have in the past placed too much importance on a traders' failure to carry out due diligence and not enough on the circumstantial evidence available. At paragraph 75 he stated.

" 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…..

21. In contra-trading cases HMRC's ability to establish a connection between the actual tax losses in the contra-trade to the specific repayment claim in the clean chain is extremely difficult. This is not least because of the timing of the payments, where the Broker, in the clean chain, will be on monthly returns, and the transactions to which that repayment relates, will be some two or three months later, dependent on the accounting dates in the dirty chain. In *Livewire Telecom Ltd* Mr Justice Lewison stated:

Paragraph 102: "In my judgement in a case of alleged contra-trading, where the taxable person claiming repayment of input tax is not himself a dishonest conspirator, there are two potential frauds:

i) The dishonest failure to account for VAT by the defaulter or missing trader in the dirty chain; and

ii) The dishonest cover-up of that fraud by the contra-trader.

Thus it must be established that the taxable person knew or should have known of a connection between his own transaction and at least one of these frauds. I do not consider it is necessary that he knew or should have known of a connection between his own transaction and both of those frauds. If he knows or should have known that the contra-trader is engaging in fraudulent conduct and deals with him, he takes the risk of

participating in a fraud, the precise details of which he does not and cannot know."

22. In *Blue Sphere Global Ltd* at paragraph 44 the Chancellor held that:

> "44. There is force in the argument of Counsel for BSG but I do not accept it. The nature of any particular necessary connection depends on its context, for example electrical, familial, physical or logical. The relevant context in this case is the scheme for charging and recovering VAT in the member states of the EU. The process of off-setting inputs against outputs in a particular period and accounting for the difference to the relevant revenue authority can connect two or more transactions or chains of transactions in which there is a common party whether or nor the commodity sold is the same. If there is a connection in that sense it matters not which transaction or chain came first. Such a connection is entirely consistent with the dicta in *Optigen* and *Kittel* because such connection does not alter the nature of the individual transactions. Nor does it offend against any principle of legal certainty, fiscal neutrality, proportionality or freedom of movement because, by itself, it has no effect.
>
> 45. Given that the clean and dirty chains can be regarded as connected with one another, by the same token the clean chain is connected with the fraudulent evasion of VAT in the dirty chain because, in a case of contra-trading, the right to reclaim enjoyed by C (Infinity) in the dirty chain, which is the counterpart of the obligation of A to account for input tax paid by B, is transferred to E (BSG) in the clean chain. Such a transfer is apt, for the reasons given by the Tribunal in *Olympia* to conceal the fraud committed by A in the dirty chain in its failure to account for the input tax received from B.
>
> 46. Not all persons involved in either chain, although connected, should be liable for any tax loss. The control mechanism lies in the need for either direct participation in the fraud or sufficient knowledge of it."

The Chancellor concluded at paragraph 55.

> "55 .In my view it is an inescapable consequence of contra-trading that for HMRC to refuse a reclaim by E it must be in a position to prove that C was party to a conspiracy also involving A. Although the fact that C is a party to both the clean chain with E and the dirty chain 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 a dirty chain inevitable in the sense of being pre-planned."

23. We have also been referred to Christopher Clarke J's comments at paragraph 109 of *Red 12 Trading Ltd* as authority for the proposition that the Tribunal may consider compelling similarities between one transaction and another and that it is not precluded from drawing inferences where appropriate, from a

pattern of transactions of which the individual transaction in question forms part. Christopher Clarke J also highlighted the following as important factors in assessing the knowledge or means of knowledge of a trader:

i. "compelling similarities between one transaction and another".

ii. "pattern[s] of transactions".

iii. "transactions all of which have identical percentage mark ups…".

iv. "…made by a trader who has practically no capital…".

v. "…as part of a huge and unexplained turnover…".

vi. "… with no left over stock".

vii. " A Tribunal could legitimately think it unlikely that the fact that all 46 transaction in issue can be traced to tax losses to HMRC is a result of innocent coincidence".

24. Briggs J in *Megtian V HMRC* [2010] EWHC 20 (CH) stated as follows:-

> "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 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 while the absconding takes place.
>
> 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 transactions were connected with a tax fraud, without it having to be, or even being possible for it to be, demonstrated precisely which aspect of a sophisticated multifaceted fraud he would have discovered, had he made reasonable enquiries. In my judgment, sophisticated frauds in the real world are not invariably susceptible, as a matter of law, to being carved up onto self-contained boxes even though, on the facts of particular cases, including *Livewire* that may be an appropriate basis for analysis."

25. In *Moblix* at paragraph 62 Moses LJ states:

> "62. The principle of legal certainty provides no warrant for restricting the connection, which must be established, to a fraudulent evasion which immediately precedes a trader's purchase. If the circumstances of that purchase are such that a person knows or could know that his purchase is or will be connected with fraudulent invasion, it cannot matter a jot that the evasion precedes or follows the purchase. That trader's knowledge brings him within the category of participant. He is a participant whatever stage at which the evasion occurs."

26. It is worth bearing in mind the observation by Judge Colin Bishopp's in C*alltell TelecomLtd & Another –v- Revenue and Customs* [207] UKVAT V2066 in the First – tier Tribunal:

> "Much will depend on the facts, but an obvious example might be the offer of an easy purchase and sale generating conspicuously generous profit for no evident reason. A trader receiving an offer would be well advised to ask why it had been made; if he did not he would be likely to fail the test set out in paragraph 51 in the judgement of *Kittel.*"

27. We have been referred to the Judgement of the CJEU in the joined cases of *Mahageben KFT* (C-80/11) and *Peter David* (C-142/11). Mr Mandalia did not argue the cases, but stated that he did not consider that they had altered the decision in *Mobilx.* Mr Bridge submitted that the decisions are important because of the impact they have on the inferences that can properly be drawn from often uncontroversial facts. The tax authorities must adequately "police" the market to ensure that traders keep proper records and defaulters are pursued. Failing to police the market and effectively delegating the responsibility to police the market to exporters by imposing a de facto blanket policy of denying input reclaims (extended verification) is unlawful.

28. Mr Bridge further submitted that HMRC had the opportunity to prosecute individuals in relation to VAT fraud. In spite of this HMRC has apparently taken either no**,** or alternatively no adequate**,** steps to stop persons responsible from defaulting on VAT payments in the United Kingdom. He submitted that on the facts of the instant case there is evidence that HMRC failed to police the internal market in mobile telephones adequately**,** or at all**,** during the period of the relevant trading. In around February 2006 (as evidenced by Mr Stone) in the face of eye watering losses from fraud**,** and approximately 18 months before the introduction of the reverse charge in June 2007, HMRC instituted a blanket policy of denying input tax reclaims in all cases where extended verification led to a defaulting trader.

29. In view of the fact that several cases have been adjourned behind these decisions, and although the cases of *Bonik Eood,* and *Gabor Toth* from Bulgaria and Hungary respectively are yet to be decided, we think it would be helpful to give our views on the cases. Both cases related to valid VAT invoices for work done and goods delivered in circumstances where both Appellants had not been put on notice that there was anything unusual in the transactions. Both the repair to the dam and the delivery of the logs had taken place and both Appellants had correctly accounted for the VAT. The Hungarian law at paragraph 45 (5) of the law LXXIV of 1992 states:

> "The issuer of the invoice or simplified invoice is responsible for the veracity of the information given therein. The taxation rights of the taxable person indicated as the buyer in the certificate cannot be compromised if the taxpayer acted with due diligence bearing in mind the circumstances under which the product was sold or the service provided"

30. That law required a trader to act with due diligence. The ECJ held that such a provision was outside the right to deduct, which is an absolute right, to be

interpreted strictly.(See paragraph 17 above). Even though the Hungarian Tax Authorities had established that both transactions were subsequently found to be fraudulent, the ECJ held that a taxable person can be refused the benefit of the right to deduct only on the basis of the case law resulting from paragraphs 56 to 61 of *Kittel and Recolta Recycling.* According to which, it must be established, on the basis of objective factors, that the taxable person to whom the goods or services were supplied, which then served as the basis to substantiate the right to deduct, knew or ought to have known, that the transactions were connected with fraud previously committed by the supplier or another trader at an earlier stage in the transaction.

31. The ECJ has said that, in principle, it is for the tax authorities to carry out the necessary inspections of taxable persons in order to detect VAT irregularities and fraud as well as to impose penalties. Further:

> "It is a matter for the national authorities and courts to refuse to allow the right to deduct where it is established on the basis of the objective evidence that that right is being relied on for fraudulent or abusive ends"

32. At Paragraph 46 of the judgment states;

> "A taxable person who knew, or ought to have known, that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of Directive 2006/112, be regarded as a **participant** (our emphasis) in that fraud, irrespective of whether or not he profited by the sale of the goods or use of the services in the context of the taxable transaction subsequently carried out by him (see *Kittel and Recolta Recycling.*paragraph 56).

33. The ECJ confirmed that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by Directive 206/112. In that regard, the ECJ has already held that European law cannot be relied on for abusive or fraudulent ends. It is a matter for the national courts to refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent or abusive ends.

34. The cases related to a single transaction for work done and goods delivered in circumstances where the traders were not put on notice that there might be a fraud. In MTIC cases in the period of this appeal all traders were on notice that fraud was prevalent in the market place.

35. We have decided that the references require HMRC to establish, to the requisite legal standard, the objective evidence which allows the conclusion to be drawn that the taxable person knew, or ought to have known, that the transactions relied on as a basis of the right to deduct are connected with fraud previously committed by the issuer of the invoice or by another trader acting earlier in the chain of supply. The fraud can be 'previously' committed in the sense that the necessary preparations have been made to enable the fraud to be brought to fruition at a later date. The appellant's transaction or transactions must be connected to the earlier chains in such away that the fraud could not be brought to fruition without the appellant's participation. As a result of the proposals being put to him, an appellant would know, or ought to know, that **the only reasonable explanation** (our emphasis) for the transactions in which he was involved was that it was

connected with fraud. As the right to refuse to deduct is an exemption, it has to be interpreted strictly.

Standard of Proof

36. These are civil proceedings and, as such, the standard of proof is the ordinary civil standard i.e. on the balance of probabilities. The case of *Reventhi Shah (Administratrix of the Estate of Naresh Shah Deceased) v Kelly Anne Gale; Kelly Anne Gale v Jason Grant, Mark Young, Paul Hilton, Samantha Easton* [2005] EWHC 1087 (QB) (concerning a civil action for unlawful killing) made it quite clear that there is a single civil standard of proof (i.e. on the balance of probabilities) applicable in all civil proceedings regardless of the allegations levied. Lewison J (as he then was) stated:

> "In my judgment, it would be wrong to approach this case on any basis other than the balance of probability with appropriate respect paid to the need for cogent evidence to reflect the serious nature of the allegation and the inherent improbability that this 22 year old young lady of good character should involve herself in such conduct as that alleged. I simply do not accept that it is appropriate, as a matter of law, to require a higher standard of proof simply because of the nature of the allegation. If murder, why not allegations of rape or the most serious fraud."

The facts.

37 Mr Spurgeon began his career in telecommunications in 1996/7 when he was 21 and he took a job with European Telecom PLC in Colnbrook, Berkshire. He was ultimately appointed to represent "Major Export Accounts and International Business Development" in the company, where he often was selling in excess of 100,000 units in each transaction. He was selling to various companies including Vodafone Retail and Corporate, Hutchinson Telecom HK, Singapore Telecom D2 (now Vodafone Germany), First Telecom HK and many other smaller companies both retail and trade. We have been referred to *JDI Trading Limited v The Commissioners for Her Majesty's Revenue and Customs* TC 02309 by Mr Bridge. From the facts in that case we note that European Telecom PLC "employed 650 people and was based in seven different countries. It was an authorised distributor for a variety of mobile phone manufacturers including Nokia, Motorola and Sony Ericsson as well as being a substantial operator in the grey market". Mr Spurgeon developed some good relationships during his employment and prior to his leaving the company was earning up to £100,000 per year pro-rata. He had one of the best selling records in the company. In 1999 he had anticipated a bonus of £8,000 but it was not paid. He had been told that the reason behind the refusalwas because of the exchange rate

fluctuations. He felt aggrieved and resigned from the company. When he left he took with him his data base of the company's customers. He had, in any event, contacted a recruitment agency and he had been offered a job by Data Monitor but decided he would start his own business.

38. He consulted accountants, McIntyre Hudson, who advised how he might set up a business and he incorporated Trading on 28 January 1999. He had only been involved in sales at European Telecoms PLC but his accountant assured him that he would have no difficulty in running his own company. Trading was registered for VAT on 1 May 1999. Trading had requested to change its VAT return dates to monthly in October 2000 but in August 2006 it asked for the date to be changed back to quarterly. He was appointed a director on 28 January 1999 and Anthony Hussey (Mr Hussey) was appointed a director in October 2000. His mother, Shirley Spurgeon, was appointed secretary. Mr Spurgeon had previously worked with Mr Hussey at European Telcom PLC. The VAT return indicated that the turnover would be £2,500,000 of which £1,000,000 would relate to sales into Europe. The trade was shown to be the import and distribution of mobile phones. In a telephone call to HMRC, Trading indicated that it anticipated importing laptop computers, Sony play stations and gaming machines but this never took place. Mr Spurgeon confirmed that Trading only dealt in mobile phones. Trading achieved £34,000,000 sales and £34,000,000 purchases in its first year of trading, substantially greater than the turnover of £2,500,000 indicted when registering for VAT.

39. When applying for Trading's VAT registrations, Mr Spurgeon provided a reference from European Telecom PLC, which was signed by Mr Hussey. Mr Spurgeon said that he had resigned from European Telecoms PLC. Mr Hussey, subsequently worked for him. We were referred to two other letters by way of trading reference. We believe that they too had been obtained, on the advice of Trading's accountant, so that Trading could register for VAT purposes.

40. Mr Christopher gave evidence as to the Companies and the deals referred to at paragraph 51. He had prepared his statement from HMRC's files and documents which had been made available to him, but he agreed that he had not interrogated any of the emails. We found his evidence to be imprecise, in that he did not appear to have first hand knowledge of the matters involved in the appeal. He identified the turnover for Trading, which are agreed, for the periods from 1 May 2001 to 30 April 2006 as under:-

1 May 2001 to 30 April 2002 £161,365,685

1 May 2002 to 30 April 2003 £122,856.432

1 May 2003 to 30 April 2004 £ 56,540,482

1 May 2004 to 30 April 2005 £ 48,014,164

1 May 2005 to 30 April 2006 £ 50,704,328

We have not allowed Mr Mandalia to allege fraud with regard to any of these transactions because they do not form part of this appeal and have not been pleaded.

We have allowed this detail as Mr Mandalia considers that the trading pattern is relevant to the subsequent transactions carried out by Group.

41. Group was incorporated on 16 May 2003 and Mr Spurgeon and Mr Hussey were appointed directors. Mr Spurgeon was appointed the secretary. Group registered for VAT on 11 August 2003 and indicated that it would be supplying internet telephony services to the public. It did not expect to receive regular VAT repayments and Group's estimated turnover was £2,000,000 with sales of £60,000 to Europe. The company was intending to exploit the possibility of making 'voice calls' between computers. It appeared that the £500,000, needed to set up the company, came through Trading's bank account. A substantial amount of the investment passed through Group's bank account from Unistar. Mr Hussey invested £250,000 as identified on the bank statement of 17 November 2003. Mr Spurgeon recalled that Mr Hussey had had to remortgage his home. There are identified payments from Mr Spurgeon's mother and grandmother and, on the balance of probabilities, we believe the £500,000 came from their personal resources.

42. Group commissioned advertising and marketing initiatives and it traded for a number of months after its launch. However, the venture was not successful and in April 2005 the shareholders decided to abandon the project. Their accountants had advised that if they were able to start up another business utilising Group they would be able to set of the losses in the company against any future profits. We are satisfied from the evidence that that was the case. Group started to trade in mobile phones to recoup the losses it would otherwise have made and by March 2005 achieved £368,000 sales. Mr Christopher has produced evidence, which is not disputed, as to the turnover for Group from the date of registration 31 October 2003 to 31 October 2006 as under:-

31 October 2003	£ 250
1 November 2003 to 31 October 2004	£ 32,472
1 November 2004 to 31 October 2005	£ 2,675,316
1 November 2005 to 31 October 2006	£14,228,141

43. Mr Spurgeon accepted that he had learnt about VAT fraud whilst working at European Telecoms PLC but that his knowledge, by the time of the hearing, was substantially different. He understood that sales into Europe would not involve a payment of VAT from the Companies' customers and that the Companies would have to recover that VAT by way of a repayment, which they did in the deals before those which were the subject of this appeal. He had learnt about MTIC fraud as a result of meetings with HMRC and reading notice 726 setting out the joint and several liability. We are satisfied that Mr Spurgeon was well aware of the difficulties in relation to the mobile phone trade. The impression he had obtained by the time of the hearing was that there was a very high level of fraud in the market place. He said that the Companies were taking precautions to ensure that they did not get involved with fraudulent transactions.

44. Mr Spurgeonhad insisted that the Companies only dealt with customers and traders who banked with a United Kingdom Bank. In cross-examination he accepted

that details of three FCIB accounts appeared in the deal packs. He had not appreciated, until the hearing, that that had happened. He now realised that some of the traders would have used a United Kingdom Bank as an accommodation account. Payments appeared to have been made from their FCIB accounts through the United Kingdom Bank. We found Mr Spurgeon,s evidence throughout to be succinct, informed and detailed, demonstrating that he had a thorough understanding of the mobile trade industry.

45. Mr Stone gave evidence under oath but agreed that he had not been involved with this case and that his evidence related to MTIC trade in general. He confirmed that the market had effectively collapsed once the reverse charge was introduced in June 2007. He also confirmed that only 179 traders remained in the market thereafter, out of some 179000 before. The reverse charge puts the onus on the customer to account for the VAT he has been charged by his supplier. Mr Stone produced a schedule which revealed that over four billion phones were being traded in March, April and May of 2006. Extended verification was introduced in May 2006 and by December the market had reduced to 61 million phones. Mr Bridge suggested to Mr Stone that the collapse in the market in mobile phones from May/June in 2006 was because HMRC had adopted a general policy to stop making repayments and to insist on extended verification on all traders dealing in mobile phones, whether they were involved with MTIC fraud or not. Mr Stone denied that there was any such policy, but it is significant to note that in a period of 6 months the problem had been eradicated, as, by December 2006, the mobile phone trade was down to where it had been six/seven years earlier. We do not know, nor has any evidence been produced, that there was a policy of this nature from the Treasury, but we do accept that there were sufficient non-repayments and extended verifications for the problem to be resolved. We also accept that as a result of that innocent, as well as fraudulent, traders would have been affected.

46. We have been told that Mr Spurgeon, and both Aircall and Sunico, continued trading in mobile phone on the introduction of the reverse charge. Mr Spurgeon indicated that his company had achieved £12,000,000 of turnover since the introduction of the reverse charge. Mr Spurgeon gave evidence as to the way in which the Companies carried on their businesses. We have been told that apart from Mr Spurgeon, as Managing Director, and Mr Hussey, the Sales Director, three others were employed at Trading. Rohen Badhar, the International Business Development Manager; Helen Leheup, the office Manager; and Marie Hawkes, an administration assistant. Mr Spurgeon is 34 years old and is now living in Bude in Cornwall. With hindsight, he believes that the only way the Companies could have avoided fraud is by ceasing to trade. The impression he had received from HMRC now was that fraud had permeated 99% of the market at the time of the deals. As part of his verification process, he took the steps recommended by HMRC through their various policies and guidance notes. He supplemented these with further checks and precautions by visiting the suppliers and customers, where possible, and making appropriate enquiries of Redhill. He accepted that the checks that the Companies made were never going to completely eliminate all the risks that the goods might in someway be linked to fraud. He commenced trading in 1999 and by the time of the deals in question he had built up good relationships with the owners of the business that the Companies traded with. Those links extended outside of the business environment. He only purchased from people he trusted- Mr Darren Bee of DVB Ltd and Mr Neegum of

Aircall had become good friends and they occasionally socialised together. The Companies provided complete transparency to HMRC in respect of all their trades and HMRC had full knowledge of all the deals.

47. As far as Mr Spurgeon was concerned, none of the deals were contrived. All of the deals were negotiated either in transactions in the United Kingdom or in Europe. Most of the deals were brokerage deals involving the onward sale of goods purchased specifically for the companies. Redhill was checked regularly and where they confirmed that the VAT details were correct he was content to trade with that business. The Companies sent monthly returns to HMRC together with a spreadsheet relating to previous trading periods. He visited the premises of the Companies suppliers. He had visited Aircall, DVB and Elite and Mr Hussey visited Insignia. The Companies freight forwarders were Hawk Precision Logistics Ltd (Hawk) based at Jas Buildings, Cargo Point, Bedfont Road, Stanwell, Middlesex. The Companies have never used any other freight forwarder. The products that the Companies purchased were individually inspected and IMEI numbers verified. Before an inspection took place Hawk were asked to send 10 specimen IMEI numbers so that the Companies could check that they were in order. Mr Spurgeon confirmed that the Company had checked all the IMEI numbers in each of the deals; downloaded the information from the computer at Hawk and made them available to HMRC. He indicated that the results had been emailed to HMRC during the preparation for the appeal, although he had been unable to produce the list. Mr Christopher confirmed that he had not checked any emails.

48. Mr Spurgeon told us that deals were concluded as a result of calls looking for buyers and sellers. He produced to the Tribunal details of approximately 1450 telephone calls logged for Trading from 2 May 2006 to 31 May 2006 which represents 21 working days excluding weekends. This is an average of 69 calls each day. Mr Spurgeon suggested that it was not surprising that all the figures and timings matched from the evidence that was produced of the deals. All the documentation in the deal packs represented the completed deal and could not therefore show the work that might have gone into setting up the deal. Deal 1 involved the purchase from Aircall of 2000 units and a sale to Sunico. The deal arose either because Sunico would have told them what they wanted or Group had offered it units, knowing that Aircall had the units available. Requests from customers rarely matched and deals would be struck on the basis of what the Companies had available or could source. The goods might already have been at Hawk for Aircall and the Companies would have been offered inspection facilities. The price of the units sold to Sunico by Group would be based on the price Group had to pay for them from Aircall plus a mark up. At this stage, everything would have been verbal and the deal would have been confirmed over the telephone. If the goods were not in Aircall's possession, the Companies might proceed on the basis that the goods would be available and find a customer accordingly. If the goods were not available the sale would not proceed, but it would not have been firmed up until the Companies knew the goods were available.

49. Inspectors would look at the IMEI numbers on 10% of the boxes and they would take out a sample to check the IMEI numbers on the individual units. Where a discrepancy occurred at the time of the inspection, the Companies would advise their customers before going ahead with the deal. Videos, ostensibly taken at the time of all the inspections for all of the deals, were produced during the appeal to HMRC and

one was viewed by the Tribunal. Mr Mandalia confirmed that he had examined some of the videos carefully and he was able to confirm that they followed the pattern of the video shown to the Tribunal. We were told that the videos had been prepared by a professional firm and we were surprised at its poor quality. The video showed the back of one of the operatives, which obscured the actions being taken by the individual opposite to him at the table. We would have expected the video to have shown the boxes being opened, examined and the products being returned to the box. The inspection reportedly took place at Hawk. We had understood that Hawk was a substantial and busy freight forwarding business. We were surprised that there appeared to be very little evidence of any other activity than the inspection of the goods. We were even more surprised to be told that Mr Spurgeon had supplied the video camera for the inspectors to film the activity. We would have expected a professional organisation to have had its own video cameras and to have set the video up in such a way that a viewer could see what was taking place. On the balance of probabilities we do not believe that the videos related to the inspection of this stock. Nor do we believe it would have been necessary to video the inspections if they were being carried out by a reputable business, that the Companies had used for many years.

50. Once the units had been inspected and confirmed to the Companies order they were held by Hawk for the Companies. Once payment had been received the companies would advise Hawk to release the goods to the customers. As evidence that the Companies were involved in genuine transactions, Mr Spurgeon has also produced evidence of credit notes given in relation to transactions, which did not proceed, over a period from June 2005 to August 2006. Mr Spurgeon said that he was not aware that DVB and Aircall also made supplies to some of the Companies' customers. He was not surprised by this as it might well have suited Aircall and DVB to deal directly with the Companies' customers depending on the state of the market at the time. He said that the profit margin on European sales was about 5%. This was always higher than a sale in the United Kingdom because of the additional expense and risk. Mr Christopher suggested that the margins were fairly uniform. He has calculated the profit on the difference between the selling and purchase price per unit. The profit margins below are based on the total sales price as against the acquisition price, hence the slight variation. Given that the average price for the transactions is approximately £287,000 and the variation in margins in Mr Christopher's tables at pages 175 to 177 vary from 4% to 6% a difference of 2% would amount to £5740. That is more than the profit on some of the deals and we would not, therefore, consider them to be 'fairly uniform'.

51. We set out details of all of the deals in the Deal Table below.

Deal Table

UGR

Quarter 04/06

UK Supplier	Purchase Net Value	VAT	EU Customer	Sale	Profit	%Profit
Aircall	£75000	£13125				

Aircall	£149000	£26075	Sunico	£234000	£10000	4.46
Aircall	£144530	£25292.75	Planet 3G	£150350	£5820	4.02
Elite Mobile	£229500	£40162.50	Sunico	£238500	£9000	3.92
Aircall	£360000	£63000	Planet 3G	£235,500	£10500	4.67
			DRT	£141300	£6300	4.67
Aircall	£299000	£52325	Sunico	£317000	£18000	6.02
Insignia	£182700	£31972.50	Sunico	£191800	£9100	4.98
Aircall	£226908	£39708.90	Sunico	£240660	£13752	6.06
Insignia	£121000	£21175.00	Mobile World	£127000	£6000	4.96
Insignia	£450240	£78792	Mobile World	£477120	£26880	5.97
TOTAL	**£2,237,878**	**£391,628.65**		**£2,353,230**	**£115352**	

UGR

Quarter 05/06

	Purchase		EU			
UK Supplier	**Net Value**	**VAT**	**Customer**	**Sale**	**Profit**	**% Profit**
1 Aircall	£354,000	£61,950	Q Evolution	£375,000	£21,000	5.93
3.Aircall	£390,000	£68,250	Q Evolution	£413,419	£23,419	6.00
4. Aircall	£148,190	£25,933.25	Q Evolution	£157,325	£ 9135	6.16
5 Aircall	£73,750	£12,906.25	Sunico	£77,500	£ 3750	5.08
6. Aircall	£73,750	£12,906.25	Planet 3G	£78,105	£ 4355	5.91
7 Aircall	£307,000	£53,725	First Telecom	£322,000	£15,000	4.89
8. Aircall	£381,312	£66,729.60	World Coms	£404,151	£22,839	5.99
9.Aircall	£121,800	£21,315	Q Evolution	£128,100	£ 6300	5.17
9 Aircall	£68,100	£11,917.50	Q Evolution	£ 71,700	£ 3600	5.28
11.ircall	£381,000	£66,675	First Telecom	£401,000	£20,000	5.25
12 DVB	£286,000	£50,050	World Coms	£300,000	£14,000	4.90
13 DVB	£172,500	£30,187.50	World Coms	£180,500	£ 8000	4.64
14 DVB	£147,000	£25,725	World Coms	£154,000	£ 7000	4.76
15.Aircall	£386,000	£67,550	First Telecom	£406,000	£20,000	5.81
16. DVB	£878,000	£153,650	World Coms	£920,000	£42,000	4.78
17 DVB	£191,904	£33,583-20	World Coms	£202,000	£10,096	5.26
18 Aircall	£463,000	£81,025	Sunico	£490,000	£27,000	5.83
19 Aircall	£261,464	£45,756	Sunico	£276,115	£14,651	5.60
20 DVB	£134,520	£23,541	World Coms	£141,360	£ 6840	5.08
21. DVB	£314,404	£55,020.70	World Coms	£331,450	£17046	5.42
22 DVB	£348,000	£60,900	World Coms	£366,000	£18,000	5.17
23 DVB	£201,500	£35,262.50	World Coms	£212,000	£10,500	5.21
TOTAL	**£6,083,194**	**£1,064,558.95**		**£6,407,725**	**£324,531**	

UTL
Quarter 04/06

UK Supplier	Net Value	VAT	EU Customer	Sale	Profit	%Profit
1 Aircall	£450,000	£78,750	Sunico	£470,000	£20,000	4.44
2 Aircall	£75,000	£13125	Sunico	£78,000	£3000	4.00
3 Aircall	£201,960	£35343	Sunico	£213,840	£11,880	5.88
3b Aircall	£84,375	£14,765.63	Sunico	£88,125	£3750	4.44
4Insignia	£249,665	£43691.38	Sunico	£258,850	£9185	3.68
5DVB	£108,900	£19,057.50	World Coms	£113,850	£4950	4.55
6 DVB	£303,000	£53025	DRT	£318,000	£15000	4.95
7 Insignia	£713,700	£124,897.50	World Com	£746,850	£33150	4.64
7b. Insignia	£713,700	£124,897.50	World Com	£746,850	£33150	4.64
8 Aircall	£441,000	£77,175	World Com	£462,000	£21,000	4.76
9 DVB	£457,195	£80,009.13	Sunico	£479,680	£22,485	4.92
10 DVB	£372,000	£65,100	World.Com	£390,000	£18,000	4.84
TOTAL	**£4,170,495**	**£729,836.64**		**£4,366,045**	**£195,550**	

Quarter 05/06

UK Supplier	Value	VAT	EU Customer	Sale	Profit	%Profit
1 Aircall	£178,143	£31175.03	Sunico	£187,873.50	£9730.50	5.46
2Aircall	£105,000	£18375	Sunico	£110,400	£5400	5.14
3Aircall	£102,600	£17955	Sunico	£108,225	£5625	5.48
4 Aircall	£149,000	£26,075	Sunico	£156,000	£7000	4.70
5 Aircall	£430,500	£75,337.5	Sunico	£456,000	£25,500	5.92
6 Aircall	£724,000	£126,700	World C	£768,000	£44,000	6.08
7 Aircall	£187,985	£32,897.38	World C	£199,120	£11,135	5.92
TOTAL	**£1,877,228**	**£328,514.91**		**£1,985,618.5**	**£108,390.5**	

52. We do not propose to examine all the documentation for all the 49 deals but we have examined 20 deals picked at random save for the deal involving litigation. We have only considered the transactions as they affected Unistar Trading and Group as emboldened at the start of each deal. Mr Spurgeon has indicated that he had done everything that HMRC required of him and in giving evidence, as to the deal packs, appeared to be able to answer all the queries raised in cross-examination. We were satisfied that Mr Spurgeon had a very thorough understanding of his deal packs. We have separately identified the standard packs for Group and Trading and highlighted the discrepancies in each deal where appropriate. It is agreed by the parties that all the deals form part of a fraudulent scheme. We have followed the numbering in the Deal Table at paragraph 51. Mr Bridge has produced a detail of all the deal packs at the end of his written submissions. These have been considered by Mr Spurgeon and variously commented on where the documents are missing. Our observations in relation to the deal packs are dealt with in our decision, but we have not considered the details provided in the submissions as we can only rely on the evidence before us.

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Deal 2. (Vol 12.p 4) 3 April 2005. The goods have passed through the following traders. Attick Attack UK Ltd > Phone Shop (Bloxwich) Ltd > JOS UK Ltd > Lettings Solutions UK Ltd > **Aircall International Ltd > Unistar Group Ltd > Planet 3 G SARL**.

- 10 IMEI numbers supplied by Hawk to Group prior to the goods being purchased to be checked by Trading to ensure that they had not been dealt with before. The sheet notes the specification for the goods which comply with both deals requirements and which were checked at 12.53 noon, when Hawk was instructed to proceed. Mr Spurgeon told us that this check was carried out on all the deals before an order was placed. The form refers to 2715 units but the deals were subsequently amended to 1970.
- Packing list provided by Trading of 2 20 kgs pallets for 500 and 470 (970) Samsung D600s by fax on 4 April 2006 at 10.20. This should have been for 1970.
- Two Stock advice/inspection requests sent in blank to Hawk and returned completed by Hawk as reports relating to deals 1 and 2: one faxed on 3 April 2006 at 14.34 replied to at 14.09 for 1000 of part of 2715 Samsung D 600; the other for 970 faxed 15.27 replied 14.34. The Fax timing on the first request are out of sequence as they appear to have been reversed. The reports confirm the specification of the goods and the requests asked that the IMEI numbers be scanned to Helen@unistar.co.uk. (This appears to be a new requirement adopted by Unistar from 5 January 2006). The inspection report identify that there were 3 request but only two appear in the pack. The Purchase Order Request identified 2715 and was amended to 1970, which probably explains the discrepancy.
- Amended Purchase Order dated 3 April 2006 to Aircall Woodford for 1970 Samsung D600s price £149 = £293,530 + VAT £51,367.75 = £344,897.75 The standard purchase order sets out the specifications requirement which do not necessarily match the request from Trading's customers. Mr Spurgeon confirmed that this was the standard wording on all the Companies' purchase orders. At the end of Purchase Order there is the following:

  > " In the event that HM Customs and Excise should disallow any amount shown by the Supplier on the Purchase invoice as VAT, on the grounds that the transaction was part of a supply that was circular in nature and involved a defaulting trader, any amounts shown as VAT will be reduced and a credit note issued".
- Two invoices of 3 April 2006 from Aircall one for 1000 the other for 970 Samsung D600s for deals 1 and 2. The invoices indicate that Aircall banks with Barclays and identifies the sort code and account number. The invoice has been typed subsequently and was actually received by Trading on 12 May 2006.
- Release note dated 4 April 2006 from Aircall to Hawk (freight forwarders) releasing the goods to Trading but indicating that they remained the property of Aircall until paid for.

- Supplier declaration in relation to 1970 units to be completed in its entirety before any transaction is accepted. The declaration is so completed signed and dated 3 April 2006.
- Purchase order from Planet 3 G in Paris dated 3 April 2006 (Faxed detail illegible) requiring the goods to be European specification with French software for 1500 Samsung D600.
- Invoice request to Group's administration dated 4 April 2006 at 11.30 am for 970 Samsung D600s to Planet 3G. This occurred after Group's purchase order request to Aircall on 3 April 2006 for 1970 Samsung D600s at 9.50. Mr Spurgeon told us that the deals were set up by telephone and subsequently reduced to writing as a result there was frequently a delay between the placing and completing of the orders and the documentation.
- All the invoices in the packs supplied to the Tribunal have an inked stamp on them requiring the operatives at Group and Trading to tick 19 different boxes to ensure that the transaction has been handled properly. The ones that we have checked appear to have been completed at different times, as we would have expected. Different individuals appear to have carried out different functions as indicted by the writing in the boxes..
- Invoice from Trading to Planet 3 G price expressed in Euros price 227 per unit totalling 220,190. Payments was made in Euros although Unistar paid Aircall in sterling. There is no explanation given as to how the Stirling amount has been calculated.
- A message dated 4 April 2006 from Unistar indicating that they are now selling under Unistar Group Limited as apposed to Unistar Trading and requiring payment to the Group account at Barclays.
- Redhill request to check the VAT numbers and its confirmation as to VAT details for Aircall, and Sunico dated 3 April 2006 and for Planet 3G dated 4 April 2006. The Redhill replies dated 4 April 2006 at 10.50 am
- Transport instructions from Trading to Hawk dated 4 April 2006 for 970 Samsung D600s (the entire order was for 1970) requiring the goods to be delivered to Planet 3 G in Paris at 9.00am on Wednesday 4 April on hold and to remain so until further written instructions. The instructions asked for stamped CMR and details of ferry/tunnel ticket.
- CMRs Group to AFI (freight forwarders for Planet 3 G) dated 4 April 2006 properly completed and signed for 970 units.
- Eurotunnel Folkestone ticket as at 4 April 2006 a 19.17. Inspection completed 15.27 therefore just under 4 hours to get from Stanwell, Middlesex to Eurotunnel.
- Faxed detail from Barclays of payment by Group of £263,200 and £169822,75 on 4 April 2006 for deals 1 and 2 to Aircall.
- Faxed detail payment by Planet 3G to Barclays 220,190 Euro via Banco Espanol de Credito.

Deal 7.(Vol 13 p 86). 27 April ***2006***. The goods have passed through the following traders.

- The deal took place on 21 April 2006. GPA International Ltd > Cobra Communications Ltd > Fonestop MG Ltd > London Mobile Communications

Ltd > Signal Telecom > **Insignia Telecom (UK) Ltd** > **Unistar Group Ltd > Sunico A/s >** Premiston OU **.**

- The documents follow the same format as before save that the invoice to Sunico states

" We declare that to the best of our knowledge these goods were not customs stamped when they left our warehouse".

- Mr Spurgeon explained, under cross-examination, that he had written to HMRC in September 2003 explaining that some of the Companies' customers did not want to buy phones which had been 'customs stamped'. HMRC stated that the stamping simply confirmed that HMRC had inspected them. It was clear, however, that Mr Spurgeon was aware of the concerns in the market place as early as 2003. The invoice dated 12 April 2006 indicated that the goods were to be paid for once they had been examined at K&N in Copenhagen.

- The goods were transported to Sunico in Denmark on 25 April 2006, via Eurotunnel on 24 April 2006 at 21.59. but were to be held to Group's order pending further written instructions. They would have arrived by 9.00 am on 25 April 2006 as requested.

- There was a Redhill request with regard to Sunico and Insignia Telecom UK Ltd dated 21 April 2006 and replied to by Redhill the same day.

- The inspection report has a manuscript note on it confirming that the specification had been checked with Nicky, Sunico merely wanted group to be sure that the phones had been made in Finland. Mr Spurgeon explained that Finnish mobile phones were, at that time, the best in the market.

- Group were paid for the goods by Sunico to their Barclays account on 25 April 2006

- Group paid Insignia at their Handelsbanken on 25 April 2006

Deals 9a. (Vol 14 p 4). 28 April ***2006***. The goods have passed through the following traders. Computec Solutions Ltd > Global Access International > Trade Smart > Sound Solutions (GB) Ltd > Total Data Systems Ltd > **Insignia Telecom (UK) Ltd > Unistar Group Ltd > Mobile World GmbH.**

- 28 April 2006. 9a was for 1000 Nokia 7610 and 9b for 2240 Nokia N70s to Mobile World GmbH in Germany at a total price of £604,120. They requested black/red 7610 phones; 2 pin plug and no stamps removed or otherwise and silver N70s with 3 pin plugs. The phones were silver and black.

- Redhill confirmation re Insignia dated 28 April 2006.

- There was the same note that payment was to be made to Group as apposed to trading.

- There is a check requested by Insignia and signed by Anthony Hussey, on behalf of Group, confirming that all legitimate checks had been made of Group's customer and that VAT had been or would be paid on the goods. The goods were sold to Mobile World GmbH in Germany and no such VAT would have been payable.

- Group were paid on 3 May 2006. Although Mr Spurgeon has indicated that he understood all the Companies customers paid the Companies through a bank, other than the FCIB, this payment was made by Mobile World from its FCIB account through its HSBC bank in London. .

- Group paid Insignia via Handlesbanken through Barclays £671,207 on 3 May 2006.

- The transport instructions were via Dover to arrive at Dusseldorf by 9.0am on Tuesday 2 May 2006. The phones went by SeaFrance on 1 May and arrived at 21.35pm that evening

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Deals 3 and 4. (Vol 14 p 266). 5 May 2006. The goods have passed through the following traders. Computec Solutions Ltd > Zenith Sports Ltd > New Ora Ltd > **Aircall International Ltd > Unistar Group Ltd > Q-Evolution General Trading.**

- Invoice to Aircall dated 4 May 2006 for 2500 Nokia 6681 and 1015 Samsung D820 for £632,373.25

- 4 May 2006. Amended invoice to Q –Evolution for 2496 Nokia 6681 (4 less) and 1015 Samsung D820 for £570,744.

- Sent by air to Dubai 6 May 2006. Flight changed to Emirates for 8 May 2006

- Q-Evolution paid £571,075 for the phones on 4 May 2006 through their FCIB account to Group's Barclays account. This represented a reduction of 8 phones at £165.50 not 4. The payment was acknowledged again by fax from Barclays.

- Group paid Aircall on 5 May 2006 £630,000 (£2,373.25 short). There is a manuscript note confirming a short payment of £2006.65 ,which identifies the amount due as £632,000 not £632,373,25.

- There is a note on the front sheet to the Purchase Order that Customs VAT confirmation has been obtained but there is no Redhill letter in the pack.

Deal 7. (Vol 15 p 1). 5 May 2006. The goods have passed through the following traders. Mediawatch 360 Ltd > Xchange Communictions Ltd > Croak Ltd > **Aircall International Ltd > Unistar group Ltd > First Telecom International Ltd.**

- Group's Purchase order was in its standard form and indicates that MrSpurgeon carried out the deal. It is dated 5 May 2006 for 2000 Motorola V3X.

- There does not appear to have been the usual Redhill enquiry with regard to the customer in this case First Telecom International Ltd. There is a note on the front sheet to the Purchase Order that Customs VAT confirmation has been obtained but there is no Redhill letter in the pack. Mr Spurgeon explained that there would not have been a Redhill enquiry as First Telecom was ***not*** in Europe but Hong Kong.

- The inspection report was faxed to Group by Hawk on 5 May 2006 at 16.17pm. This appears to have been after payment to Aircall was made at 15.20.

- Group paid Aircall on 5 May 2006 at 15.20 £360,000. There is a note that £725 has not been paid which appears to have been paid on a subsequent payment of £316,410.75 on 8 May 2006

- Invoice First Telecom dated 5 May 2006 for 2000 Motorola V3X at £161 totalling £322,000. Required original handset, battery. Purchase Order dated 9 May 2006 at 17.49. Mr Spurgeon had ***indicated*** that the typing of the documentation was often delayed. However, the purchase order appears to have been faxed at 17.49 presumably on 9 May 2006

- Sent to Dubai by Cathy Pacific 5 May 2006

- First Telecom paid 10 May 2006 by Travelex to Group's Barclays account.

Deals 9 and 9a. (Vol 15 p 184). 5 May 2006.The goods for both deals have passed through the following traders. Computec Solutions Ltd > Zenith Sports Ltd > Zenith Sports Ltd > New Ora Ltd > New Ora Ltd > **Aircall International Ltd > Unistar Group Ltd > Q-Evolution General Trading.**

- Purchase Order Request dated 5 May 2006 sent to Aircall by Group at 2.25 for 424 W9001 and 300 W810i. The invoice was for 420.

- Group paid Aircall on 9 May 2006 to Aircall's Barclays account £530,807.50 being the purchase price for the two invoices for deals 9 and 9a of £ 223,132.50 and £ 307,675.00.

- Invoice Group to Q – Evolution dated 8 May 2006 for 420 Sony Ericsson W9001 and 300 Sony Ericsson W810i for £128,100 and £71,700 respectively totalling £199,800 arising from a Purchase Order dated 5 May 2006 totalling £201,020. This arises from the 4 phones which were missing valued together at £1220.

- Q – Evolution paid Group to Group's Barclay account £200,676.16 on 9 May 2006. There is a manuscript note as under:

£200,689.00

Previous over payment £ 331.00

£ 201,020.00 the price on the Purchase Order

Less invoice price £ 199,800.00

Over paid £ 1,220.00

Q- Evolution paid for 4 phones for which it had not been invoiced.

- There is also FCIB message confirming the payment from Q –Evolution to Group of £200,689. Mr Spurgeon indicated that he was unaware of this until the hearing.

- There is an export declaration and the goods were flown to Dubai by Cathy Pacific at 16.24 pm on 9 May 2006.

Deal 11 (Vol 15 p 365). 9 May 2005. The goods for both deals have passed through the following traders. Mediawatch 360 Ltd > Xchange Communications Ltd > Crotek Ltd > **Aircall International Limited > Unistar Group > First Telecom International Ltd.**

- Purchase order Unistar to Aircall dated 9 May 2006 with standard description of phones required. 2000 Samsung P850 at £190.50 per unit

- IMEI requests identifies: languages, English, Indonesian, Tieng viet, BahaSa, Malaysia + Chinese. 3 pin. Black. This did not comply with the order from First Telecom

- Aircall paid via Barclays Bank 10 May 2005, the purchase price £447,675

- Purchase Order addressed to Unistar Trading dated 26 May 2006 (This must be out of order as it does not relate to these transactions) Telecom required standard battery, travel charger, handsfree, 128MB memory card, CD, Cable, AV cable

- Invoice 9 May 2006 First Telecom next available flight to Hong Kong.

- CMR Shipment on hold sent via Cathy Pacific arrived 9 May 2006. Manuscript note goods released 11 May 2006 “new flight as before 12/5/06 - 4 days before payment.

- All other export documentation dated 9 May 2006.

- Payment 15 May 2006 First Telecom beneficiary Unistar Trading through Travelex Hong Kong HSBC account 200675/90901083 to Barclays account. The invoice was addressed to Unistar Group. This is the group account.

- Acknowledgement of payment from Barclays Bank to same account number but referring to group.

Deal 15. (Vol 16 p 268). 11 May 2006. The goods for both deals have passed through the following traders. Mediawatch 360 Ltd > Xchange Communications Ltd > Crotek Ltd > **Aircall International Limited > Unistar Group > First Telecom International Ltd.**

- Purchase order from Unistar 11 May 2006 for 2000 Samsung P850: Specification: Boxed and badged exclusively by Manufacturer, Central European languages, original manufacturing packaging, Brand new original stock, Goods must not be previously sim locked. Goods must not be Customs stamped at £193 per unit £5000 more than at deal 11 above. Amended to standard wording and re-sent according to fax on 11 May 2006

- Invoice 11 May 2006 £453,550

- IMEI manuscript note shows language English Bawasa, Malaysia, and oriental. Note also indicates "Spec Ok Confirmed RGS 3 pm 11/5" Mr Spurgeon advised that they always rang the customer with the detail of the specification if it was not the same as that on the purchase order.

- Group paid Aircall on 11 May 2006 £453,000 at 14.42 from its Barclays Bank account. The payment was £550 short. Group had not been paid by First Telecom until 8 days later. That payment was made 29 seconds after First Telecom's Purchase Note which appears, in any event, to have been amended later.

- 17 May 2006 cheque for £550 paid to Aircall for shortfall

- Invoice Unistar Group to First Telecom 12 May 2006. 2000 Samsung 850 at £203 Per unit an increase of £5000 over the price 3 days earlier on 9 May 2006 (see deal 11 above)

- Goods sent by Cathy Pacific and arrive 16 May 2006 at 17.50 pm ship on hold

- Unistar paid via HSBC Hong Kong £406,000 on 19 May 2006 with further confirmation from Barclays Bank as at deal 11.

Deal 17. (Vol 17 p 4). 17 May 2006. The goods in this deal passed through the following traders. XS Enterprise Systems Ltd > Deepend Trading Ltd > Dualite Ltd > Datakey producs Ltd > **DVB Ltd > Unistar Group > World Communications France SARL.**

- Amended Purchase Order from Unistar to DVB Ltd for; 4000 Samsung D600 and 1999 Motorola V3 Black. Standard wording on Purchase Order.

- IMEI Black Country. Manuscript note "Checked all OK"

- Invoice Motorola £191,904 Samsung £878,000 plus VAT = £1,257.137.20 requiring payment to Bank of Ireland.

- Unistar paid DBV Ltd on 18 May 2006 at 15.11 £1,122,137.20, which was £135,000 short.

- Further payment 19 May 2006 £1,000,000 at 15.28.(See deal 20 below) manuscript note on advice

  064 £135,000 (Appears to be the shortfall)

  067 £865,000

  £,1000,000

- Purchase Order 17 May 2006 for 2000 Motorola V3X, Black: Free Euro Sim. Invoice World Communications 17 May 2006 at £101 per unit for £202,000.

- Note from Unistar to World Communications stating selling goods under Group not Trading and to make payments accordingly.

- CMR 1999 Motorola V3 sent 17 May 2006 through Channelports at 20.54 pm

- World Communications paid Unistar 18 May 2006 £201,876.22 (£123.78 short) to Barclays Bank via HSBC London. Note on payment advice (Chg 22.78?). This relates to the fact that one phone was missing at £101 so that only the balance of £22.78 was due)

Deal 20, (Vol 17 p 278). 18 May 2006. The goods for this deal passed through the following traders. XS Enterprise Systems Ltd > Deepend Trading > Blue Wire Connections Ltd > Ocean Connection > **DVB Ltd > Unistar group Ltd > World Communications France SARL.**

- Purchase Order 18 May 2006 Unistar for 1000 Sony Ericsson W810i; 1000 Nokia N80; 947 Nokia N91; and 1140 Nokia 7610 valued at £1,173,148.20.

- IMEI for 1140 Nokia 7610, manuscript Checked all OK

- Separate invoices for all four orders one of which was for 1140 Nokia 7610 valued at £134,520 plus VAT £23,541 = £158,061.

- Unistar paid DVB Ltd at Bank of Ireland on 19 May 2006 at 15.28 from Barclays £1,000,000 (This appears to be the same payment as at 17 above). There is the manuscript note as at deal 17 above and an additional note:

  " £1,173,148.20 (This deal)

  £ 865,000.00 (Unclear what this is)

  £ 308,148.20

- Unistar paid DVB Ltd a further £308,148.20 on 22 May 2006 at 15.43 - 3 days after paid by World Communications There is a manuscript note of the payment of £1,173.148.20 for deal 20 above with a deduction of £865,000.

- Invoice World Communications 1140 Nokia 7610 at £124 per unit for £141,360. Identifying payment "By Chaps after satisfactory inspection at AFI Paris on 19 May 2006."

- Passed through Channel on 18 May 2006 at 20.55.

- World Communications paid Unistar group through Barclays Bank on 19 May 2006 £1,050,797.23 (being payment for deals 20, 21, 22,and 23 amounting to £1,050,810. the payment was £12.77 short. There is a manuscript note on the confirmation that £12.77 represents the bank's charges).

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Deal 1. (Vol 8 p 3) 7 April 2006 The goods have passed through the following traders. Sunico > Mingele > I Connect U > Aflecks Phones Ltd>R K Brother>Electron Global Ltd > Mana Enterprises Ltd > Newway Associates >**Aircall International > Unistar Trading > Sunico**. The documents for trading were identical to those for the Group and we have set them out in detail on the first deal so that this can be seen.

- 10 IMEI numbers supplied by Hawk to Trading prior to the goods being purchased to be checked by Trading to ensure that they had not been dealt with before. The sheet notes the specification for the goods which comply with Sunico's requirements and were checked at 12.00 noon when Hawk were instructed to proceed. Mr Spurgeon told us that this check was carried out on all the deals before an order was placed as is evidenced by the confirmation by Nicky at 12,00
- Packing list provided by Trading of 520 kgs pallets for Nokia N70s, 350 and 320, sent to Hawk by fax on 7 April 2006 at 13.22.
- Stock advice/inspection request and report details (faxed on 7 April 2006 at 13.22). The purchase order which follows from Sunico is timed at 4.14 pm.The report confirms the specification of the goods and asks that the IMEI numbers be scanned to Helen@unistar.co.uk. Mr Spurgeon told us that the details of the specification would be telephoned to the customer, in this case Sunico, who would advise whether they wanted to proceed, there is a confirmation on the form in manuscript signed by RB confirming that to be the case and that the call had occurred at 14.32 pm.
- Purchase Order dated 7 April 2006 to Aircall Woodford for 2000 Nokia N70 price £225 = £450,000 + VAT £78,750 = £528,750 (faxed 14.14 pm). The purchase order sets out the specifications requirement which did not necessarily match the request from Trading's customers. Mr Spurgeon confirmed that this was the same on all the purchase orders. The note at end of order is the same as that on Group's Purchase Orders and reveals that Unistar was aware of the possibility of the circularity of the funds as early as the start of all the deals
- Pro-forma Invoice and invoice of the same date from Aircall same amount indicating Aircall's bank as Barclays with sort code and account number. The invoice has been typed later and was actually received by Trading on 12 May 2006.

- Release note from Aircall to Hawk (freight forwarders) releasing the goods to Trading but indicating that they remained the property of Aircall until paid for.
- Supplier declaration to be completed in its entirety before any transaction is accepted. The declaration is completed in its entirety signed and dated 7 April 2006.
- Purchase order from Sunico in Denmark dated 7 April 2006 (Faxed 8 May 2006 at 12.23) requiring the goods to be new and original with European specification, containing 1 handset of GSM 900 MHz/1800MHz with Central European Software (English, French, Italian, German Spanish.etc).2 original batteries, 1 manual,1 International warranty, 1 two-pin travel charger etc.
- Invoice request to administration dated 7 April 2006 at 11.15 am. This appears to have occurred before the purchase order was sent to Aircall at 14.14. Mr Spurgeon told us that the deals were set up by telephone and subsequently reduced to writing. As a result there was frequently a delay between the placing and completing of the orders and the documentation.
- Invoice from Trading to Sunico price £235 for £470,000.
- A message dated 7 April 2006 from Unistar indicating that they are now selling under Unistar Trading Limited as apposed to Unistar Group and requiring payment to the Trading account at Barclays. This is the converse of the wording for Group.
- Redhill request to check the VAT numbers and their confirmation as to VAT details for Aircall and Sunico both dated 7 April 2006. The Redhill letter faxed to Trading on 7 April 2006 at 11.22.
- Two transport instructions from Trading to Hawk dated 7 April 2006 for 1050 and 950 Nokia N70s (the 2000 order) requiring the goods to be delivered to Sunico in Denmark at 9.00am on Monday 10 April on hold and to remain so until further written instructions. The instruction also confirmed that Trading's new insurance limit per vessel was £1 million.
- CMRs Trading to Sunico 7 April 2006 properly completed and signed.
- Eurotunnel Folkestone ticket as at 9 April 2006 a 19.49
- Faxed detail from Baclays of payment by Sunico of £470,000 on 10 April 2006 via HSBC Bank PLC. Similar detail of payment of £526,750 to Aircall's Barclays account.

Deal 6. (Vol 9 p 86). This deal is the one over which Unistar was sued by DVT Vertnebs and we examined it in some detail. The deal is dated 12 April 2006. The goods have passed through the following traders. Mingele > I Connect U > Aflecks Phones Ltd > Fone Dealers Limited > Emmen Communications Ltd > Diginett Limited > New Way Associates > **DVB Ltd > Unistar Trading > DRT Vertnebs.**

- IMEI detail. Manuscript note manuals Greek/English. Languages Greek/English/ Nederlands. Boxes 5.
- Inspection report states language Russian; Dark Grey; English key pad.The report carries a manuscript note "Frank advised this stock has **EU Warranty** by telephone 16.28 12/4/06"
- DVB Ltd Invoice dated 12 Apri; 2006 £356,025. The invoice states "It is the customers' responsibility to check the stock before release. DVB Limited accept no responsibility for any discrepancies once stock is released".

- There is a release not addressed to Hawk from DVB Ltd dated 12 April 2006 releasing the phones to Unistar. There is no provision for them to be held to DVB's order although they were not paid for until the following day. We note that Unistar, both Group and Trading have dealt with DVB on many occasions.
- Unistar paid DVB at the Bank of Ireland on 13 April 2006 £356,025 at 10.40.
- Purchase Order (Undated): Nokia (5 in a box, Central European spec and warranty) made in Finland; 9301i packed 5 in a box. English key pad. Brand new Virgin Stock ; 1000pcs; Silver/Grey; Central European incl GB/NL in software. No Arab/Asian language; Manual English. Battery Type. Lithium slim. Extra equipment; full pack. Date of delivery 13 April 2006 at MBS Kelsterbach. **Warranty European**; price £318,000.
- Redhill request dated 12 April 2006 re DRT Vertriebs GmbH. Also separately Sunico and DVB replied to 12 April 2006 for Aircall, DRT and DVB Ltd.
- Invoice 12 April 2006 for £318,000.
- Copy note to pay Trading although invoices are all Trading accounts.
- Transport instructions to N Badkar (who appears to have moved many of the goods) for delivery to MBS Frankfurt at 9am 13 April 2006 to remain on hold until paid for. Asked for copy CMR.
- Goods passed through Channel 12 April 2006 at 21.40
- DRT paid Unistar £318,000 through Barclays Bank on 13 April 2006 via HSBC.

Deal 9. (Vol 10 p 4). 19 April 2006. The goods have passed through the following traders. Hardware Traders Deutchland > Midwest > Deepend Trading Ltd > Phone 2 Phone > Ocean Connection > **DVB > Unistar Trading > Sunico.**

- Purchase order to DVB from Unistar Trading dated 19 April with standard requirement for specification. 1499 Nokia 9300i qwerty key pad. £537,204.13.
- Invoice request addressed to Sunico for 1500 Nokia 9300i amended to 1499 on invoice 19 April 2006 for £479,680. Detail specification from Sunico.
- Redhill request 18 April 2006 Sunico confirmed 19 April 2006. Redhill request 19 April 2006 for DVB.
- 19 April 2006 transport instructions to Hawk for phones to be delivered to Kuhne & Nagel, Copenhagen, Denmark by 9 am 20 April 2006 and to be held to order pending further written instructions.
- CMR 19 April 2006 with an acknowledgement by K & N at 9.45 am on 20 April 2006. Confirms goods to be held to order of Unistar Trading.
- The goods were checked in at Eurotunnel in Folkestone at 21.06 on 19 April 2006
- Sunico paid Unistar Trading at Barclays Bank on 20 April 2006 £479,680 via HSBC.
- Unistar paid DVB at the Bank of Ireland on 20 April 2006 £537,204.13 at 15.17

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Deal 2. (Vol 10 p 294). 12 May 2006. The goods have passed through the following traders. Regal Emporium Ltd > Zenith Sports Ltd (T/A I Connect Telecommunications) > New Ora Ltd (T/A Phone City) > **Aircall > Unistar Trading > World Communications France SARL.**

- Purchase Order 12 May 2006 from Unistar to Aircall. 3000 Nokia 6680 (Deal 3 in Deal Table at paragraph 56 for this period); 4000 Nokia 6280 (this deal); and 1310 Nokia 6111 (deal 1 in Deal Table for this period). Invoice dated 15 May 2006. for £1,577,419.88
- Inspection identified 485 pcs English, Arabic; 351 pcs English. This does not comply with the World Communications requirement below, for all the phones to be in Arabic.
- The IMEI detail does not refer to Arabic at all.
- There is a transport instruction dated 15 April 2006 to Hawk to deliver the phones to AFI Paris by 9 am on 16 May 2006 the goods to remain on hold. There is a similar instruction to N Badkar to move the goods.
- Unistar Trading paid Aircall through its Barclays account £505,837.50 (deal 3 this period) on 16 May 2006 at 11.39. They also paid £1,071,582.38 on the same day at 13.02. There is a manuscript note as follows:

  4 x 6280 £850,700 (This deal 2)
  1310 x 6111 £220,882.38 (Deal 1 this peiod)
  £1,071,582.38

- Purchase Order World Communications 15 May 2006 asking for Arabick **(note:their spelling)** key pad. Amended invoice from Unistar Trading for £768,000. Original invoice had price per unit of £181 instead of £192.
- CMR 15 May 2006 vehicle KS 03 XTJ held to order.
- There is a Freight Ticket for Channelports Limited on 15 May 2006 at 20.01 for vehicle KS 03 XTJ. There is a note for SeaFrance but this refers to a different vehicle.
- There is a request to Pay trading as before. World Communications paid Unistar Trading on 16 April 2006 £967,107.19. there is a manuscript note

  £768,000 (Deal 2)
  £199,120 (Deal 1)
  £967,120

  There is a further note identifying £12.81 as bank charges.

Deal 4. (Vol 11 p 3). 12 May 2006. The goods have passed through the following traders. Jakub Impex SL > LTH Ltd > Cobra Communications > Letting Solutions > **Aircall > Unistar Trading > Sunico.**

- Purchase Order 12 May 2006 Unistar to Aircall for 1000 Samsung D600s standard specification valued at £175,075.
- IMEI detail checked and confirmed with Sunico. European languages.
- Purchase Order from Sunico dated 15 May 2006 required Euro specification with Central European software and international warranty. Faxed to Unistar 25 May 2006 at 09.58. Mr Spurgeon confirmed that the Paper work often followed the event. The Purchase Order appears to have occurred after the invoice of 12 May 2006. We would have expected it to have been correctly dated even though it was faxed later.
- Unistar paid Aircall at Barclays Bank on 16 May 2006 £628,323 at 9.52. there is a manuscript note which states:

  Pd 2320 £453,248.03

Pd 2321 £175,075.00 (This deal)
£ 628,323.03

- Invoice Unistar to Sunico dated 12 May 2006 for 1000 Samsung D600 at £156 per unit amounting to £156,000 for delivery 15 May 2006 K & N Copenhagen, Denmark.
- Transport instructions from Unistar to Hawk dated 19 April 2006 for the correct goods but the phones had been shipped on 14 May 2006..
- CMR dated 12 May 2006 for vehicle KP 55 AU. Via Eurotunnel on 14 May 2006 at 19.24.
- Sunico paid Unistar's Barclay account £156,000 on 15 May 2006 from their HSBC account.

Deals 5, 6 and 7 . (Vol 11 p 64). 12 May 2006. The goods have passed through the same traders for all the deals. Sunico > Orange and Green Traders > Regal Emporium > A2Z Trading Ltd > Sunmac (UK) Ltd > Jos (UK) Ltd > New Order > **Aircall > Unistar Trading > Sunico.**

- Purchase Order for 600 Nokia 6270, 499 Nokia N80 and 450 Nokia NE60 from Unistar. The invoices from Aircall are dated 12 May 2006 for £453,248.03 inclusive of VAT.
- The supplier Declaration although dated 12 May 2006 appears not to have been sent to Unistar until 9.28 on 31 May 2006.
- The stock advice/inspection report has a fax legend 12/5/06 - 09.58am
- IMEI report, which should have been received first, has a fax date of 12 /5/6 at 10.38 which is the wrong way round.
- Unistar Trading paid Aircall £628,323.03 on 16 May 2006 at 09.52. There is a manuscript note as follows;

  Pd 2320 £453,248,03 (These deals)
  Pd 2321 £175,075.00 (Deal 4)
  £628,323.03
- Purchase Order from Sunico dated 15 May 2006 for all the phones,
- Amended invoice from Unistar to Sunico arising from there being 1 less Nokia N80 dated 12 May 2006. 600 Nokia 6270 £110,400; 499 Nokia N80 £187,873.50; and 450 Nokia E60 £108,225.
- Transport instructions for 600 x Nokia 6270 and 450 x Nokia E60 dated 12 May 2006 for delivery 15 May 2006.
- Further transport instructions dated 19 May 2006 in relation to 499 Nokia N80 for delivery 15 May 2006. It is peculiar that these phones went a week later and 4 days after they had been paid for. This has not been the pattern throughout.
- 2 CMRs dated 12 May 2006 for all the phones on vehicle KT 55 GVJ.
- The phones went via Eurotunnel on 14 May 2006 at 19.21 in vehicle KT 55 GVJ.
- Sunico paid Unistar on 15 May 2006 £406,948.50 for all the phones.

53. Mr Spurgeon produced documentation which he had obtained from Hawk, and which did not appear in the Companies deal packs, but he confirmed were examples of the documentation used by Group and Trading to identify and move the goods through Hawk. They consisted of

- Pre-Alert addressed to Hawk dated 4 May 2006 in relation to 1015 x Samsung D620 indicating that Group were expecting the goods to be delivered to Hawk's warehouse by 12 pm on 5 May 2006 by Aircall and that the goods were to be held to Group's order pending further instruction. This document does not appear to relate to any of the deals the subject of this appeal. There were no Samsung D620s dealt with by Group in this period.
- A similar Pre-alert dated 17 May 2006 to AFI, the freight forwarders in Paris advising that 1999 x Motorola V3 were being delivered on 18 May 2006 for World Communications France SARL. These goods would fall within Group's period 05/06. Only 2000 Motorola V3s were sold in deal 7 to First Telecom International Ltd on 5 May 2006. This document does not relate to the deals in this appeal.
- Confirmation of allocation of goods dated 4 May 2006 addressed to Hawk asking for confirmation that 1000 x Samsung D600 had been allocated to Group by Aircall and asking Hawk to advise if an attempt was made by Aircall to move the goods as Group had not, at that time, paid for them. This would fall within group's period 05/06. Aircall have only sold Nokia phones at deals 18 and 19 on 18 May 2006. This document does not relate to the deals in this appeal.
- A similar confirmation allocation dated 18 May 2006 confirming the allocation of 1140 x Nokia 7610s to group from DVB Ltd. This document may relate to deal 20 in Group's period 05/06.
- Transport instructions date 12 May 2006 for 2000 x Samsung P850s to be consigned to First Telecom International Ltd in Hong Kong. This document does not relate to the deals in this appeal.
- Transport instruction dated 3 April 2006 to Hawk for 1500 x Samsung D600 consigned to Sunico in Denmark (1000 to be taken from 1970 , presumably already held to Group's order, and 500 from separate batch) which might relate to deal 1 of Group's period 04/06 save that deal 1 above refers to two transport instructions for deal 1 which are not the same.
- Confirmation of release of 1500 x Samsung D600s dated 5 April 2006 from Elite Mobile PLC to Group at 15.50pm. This release to deal 3 of Group's period 04/06
- Release of goods date 8 May 2006 addressed to Hawk releasing 500 x Samsung D600 to Sunico.This appears to relate to Group's deal 5 in period 05/06 and indicates that the goods were at the time on hold at K&N Copenhagen.
- Release of goods dated 19 May 2006 addressed to AFI in Paris releasing 1140 x Nokia 7610 to World Communications France Ltd. This appears to relate to Group's deal 20 in period 05/06.

54. There are some transport details in the packs. In view of the very detailed information in the deals we have decided, on the balance of probabilities that the information similar to that provided by Hawk must have been used in the deal packs when the transactions were carried out. Mr Spurgeon has also produced a list of approximately 1450 telephone calls for Trading for the period 05/06 commencing at 2 May to 31 May. The list is a little hard to follow as the dates are not sequential, which we would have expected them to be. We have assumed that the deals for World Communications and Sunico may have started on 6 May for the transaction completed

on 12 May. As far as World Communications are concerned there are 6 calls on 9 May from Unistar Trading to World Communications followed by a single call to Aircall. There are no further calls to World Communications, which we would have expected, as Unistar would have advised them that the deal had been completed. On the balance of probabilities these calls relate to the three deals with World Communications completed on 12 May 2006. The 1450 calls confirm Mr Spurgeon's statement that the Companies transactions were mainly carried out by telephone. There are, however, no calls on the list in relation to the transactions with Sunico in Denmark in the like period and only two calls to Aircall.

55. Mr Christopher submits that all the deals are contrived because all the deals took place on the same day and it is difficult to see how 5 or more parties could have had time to make contact with each other, agree on terms, arrange to release the goods, make payment and arrange inspections. None of the chains can be traced to a manufacturer or even to an authorised distributor. The supply chains lack any commercial reality. The goods are acquired from a trader in a European Country, pass through several buffers in the United Kingdom, before being exported to another trader in another European country by Unistar. The membership of the supply chains show a remarkable degree of consistency: sometimes several chains contain precisely the same members in precisely the same order. The chances of that occurring, in a genuine market is infinitesimally remote. He has referred to several discrepancies among the deals. He noted that for UGL's deals 4 and 5 for the period 04/06, the sales invoice state " We declare that to the best of our knowledge these goods were not customs stamped when they left our warehouse". However, the inspection report states "150 units have custom stamps on outer boxes…". In UGR's deals 18 and 19 for the period 05/06 the deal chain shows circularity with Sunico being at the top and bottom of the deal chain. Mr Spurgeon has said that he could not have known of the various traders in the chains beyond the suppliers to the Companies and their customers.

Other due diligence.

56.There is a note of a meeting on 24 June 2004 when extensive verification was undertaken of transactions carried out by UTL in 05/04. It transpired that most of the transactions were related to supplies that did not take place in the United Kingdom. There were only 3 transactions where the goods were sourced in the United Kingdom. The supplier was DVB and the customers Phoenix Sarl and Sunico. All the tax had been declared and recovered and a repayment of £24,6821.73 was made. HMRC explained to Helen, an employee of UTL, that merely checking Redhill would not protect the company if a joint and several claim was made. A letter had been written to Mr S King at McIntyre Hudson, accountants to UTL and UTG, in which HMRC confirmed that further repayments had been made, on a without prejudice basis, on 17 September 2004 in the sum of £60,900 and on 8 October 2004 in the sum of £153,055. The letter went onto to say that HMRC's enquiries in relation to the period 05/04 showed that transaction chains examined in the VAT period originated with either a missing trader, hijacked VAT registration or other defaulting traders. The revenue loss associated with these transactions had been significant but, not withstanding that, they assumed that UTL were unaware of these facts. Mr Spurgeon said that he was unaware of this letter as it had been addressed to the Companies accountants.

57. At a meeting in September 2006 with HMRC Mr Spurgeon advised that no due diligence checks had been made of the suppliers as they had all been known to him personally for about 5 years. Mr Spurgeon confirmed that each supplier completes a supplier declaration for each deal and that the Companies required the same to be completed before any transaction took place. The supplier declarations also contained further statements as to the goods; that full IMEI checks had been carried out; and that they were VAT compliant. Mr Christopher considered that Group and trading should have carried out regular checks on all its suppliers. He had carried out an Experian Silver report on 14 September 2007 on Insignia Telecom (UK) Ltd showing a credit limit of £50,000 and a credit rating of £25,000 and a credit opinion " A below average risk company; little reason to doubt credit transactions to the limit assigned". Mr Spurgeon pointed out that it would say that as HMRC had probably not repaid their VAT entitlement either. Mr Christopher had carried out similar reports for Aircall and DBV Ltd.

Loans.

58. It can be seen from the analysis of some of the deals that payment was made by the Companies before they had received payment from their customers. Mr Spurgeon explained that he had met up with Mr Joseph Wayne Case. He told us that Mr Case had owned 50 to 100 shops selling mobile phones and that he had sold his business very well and he wished to invest some of the proceeds in other companies from time to time. He had begun by lending the Companies small amounts but by the time of these deals he had lent them substantial funds. Mr Case is a director of PNC Telecom PLC (PNC), which operated from his home. Its principal business was the wholesaling of mobile phones. PNC had received repayments in excess of £5,000,000 between 06/05 and 06/06. The Companies also received funding from Cairns Investment Holdings Ltd (Cairns) based in the Channel Islands. These loans were arranged by Mr Case. Cairns are shareholders in PNC.

59. Mr Spurgeon emailed details of the loans which had funded the business in April and May 2006 to HMRC on 25 July 2006:

a. Long term loan of from Mr Case of		£1,573,000
b. Short term loan of from Cairns of		£1,500,000
c. Further short term loan from Cairns of		£1,500,000
d. Further short term loan from Cairns of		£ 175,000
e. Further short term loan from Cairns of		£ 325,000
	Total	£3,573,000
Repaid Cairns		£1,500,000
Balance still outstanding Case	£1,573,000	
Cairns	£ 500,000	£2,073,000

Interestingly, the total VAT funded by the Companies in the deals amounted to £1,950,451.10 so that it is clear that Mr Case and Cairns between them were funding the VAT. The balance of the VAT came from the Companies' customers.

60. Apparently there is no documentary evidence for these loans but it appears that they were made in exchange for agreed verbal commission. Mr Spurgeon admitted in cross-examination that he did not know Cairns but that the loans had been arranged through Mr Case. Mr Mandalia suggested to Mr Spurgeon, in cross-examination, that there was no documentation because there was no risk as the deals were contrived. Mr Spurgeon replied that he did not consider this strange. He also told us that he has received, and continued in his new business to receive, substantial loans which are similarly unsecured.

61. Mr Spurgeon referred to deal 6 (in the deal table UTL 04/06 at paragraph 6) with DRT Vertnebs for £318,000. (We note that UGR had also sold to DRT in the period 04/06 at deal 5). Fladgate Fielder, solicitors in London wrote to Mr Spurgeon on 11 July 2006 indicating that they were instructed for DRT Vertnebs GmbH in relation to the sale of 1000 Nokia 9300i telephones for £318,000. DRT understood that the telephones had European warranties. DRT's customer had complained that the phones did not have a European warranty and as a result their customer had refused to accept the phones. They advised that unless Trading took the phones back and refunded the £318,000 plus interest within seven days of the letter they were instructed to commence proceedings. Allan James, solicitors for Trading, replied on 20 July 2006. They indicated that DRT had traded with Trading for some time and they were aware of Trading's conditions. Any complaints needed to be advised within 48 hours. DRT had had the phones examined and the warranty point had not been raised. The reason that DRT were in difficulties was because the market had dropped and they could no longer find a buyer at the right price. Proceedings appear to have been started as we have been referred to Trading's solicitors suggested directions dated 6 November 2007 for the advancement of the case to trial, which appear to have been agreed by the parties' solicitors. Trading had also agreed to pay costs of £10,000 to Allan Jones by this time. None of the court documents have been provided. We have not had sight of the debenture or any details of the appointment of the administrator.

62. It appears that Mr Case had secured Tradings' indebtedness by a debenture. The debenture has not been produced in evidence and the only formal evidence, apart from Mr Spurgeons's comment, is contained in a note from Rob Smith dated 20 July 2006 which states:-

> "In the account of Unistar Trading Ltd there is a post-balance sheet event stating that a debenture (value not given) had been signed by Ruarri Spurgeon (on a date not given) in favour of the main creditor (not identified but the phrase implies that this is the ' unconnected third party' holding the unsecured loan). ……The interest rate on this is disclosed as between 12.5% and 18% …..Total interest payable in 2005 represented more than half the gross profit figure."

63. Mr Spurgeon said that the Debenture had been taken out by Mr Case and it required him to notify Mr Case if litigation was commenced. Mr Spurgeon has told us that he advised Mr Case of the action commenced by DRT but he has not stated when that was. We assume it must have been some time in August 2006 as that would be shortly after the letter raising the claim. We have been told that Mr Case became concerned about the prospects of success of the action and placed Trading into administration. We have not been told on what date this occurred but it must have been after November 2007 because the proceedings were still not concluded by that

date as evidenced by the directions (see paragraph 60 above). As a result of the administration DRT did not pursue the action. We are not told when the action ceased. We note from the schedule of loans provided by Mr Spurgeon that Mr Case continued to lend money to Trading up to June 2007. Mr Case must have been concerned about his loans well before the case went to trial. It is unusual that he was still prepared to lend money to the company in circumstances where he must have been considering placing the company into administration.

64. Mr Spurgeon has produced two schedules of the commission paid to Mr Case for the period 4 May 2006 to 11 June 2007. The one at page 143 of Volume 6 of his exhibits show commissions amounting to £95,889 for that period. The one included in the longer list at page 136 of his exhibits shows commissions for the period 3 April 2006 to 17 May 2006 (covering the dates of the deals) totalling £156,993.75. The average debt over the period, after the repayment of £500,000 on 18 April 2006 was £1,500,000 to 17 May 2006 when £1,000,000 was repaid to Mr Case. The opening loan with Mr Case appears to have been £1,500,000 on 30 April 2004 with a closing balance of £36,000 on 12 June 2007. The debt appears to have been approximately £1,500,000 for the 45 days covered by the deals which represents 51% interest for the period. £95,889 is a huge sum of money for 45 days. If the commission totalled £156,993.75 then the interest charge would have been even larger. We have not been told what the discrepancy is. It appears that the funds were also lent on the basis that Mr Case had known Mr Spurgeon for over 6 years. Mr Case had secured these loans by the Debenture.

65. Mr Spurgeon also produced an internal financial statement, which Group kept in relation to loans made to Aircall to help them purchase the stock which Group subsequently purchased. Mr Spurgeon explained that one of the reasons for keeping a close and trusting relationship with his suppliers was to assist the informal short term funding which was required from time to time. The practise resulted in substantial sums of, money being loaned. The loans were made in the form of advance payment for goods that UGL were going to acquire from Aircall but which Aircall had not at that time purchased. These were never treated as payments on account as Group did not want to be in a position where it had agreed to buy the phones before it had sold them. It did, however, wish to help Aircall out, so that Aircall could purchase the products, by paying Aircall for the goods in advance. The payments were treated as loans and converted to payments when the goods were eventually purchased. In UGL's Deal 5 for the period 04/06, Group paid for the goods as the invoice was raised on 6 April 2006 as a loan. It subsequently treated that loan as a payment for the goods the following day. We note from the account that Group appears to have made advance payments by way of loans in deals 2,5 and 8 of period 04/06 over the 25 days amounting to £859,439.65.

Insurance

66. Mr Spurgeon has produced several invoices for UTL in relation to the insurance premiums for the years from 2003/3 to 2006/7. These vary from £13,000 per annum to £40,000. HMRC have conceded that the companies carried insurance and Mr Mandalia has not cross-examined Mr Spurgeon in this regard.

FCIB and payments.

67. Mr Simon Japes gave evidence under oath and confirmed that he had been working with the MTIC team in Reading since June 2006. In September 2010 he had taken further responsibility in analysing the data from the FCIB accounts computer in Paris. The Paris server contained the narrative that would have been input by the depositor of the funds. It identifies the payer of the funds, the date of the payment, the timing of the payment, the address of the payee, in which country the payee was located and the secret question and answer that identified that the user or users were genuine, when the account was interrogated. From 1st May 2006 the IP address, the log on and log off times of the person making a payment were recorded on the server.

68. The FCIB account reference give information about each account. The full FCIB account reference is in the format "00/000/000000/00". The first two digits indicate the currency (in this case sterling); the next three digits identify the type of account (in this case a current account, which could be operated digitally, and in all the different trader accounts was numbered 801); the next six digits are the customer's reference and the last two digits the currency for that customer (again sterling). The description column in the Bankmaster Plus System contains the narrative attached to the transaction by the account holder. Also within the narrative is the Electronic Banking (EB) reference which uniquely indentifies each monetary movement. It appears that these numbers are sequential and the EB reference links a payment from one FCIB account to another account and appears in the narrative for both accounts. It is this detail which has enabled him to trace the various invoices when they were included with others in a larger payment.

69. Mr Japes had prepared statements for the movement of funds for Group and Trading. He has examined the payments for all the deals and has produced flow charts for 23 of them. Out of the 51 deals he examined 35 of them showed circularity of funds. Mr Bridge submitted that as all of them had not been produced on the flow charts it was not possible to say that all the payments for all the deals were circular in nature, that is that the money returned to an original trader, as suggested by Mr Japes. Mr Japes has identified all the payments for all the deals in his witness statement. Whilst some of those show the payments may have been circular in nature, they all indicate that the payments were either circular or ended up being paid to other than the correct trader and that they were therefore fraudulent. Mr Spurgeon admitted considerable surprise when shown Mr Japes' workings. He indicated that he could not have known, nor did he know, that the payments were circular.

70. Mr Japes told us that he started his analysis with the Barclays account for Trading, tracing the receipt of monies from Trading's European customers and from there, tracing the payments made by Trading to its suppliers in the United Kingdom. He compared the amounts in the trading account of Trading with the dates and values of the invoices listed in the deal chain spreadsheets provided by Officer Christopher. Once those amounts had been identified he traced the monies paid and received by Trading through the recipient and payer of the funds. He continued this process where possible to trace each transaction in the chain until the funds had returned to the initial company that commenced the transaction. We have examined several of the payments through Mr Japes schedule. We have noted that where the flow charts show a single invoice payment initially and then a substantially larger amount, the narrative in the FCIB account has made it possible for Mr Japes to identify the individual invoiced goods in the larger sum. For example:-

- UTL's deal 6 (the subject of the litigation) for the period 04/06 is the sale to DRT Vertriebs of 1000 Nokia 9300i. The chain was Mingele > I Connect U > Afflecks Phones > Fonedealers > Emmen Communications > Diginett > New Way Associates > **DVB > UTL** > **DRT.**

    - DRT paid Trading 13 April 2006 £318,000
    - Trading paid DVB same day £356,025
    - DVB's payment to New Way, its supplier, is unidentified
    - New Way paid Diginett £557,530. The FCIB narrative states "B/O New Way Associates for ref mobile phones inv 2026, 2029 paid in full". (Mr Christopher's exhibit p 132 volume 9 is of Diginett's invoice number 2026 for 1000 Nokia 9300i valued at £349,562.50)
    - Diginnet paid £630,505 to Emmen. The FCIB narrative states "PO1844/ inv 404696, PO1847/ inv 4040705". (Mr Christopher's exhibit p146 volume 9 is of Diginnet's purchase order no 1847 to Emmen for 1000 Nokia 9300i at £348,975)
    - Emmen paid £348,740 to Fonedealers. The FCIB narrative states "PO 40437 in 50272". (Mr Christopher's exhibit p152 volume 9 is of Fonedealers invoice 50272 for £348,740)
    - Fonedealers paid Sunico £603,000. The FCIB narrative states "inv 50263,72 800x91 and 1k x93i". Although the invoices are for 100 phones less we are satisfied that it is the same transaction because of the dates and the sequential nature of the payments. The Fonedealer's account shows the payment to a/c 00836444, which is not an FCIB account. That account is identified at p 115 exhibit SJ55 through an HSBC account as Sunico's account in Denmark.

We are satisfied that the ultimate payment for this DRT transaction, the subject of the litigation referred to above, ended up with Sunico. We are also satisfied with the methodology Mr Japes has adopted for his analysis.

71. We have examined the flow charts and identify 4 below:-
UTL period 05/06 Deals 1, 2 and 3. The chain from the flow chart appears to start at continue before (World > A C Primetech > Zaagoug > Ramsha >) but from the listing at p85 bundle 1 from Regal for all 3 was Regal > Zentith Sports > New Ora >**Aircall > UTL > World**

- World paid UTL £1,423,120 (£199,120 + £758,000 + £456,000)
- UTL paid Aircall £1,577,419.88
- Aircall paid Phone City £1,565,123.50 and retained £12,296.38
- Phone City paid I Connect (t/a Zenith Sports) £1,562,194.23 and retained £2,929.27 (.2%)
- I Connect paid Regal £1,559,753.16 and retained £2,440.84 (.2%)
- Regal paid Ramsha £1,563,406.4 and paid £3,653.4 more than it received
- Ramsha paid Zaagoug £1,549,231.4 and retained £14,175
- Zaagoug paid AC Primetech £1,433,923 and retained £129,483.4
- AC Primetech paid World £1,431,430 and retained £2,499 (.2%)

It appears that £164,263.40 has been retained within the circle made up of:

£ 8.310 excess returned to World
£ 12,296 retained by Aircall

£ 14,175 retained by Ramsha
£129,482.40 retained by Zaagoup
£164,263.40

72. The fraud requires money to be placed in the scheme by a fraudster, for individuals to take their share out and the balance to be returned to the fraudster. World or a third party appears to have put £1,423,120 in when it paid UTL and received £1,431,430 back which is an increase of £8,310. All the rest of the money had effectively been put in by UTL, who had paid £154,299.78 as their share of the VAT to Aircall. UTL appear to have borrowed the VAT from Mr Case.
It appears that the following profit has been taken out excluding the larger payments above:

£2.929.27 retained by Phone City
£2,440.84 retained by I Connect
£2,449.00 retained by AC Primetech
£7,819.11

If that is deducted from £164,263.40 the result is £156,444.29 which is within £2144.51 of the VAT paid in by UTL which must be more than a coincidence. When the repayment is made by HMRC, UTL will repay its loan to Mr Case.

73. UGL period 04/06 Deal 1. We do not propose to go through the deal in detail. The flow chart does not, in our opinion, show circularity other than to Lettings Solutions. In fact the first three payments are from Sunico to UGL to Aircall and fall outside the circular movement of the cash thereafter from Letting Solutions and back to Lettings solutions. The payments to and from UGL were for the correct amounts.

74. UGL period 04/06 Deal 3. The full chain for cash purposes is Data Solutions > Bond Corporation > Bodytec > Fima Consulting > Top Brandz > Diginett > New Way > **Elite** > **UGL > Sunico.** Mr Mandalia referred Mr Spurgeon to this flow chart:

- Sunico paid UGL £238,500.
- UGL paid Elite £269,662.50 (wrongly described as £369,662.50 both in the chart and at paragraph 157 of his statement. We have checked the invoice which is for £269,662.50)
- The payment from Elite to New Way is missing as both used non-FCIB accounts
- New Way paid Diginett £838,719.74. the FCIB narrative reads “b/o new way associates ltd for mobile phone invoices 1991,1996,1997,1999 paid”
- Diginett paid Top Brandz £557,655 and retained £281,064.74
- Top Brandz paid Firma £555,598.75 and retained £3,943.75
- Firma paid Bodytec £738,458 for the 1500 D600s, 1000 6680s and 2000 K750i and appears to have paid an additional £182,859.25.
- Bodytec paid Acquired Solutions £259,351.87 for the 1500 D600s
- Acquired Solutions paid Sunico £412,000 for 1000 6680s and 1500 D600.

75. It will be seen from the chain that the payments should have gone through Bond Corporation and Data Solutions. Bodytec appears to have paid Acquired Solutions instead, presumably as a third party payment. HMRC have advised all traders that it was common in MTIC cases for third parties to make payments for goods supplied to traders other than themselves. Mr Japes has commented that payment in these deals were circular with Sunico appearing at both ends. Mr Mandalia has suggested that this must be more than a coincidence. Mr Spurgeon suggested that it was quite possible

that Sunico had decided to buy 10,000 D600s and had approached all its traders. It is for that reason that the D600s found there way back to Sunico.

76. UGL deal 7 period 04/06. The chain from the flow chart is GPA > Cobra > Fonestop > London Mobile > Signal > **Insignia > UGL Sunico** > Premisten

- Sunico Paid UGL £191,800
- UGL paid Insignia £214,672.50
- Insignia paid Signal £213,020.56 and retained £1,651.94
- Signal paid London Mobile £212,205 and retained £815.56
- London Mobile paid Fonestop £211,382.50 and retained £822.50
- Fonestop paid Cobra £209,737.50 and retained £1645
- Cobra paid Raja £ 209,079.50 and retained £658
- Raja paid Sunico £203,000 and retained £6079.5

77. Sunico, or a 3rd party, introduced £191.800 into the scheme and received £203,000 gaining £11,200. £11,672.50 has been retained by the members of the circle, which when added to the £11,200 equals £22,872.50 the VAT introduced by UTL at the start. This is more than a coincidence. UGL has borrowed the Money from Cairns and Mr Case who are to be repaid out of the HMRC repayment.

78. UGL period 05/06 Deal 1. The chain was Computec > Zentih Sports > New Ora > **Aircall > UGL > Q-Evolution.**

a. Q.Evolutions paid UGL £375,000
b. UGL paid Aircall £415,950.
c. Aircall paid New Ora £412,425 and retained £3,525
d. New Ora paid Zentih Sports £411,367.50 and retained £1057.50
e. Zenith Sports paid Computec £410,486.25 and retained £881.25
f. Computec paid Rezaco £408,195 and retained £2,291.25
g. Rezaco paid Zaagoug £406,830 and retained £1,365.
h. Zaagoug paid Q-Evolutions £350,000 and retained £56,830

Q-Evolutions or a third part introduced £375,000 and received £350,000 - £25,000 less. UGL introduced £40,950 as VAT when it paid Aircall. The VAT appears to have been withdrawn by Zaagoug when it deducted £56,830.

Submissions by Mr Mandalia

79. Mr Mandalia submitted that the Appellants do not take issue with the identification of the deal chains or the tax loss alleged. The figures for Trading's VAT returns for periods 04/06 and 05/06 were based upon a total of 17 transactions. All 17 transactions were concerned with the purchase of mobile phones from UK companies and their dispatch or export to Europe or beyond. Trading had three suppliers and three customers for these transactions. The figures for Groups VAT returns for periods 04/06 and 05/06 were based upon a total of 32 transactions. All 32 transactions were concerned with the purchase of mobile phones from UK companies

and their dispatch or export to Europe or beyond. Group had four suppliers and seven customers including suppliers and customers common to Trading.

80. The essential issues in this appeal are exactly the same as in other appeals of this type:

a. Are the Appellants' transactions in respect to which the input tax has been denied, connected with the fraudulent evasion of VAT elsewhere in the transaction chains?
b. Did the Appellants know,, or should they have known that the transactions were so connected?

To the extent that HMRC's case on knowledge of the fraud is based on inferences, from a wide range of facts in order to establish the position that the Appellants must have known that their transactions were connected with the fraudulent evasion of VAT. In the alternative, the Appellants' should have known that their transactions were connected with the fraudulent evasion of VAT as they did not take every precaution that could reasonably be required of them to ensure that their transactions wre not connected with the fraudulent evasion of VAT. (See *Kittel*).

81. Mr Mandalia submitted that there can be no serious dispute that the *Kittel* test applies to the circumstances of this appeal as Moses LJ considers the same in paragraphs 41,43 and 52 in *Mobilx*. (See paragraphs 18 and 19 above). He also referred to *Calltel*, *Red 12* and *Megtian.* (see paragraphs 24,25 and 26 above). He invited the Tribunal to apply the test(s) to the evidence on the basis that either:

a. The Appellants' (through their directors Mr Ruarri Spurgeon and Mr Anthony Hussey or employees) had actual knowledge that the relevant transactions were connected with fraud: or alternatively
b. The Appellants (through their directors Mr Ruarri Spurgeon and Mr Anthony Hussey or employees) should have known that the relevant transactions were connected with fraud.

82. The Tribunal has before it the commercial documentation disclosed by the traders for each transaction indentifying the purchase and sale of he relevant goods at each step of the transaction chain. The Tribunal has been provided with the deal logs for each of the 49 deals, prepared by Mr Christopher following his extended verification of each of the deals. In his skeleton argument, Mr Mandalia indentified a number of features of the transactions that established that the activity throughout the transactions chains is permeated with fraud:

a. There is clear evidence in each deal that the goods had been imported in to the United Kingdom from Europe
b. In a number of the deals the phones traded had two pin plugs and that they must have been imported other than through the manufacturers or main distributors.
c. There have been payments to third parties within the deal chains, which Mr Stone states are a feature of MTIC.
d. HMRC allege that each of the Appellants transactions trace back through the deal chains to a tax loss. HMRC are not required to prove the identity of the designer(s) of those chains or that the participants were knowingly involved in a single fraud. HMRC do not need to demonstrate the precise parameters of the fraudulent activity or its particular participants.

83. In cross-examination Mr Spurgeon conceded that having seen the documentation "some of the deals are deeply suspicious". He accepted that "there are points in there that are of great concern ..where questions need to be asked". He stated that he did not know whether it was the people that he was dealing with that were misinforming him, acting in a dishonest way, the people that were supplying them, or the freight forwarders. Furthermore, he conceded that the deals that are the subject of this appeal "do show indications of contrivance".

84. The circulation of the funds in the FCIB accounts means there is no genuine underlying economically justified reason for the transactions to exist. This is evidence of contrived transaction chains, in which the Appellants played an integral role. 29 out of the 49 deals have been examined. HMRC has not been able to conclude the other deals because not all the traders had FCIB accounts. It is beyond coincidence that each of the traders was able to pay each other in such a short period of time. Mr Spurgeon claimed that he would not have dealt with any trader who operated an off-shore account. When cross-examined Mr Spurgeon confirmed the importance attached to traders' banking arrangements. It is plain that the stated aspirations were not in fact followed in practice.

85. Although knowledgeable about the mobile phone trade, Mr Mandalia submitted that Mr Spurgeon was extremely vague and inconsistent in answering questions put to him about the Appellant's trading model, and the transactions in particular. Mr Spurgeon changed his evidence in light of the questions put to him. Importantly, although it is plain that the deal documentation was signed by Mr Hussey and the majority of the deals were negotiated by an employee Mr Rowan Badcar, for reasons that remained unexplained, neither Mr Hussey, the Sales Director, nor Mr Badcar, or any other employee gave evidence to the Tribunal or submitted to cross-examination.

86. Mr Spurgeon was fully aware of the problems with regard to mobile phones and the MTIC trade in particular he wrote to HMRC as long ago as 1 September 2003 highlighting the problems the Appellants had in selling mobile phones stamped by Customs and Excise. He indicated that his customers were discouraged because they thought that such mobile phones had something wrong with them. In June 2004 Officer Caroline Norton visited Trading's business and she was surprised to learn that no checks, beyond Redhill, were made of their trading partners. In June 2004 the Appellants had been advised that, as a result of a recent verification of deals in October 2003, circularity leading to a significant tax loss had arisen. The Appellants' suppliers were Aircall and DVB. Notwithstanding that the Appellants continued to trade with these suppliers.

87. As further evidence of Mr Spurgeon's knowledge of MTIC fraud he had written in a letter to HMRC on 24 March 2005

> " ..We fully accept that there are defaulting trader cases and incorrect refund claims, which are not "economic activities" however would like to state on record that we do not fall into those categories…".

On a number of occasions the Appellants were notified that repayment claims made would not be authorised until the Commissioners were satisfied with the bona fides of

the repayment claim and verification of the transactions. Mr Mandalia also noted that the Appellants Purchase Orders stated:

> " In the event that H M Customs and Excise should disallow any amount claimed by the supplier on a purchase invoice as VAT on the grounds that the transaction was part of a chain of supply that was circular in nature and involved a defaulting trader, any amounts shown as VAT will be refunded and a credit note issued".

89. Mr Mandalia submitted that the characteristics of the goods being traded and the relevant transactions highlighted that the transactions were connected with fraud. In particular the goods being traded were:

a. easily transportable high value goods of the kind normally used in MTIC fraud;
b. bought in large quantities;
c. of Central European specification but being traded in the United Kingdom, or of United Kingdom specification being exported outside of the United Kingdom by the Appellants;
d. manufactured outside the United Kingdom.

Notably the relevant transactions had the following characteristics:-

e. back to back transactions;
f. purchases and sales in the same quantities;
g. not held in stock by the Appellants, but held at the freight agent's premises;
h. paid for by the customer before payment is made to the supplier.

90. When Trading registered for VAT and indicated that it expected to turnover £2,500,000 in its first 12 months of trading it in fact achieved £34,000,000. Trading had also indicated that it had not anticipated regular repayments of VAT, save in respect of the first return, all of the returns for the first year of trading were repayment returns. Group had anticipated a similar situation when it had registered for VAT. Again each of the returns, in common with Trading, was a repayment return. HMRC did not believe that group had been set up as a result of the loss making "internet telephone service opportunity". Mr Spurgeon when asked about the operation of the two companies, the duties owed by the directors to each of the companies and the potential conflict of interest, said that he did not give the matter any consideration. HMRC believe that the only reason for having the two companies was to keep the turnovers down so that HMRC would not be alerted as to the level of trading.

91. As Mr Spurgeon was familiar with MTIC fraud the safest position for the Companies to be in was as importers. Mr Spurgeon never explained why in any of the deals the Companies did not trade as importers. In any chain of transactions, involving mobile phones with 2 pin plugs, it must have been apparent to the Appellants that the phones had been imported into the United Kingdom by a company other than the manufacturer or authorised distributor. Similarly, in any chain of transactions involving mobile phones with 3 pin chargers being exported out of the United Kingdom, it must have been apparent to the Appellants that the phones were destined for the United Kingdom. Mr Spurgeon conceded that no dealer would have agreed to change the pins as part of their deal as this would have been too expensive.

92. Mr Spurgeon said that customers paid for the goods in advance and the suppliers gave credit. Mr Spurgeon had no funds and incurred no outlay and considered that he

was fortunate that he could trade in mobile phones worth hundreds of thousands of pounds without any capital of his own. He claimed that he did not consider the business opportunity to simply be "too good to be true". Nor did Mr Spurgeon think that it was odd that Mr Case and Cairns were prepared to fund the Appellants to a substantial level merely on verbal agreements. The terms of the funding were not set out in writing Mr Spurgeon accepted that he still owed Mr Case £1,500,000 even though he ought to have been able to fund the transactions out of the profits the Companies had made in their earlier deals.

93. Mr Spurgeon had indicated that the market was fast moving and deals needed to be completed quickly. In spite of that he also indicated that some of the deals could take a number of days, which is inconsistent with his earlier observations. It is also curious that, although Aircall had a direct contact with the customers abroad, it still chose to carry on business with the Companies. Mr Spurgeon suggested that Aircall might not have been able to fund those transactions itself. He had, however, indicated that the Companies lent money to Aircall so that it could purchase goods which the Companies would subsequently buy from Aircall.

94. Mr Spurgeon was unable to give a coherent answer when asked by Mr Mandalia when any liability to either purchase the stock or supply stock arose. Importantly Mr Spurgeon claimed that the Appellants were contractually obliged to supply the goods to their customers at the point that an invoice was issued. There were no written terms and conditions between any of the traders. Mr Mandalia submitted that the vague evidence of Mr Spurgeon in this regard was, in fact, evidence of pre-arrangement between the parties so that the obligations and or recourse that they might have had, were irrelevant as the deals were contrived.

95. The way in which the Companies traded was entirely uncommercial. They appeared to hold no stock as this was at the freight forwarders. When providing stock for customers, there appeared to have been no attempt to check whether the goods were being purchased by the Companies at the best price. Mr Spurgeon indicated that much of the trading took place on the telephone. There did not appear to be any formal evidence as to the deals, which had been struck, as no notes were kept of those telephone conversations. In view of the value of the various transactions the Companies would not have been able to deal with any issues that might have arisen as a result of a misunderstanding during those telephone conversations.

96. It is noteworthy that neither the Companies nor their suppliers or customers appeared to be over concerned with the specification for the phones. Further, the Companies released the phone from Hawk to their customers' freight forwarders even though the Companies had not paid their suppliers for the goods so that the Companies did not have title. The Companies had made no arrangements with Hawk as to the proposals that the goods should be "shipped on hold". Certainly there was no arrangement whatsoever with the foreign freight forwarders in that regard.

97. Mr Spurgeon indicated that the IMEI numbers on the outside of the boxes were inspected and then checked against a mobile phone inside the box. The video of the inspections, produced by Mr Spurgeon, fails to identify the goods inspected, the date of the inspection or that he goods are those being traded by the Companies. Nor does any note of the IMEI numbers appear to have been taken. Only a cursory examination

appears to have taken place before the phones were placed back in the boxes. The video did not appear to follow the pattern that Mr Spurgeon had originally identified as to the inspections.

98. Mr Spurgeon insisted that he was not prepared to deal with any traders who had other than a United Kingdom Bank account,. When asked whether it would have concerned him so much that he would not have entered into the deals he responded; "I think that's possible, yes". As part of the information contained in the deal packs for Group, deals 9a and 9b in period 04/06 contain a customer payment advice from the FCIB. Similar payment advices were received for Group in period 05/06 in deals 1, 3,4,9 and 9a disclosing that Q-Evolution General Trading Ltd operated a FCIB account.

99. Mr Mandalia submitted that the Appellants' account of its trading model was devoid of any commercial reality and that the general nature of its business model would have put any reasonable businessman on notice that he was not involved in a legitimate trade. No legitimate trader would provide mobile phones worth tens or hundreds of thousands of pounds to another trader without payment and knowing that they will only be paid if each link in a chain of unknown length makes payment. This is particularly relevant in an industry in which by Mr Spurgeon's own account, fraudulent traders go missing.

100. Mr Mandalia submits that Mr Spurgeon, on behalf of the Companies, must have known that the transactions, the subject of this appeal were connected with fraud. If the Tribunal is not convinced of the Appellants actual knowledge, at the very least, the evidence shows that the Appellants ought to have known of the connection to fraud. The Appellants should have been alerted *inter alia* by the following;

The characteristics of the goods traded:

i. Easily transportable high value goods of the kind normally used in MTIC fraud;
ii. Mobile phones bought in large quantities;
iii. Mobile phones manufactured outside of the United Kingdom and having 2 pins *(being a clear indicator that the phones had been imported into the United Kingdom by companies other that the manufacturers or authorised distributors, but were not intended for the United Kingdom market)*and mobile phones having a 3 pin charger *(and this intended for the United Kingdom market)* being exported to an European customer'.

The characteristics of the relevant transactions:

a. The transactions were back to back;
b. All of the transactions involve purchases and sales in the same quantities;
c. All the stock was held by freight forwarders;
d. All traders accede to releasing the goods before payment was made;
e. The Appellants were not required to make payment to their supplier until they received payment from their customer;

101. Mr Mandalia submitted that due diligence was not something that traders undertake because HMRC expect to see it. Its function is to protect a trader

against the risk that either the customer will not pay, the supplier will not supply the goods or that the goods do no meet the required specification or do not come from a legitimate source. The suppliers and customers had been known to the Companies for several years and no further enquiries, other than to Redhill for the supplier and customers VAT registration certificates, had been made. The Companies required all traders to sign a declaration before each deal was carried out confirming that the transactions were legitimate. Apart from that no updates had been obtained and the Appellants had no means of knowing whether there had been a change in the way in which its suppliers and customers traded. The Appellants due diligence simply betrays the notion that the Appellants were simply concerned that its trading partners were a business that had an address and a VAT registration. Any of their enquiries were perfunctory. The Appellants undoubtedly ignored facts which should have alerted them to the serious possibility that those trading partners could not afford to be involved in the transactions in question.

102 Mr Mandalia submitted that the evidence enables the Tribunal to be satisfied to the requisite standard of proof that;

a. The relevant transactions that are the subject of this appeal were connected with the fraudulent evasion of VAT; and
b. The Appellants knew or ought to have known that the deals were connected with the fraudulent evasion of VAT.

Accordingly, HMRC submit that the appeal be dismissed.

Submissions by Mr Bridge

103. Mr Bridge submitted that the sole issue in this case is as to the state of mind of the directing mind of the Appellants at the time of the questioned transactions. The directing mind of the Appellants is Ruarri Spurgeon. The appeal must succeed unless HMRC is able to prove (the burden of proof being on HMRC) that it is more likely than not that Ruarri Spurgeon was knowingly involved in transactions connected to VAT fraud (actual knowledge) or that if Ruarri Spurgeon did not know that the transactions were connected to VAT fraud there was a means whereby he should have known that there was (not more likely than not, but the only reasonable explanation para 60 *Mobilx*) a connection to fraud (constructive knowledge).

104. Mr Bridge submitted that it must be established that the trader knew or should have known that by his purchase he was taking part in such a transaction (sic connected with fraudulent evasion of VAT), as the Chancellor concluded in his judgement in *Blue Sphere Global Ltd:-*

> "The relevant knowledge is that *BSG* ought to have known by its purchases it was participating in transactions which were connected with a fraudulent evasion of VAT; that such transactions might be so connected is not enough"

The true principle in *Kittel* does not extend to circumstances in which it is more likely than not that the transactions were connected with fraud.The essence of the approach of the court in *Kittel* was to provide a means of depriving those who participate in a transaction connected with fraudulent evasion of VAT by extending the category of

participants and, thus, of those whose transactions do not meet the objective criteria which determine the scope of the right to deduct. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in *Kittel.* The burden of proof rests with HMRC.

105. Mr Bridge referred to the cases of *Mahageban* and *Peter David* and whilst conceding that they do not directly challenge *Mobilx/Kittel* submitted that there is no obligation on the taxpayer to investigate tax fraud on behalf of the tax authorities:-

> "The tax authority must adequately "police" the market to ensure that traders keep proper records and defaulters are pursued. Failing to police the market and effectively delegating the responsibility to police the market to exporters by imposing a de facto blanket policy of denying input reclaims (extended verification) is unlawful".

106. HMRC have both statutory powers to arrest, search, seize, trace and freeze assets, and civil powers as identified in paragraphs 113 -116 of Mr Stones' evidence but has chosen not to use them. There is no evidence that any of these powers have been used against any of the traders in the chains in the instant case. It is submitted that on the facts of the instant case there is no evidence that HMRC policed the internal market in mobile phones adequately, or at all, during the period of the relevant trade. HMRC instituted a policy of extended verification in June 2002.In around February 2006 (see Mr Stone's evidence) in the face of 'eye watering losses' from fraud and approximately 18 months before the introduction of the reverse charge in June 2007 HMRC instituted a blanket policy of denying input tax reclaims in all cases where extended verification led to a defaulting trader.

107. Mr Bridge referred to the case of *JDI Trading Limited, and* whilst accepting that this Tribunal was not bound by the same, he considered that it was a recent decision with many similar features to the present appeal.:

> 1.Like the officers and directors in JDI Mr Spurgeon was a very experienced trader with years in the industry as was Mr Hussey.
> 2.Like JDI Trading and Group did not operate using an FCIB account.
> 3.Like JDI, the directors were well aware of the problems in the market and of the dangers and need for due diligence.
> 4.Like JDI some, but by no means all of the transactions appear from the FCIB evidence to establish circularity.
> 5.When asked to explain, what with the benefit of hindsight, now appeared to be revealed by HMRC's evidence Mr Spurgeon gave similar explanation to that given by Mr Smith described at paragraph 221.
> 6.When asked to explain the discrepancies between goods ordered and delivered, Mr Spurgeon provided a similar response to Mr Cuthbertson in paragraph 151.
> 7.Like JDI, Trading had entered deals which had failed and in one instance had led to legal action being pursued.

8.Like JDI, Trading was funded by way of loans from a United Kingdom based financier who had many years experience in the mobile phone trade.

108. If HMRC are to establish actual knowledge then the Tribunal would have to conclude that Mr Spurgeon had lied extensively in statements placed before him by the Tribunal and lied throughout the several days during which he was in the witness box giving evidence. Alternatively, HMRC have to prove Mr Spurgeon, on behalf of Trading and Group, had the means whereby he could have discovered that he was so involved. Mr Bridge submitted that Mr Spurgeon demonstrated, when giving evidence, that he is a man of the highest integrity and that he was genuinely troubled at what the evidence in the case revealed as to the size of the problem in the United Kingdom market in 2006. It is regrettable that the pleading of the case in the alternatives of "knowledge" and "constructive knowledge" that the Trading and Group have had to address two mutually exclusive allegations. Mr Bridge submitted that the suggestion of "constructive knowledge" was never put to Mr Spurgeon. All that was ever put to him was that the deals were contrived and on that basis the Tribunal cannot give any judgment on the basis of constructive knowledge.

109. Mr Bridge submitted that on the evidence now available, as provided by Mr Stone, it was almost inevitable that trades undertaken by any trader trading in the wholesale mobile telephone market in the United Kingdom in early 2006 would be trades connected to fraud in the sense that there would be a defaulting trader in the chain- such was the nature of the market. In those circumstances the Tribunal is not assisted by the fact that there were defaulters in the deals the subject of this appeal. As Mr Stone has identified the value of exporting trade in mobile telephones declined by approximately 98.5% between June and December 2006. Following the introduction of the reverse charge in June 2007 the number of registered deals in mobile phones reduced from 179,000 to 380. Notably, Mr Spurgeon is still operating in the market place

110. Mr Bridge submitted that it was, in the above circumstances, inevitable that Trade and Group would be trading in phones which had been subject of default because of the number circulating in the United Kingdom. Trade and Group had no means of knowing how many telephones were being traded or the extent of the problem. No one ever told Mr Spurgeon that however thoroughly he undertook due diligence and however carefully he selected his trading partners he would inevitably be trading in goods on which there had been a default.

111. Mr Bridge submitted that the policy change from 19 February onwards was unlawful as a blanket denial of VAT reclaims. The policy breached Articles 167 and 168 of the council Directive 2006/112.EC and contradicted the advice given in Notice 726 to the effect that where a trader had genuinely done everything it could do to check the trade it was entering into was not connected with fraud it would be entitled to a repayment. No policy documents have been disclosed. The extended verification amounted to the early implementation of the reverse charge in circumstances where no permission for derogation had been granted. The Tribunal is invited to rule on the lawfulness of the policy.

112. Mr Bridge also submits that the alleged knowing involvement in fraud is inadequately pleaded and particularised. He referred us to *Three Rivers District*

Council v Bank of England (No3) [2003] AC 1,at [183], in which Lord Millet stated fraud must be :-

> "distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence"

It is unclear from each of the deals what the role of Trading and Group was said to have been; what the benefit gained from the fraud was and what gain Trading, Group and the other fraudsters stood to make. There is no evidence that Trading and Group were sharing the proceeds of their fraud with the others. It is unclear whether it is alleged that Trading and Group were organisers of the fraud and whether they were involved with all the others in all the deals. Mr Bridge also submits that the alleged constructive knowledge is also inadequately pleaded. It is unclear how Mr Spurgeon might have discovered that the transactions were connected with fraud. It is unclear what Trade and Group were said to have left undone which would have revealed the truth.

113. Mr Bridge submitted that a very large part of Officer Christopher's evidence is comment and opinion evidence of the variety which the officer is not qualified to give. Opinion evidence is not admissible and should not be relied upon by the Tribunal in reaching is judgment. Mr Christopher had very limited dealings with the companies and his evidence should be limited to those dealings with which he dealt and to the formal production of documents. The tribunal is invited to rule specifically on the admissibility of the opinion evidence of Mr Christopher.

114. Officer, Caroline Walkerdine had very regular contact in the period of the extended verification, but she has not been called as a witness. HMRC had approved VAT returns on approximately 90 previous occasions and there had been regular contact with staff at HMRC. Mr Christopher was not willing to concede any ground even where it was absurd to maintain the stance that he had adopted. The approach gave the impression that he was working from a decision template.

a. IMEI numbers had clearly been provided to Caroline Walkerdine.
b. Mr Christopher refused to accept that the video was evidence that the phones had been properly inspected.
c. Mr Christopher had not checked any of the emails allegedly sent to HMRC and had not produced any of them during the hearing.
d. Despite the fact that Mr Spurgeon had produced evidence of documents provided to Hawk, the freight forwarders, Mr Christopher would not concede that such documents had been made available in the deals the subject of the appeal.
e. Mr Spurgeon gave evidence that he had provided HMRC with complete deal packs. It appeared, at the hearing, that many of those documents were missing.
f. At paragraph 30 of his first statement Mr Christopher suggests that Mr Spurgeon arranged for Group to take over 50% of Trading's business to reduce the level of repayments to a level where they might not be challenged. Mr Christopher was not qualified to express such an opinion

and it displays a bias on his part which renders other parts of his evidence less credible.

g. Mr Christopher's evidence was contradictory, in his first witness statement at paragraph 123 he states "there seems to be no element of commercial risk to the Appellants in the deals they participated in". At paragraph 59, in his second statement, he states 2 it is not unusual for losses to be made in contrived deals".

115. In marked contrast Mr Spurgeon gave evidence about the market in mobile phones with obvious deep knowledge and understanding having been an active trader for a period in excess of 15 years. He was able to address all the concerns raised in cross- examination. He raised the following general points in evidence which undermines HMRC's assertion of knowledge of the connection with fraud:-

a. Trade and Group had good relations with HMRC until the application for repayments the subject of this appeal. In the 7 years they had been trading they had never been formally notified of a connection between any of the trades they undertook and fraud.
b. They never made any third party payments.
c. They only traded with longstanding known and trusted suppliers.
d. They did not use on line market facilities such as IPT.com.
e. They required the sellers to make a detailed declarations as to due diligence.
f. They treated the United Kingdom as a substantial hub for all makes a specification of phones.
g. They carried substantial insurance.
h. They employed elaborate security measures to prevent robberies.
i. They used a United Kingdom bank account and their bank never voiced any concern about them.
j. They scanned and checked IMEI numbers.
k. They were aware of MTIC fraud but not of its extent.
l. Their margins varied from deal to deal.
m. Mr Spurgeon has continued to trade even after the introduction of the reverse charge.
n. Trade and Group employed staff to assist with the transactions.

116. The evidence given by Mr Japes of the dealings in the FCIB accounts reveals that 18 Transactions carried out before 27 April 2006 2 showed evidence of circularity. Of the 33 transactions after that date 26 of them show evidence of circularity. Mr Japes evidence also revealed that the overseas customers of Trade and Group realised profits on the onward sale of the goods, which supports the contention that these customers were likely to be viable in their own right and not dependent upon the direct proceeds of a fraud to achieve viability. It also appears that no third party payments were made by any of those customers.

117. Out of 51 deal chains 6 of the customers of Trading and Group received payments from United Kingdom companies which later went on to become defaulting traders. It should be noted that this situation did notarise in the other 45 chains of supply. The circularity found by Mr Japes does not assist in proving knowledge or involvement in fraud even in those cases where it appears to be present. Mr ***J***apes was unable to produce any evidence of shared IP addresses even thought this information

must have been made available to him from the Paris server some 12 months before his statement.

118. HMRC have produced no evidence whatsoever to demonstrate any connection between the buffers, the suppliers to Trading and Group, their customers and the defaulting traders. There are, in all, around 95 individual unconnected parties in the various chains of supply. If HMRC is correct in its suggestion of pre-arranged orchestration, somehow someone has managed to co-ordinate all of these unconnected parties, with all of their different offices, locations, protocols and banking facilities. Furthermore they have done so without leaving any evidence of co-ordination.

119. It is also difficult to understand how the German Business DRT Vertriebs, which sued Trading, easily fits into the suggested overall orchestration particularly when as a direct result of the action Trading was put into administration by the debenture holder. This was evidence of a genuine dispute between commercial traders with real commercial consequences and identifies the risk in these transactions as suggested by Mr Spurgeon.

120. It is possible for the fraud to take place without there being any knowledge of it by Trading and Group. An organiser of a fraud can feed devalued goods into the United Kingdom, via an intended defaulter and, once the intended defaulter has made a United Kingdom onward supply of those goods and collected the VAT on the sale, either directly or via a third party payment, the proceeds of the fraud are crystallised to the organiser. The organiser can source goods from the European market in the knowledge that, whilst paying what is in effect a reasonable market price to the supplier, those same goods will be in effect supplied at a discount into the United Kingdom market to facilitate their onward sale. As a result it is quite possible for exporters like Trading and Group, together with counterparties, to be entirely innocent parties in a chain of supply which includes, at a remote stage of the chain, an intending defaulting trader.

121. The features of Trading's and Group's trading described in the evidence strongly support the submission that Trade and Group believed at the time that they were involved in genuine trading and that they were not knowingly involved in trading connected with fraud and they were not aware of the apparent extent of the fraud within the United Kingdom. Only HMRC were aware of that.

The decision.

122. We have considered the facts and the law and have decided that HMRC have not proved on the balance of probabilities that Trading and Group, through Mr Spurgeon, either knew or ought to have known that the deals, the subject of these appeals, were connected with the evasion of VAT and we allow the appeals.

123. Mr Christopher was the officer who wrote to the Companies refusing to make the repayment. He did so on the basis of the evidence which had been made available to him. In so doing he had to make a judgement, as a matter of his opinion, that the Companies either knew or ought to have known that the deals in which they were involved were connected with the evasion of VAT. That is an opinion he was entitled to. At the hearing, we allowed his opinion as evidence in so far as it related to that

judgment. We have not, however, taken note of any expression of opinion on which he had no expertise to comment.

124. Mr Bridge has also submitted that the cases of *Mahageben* and *Peter David* require the tax authorities to police fraud and that they cannot abrogate their responsibilities by imposing that obligation on a trader. He does, however, accept that that apart *Kittel* and *Mobilx* are still good law. At paragraph 40 in the decision of *Mahageben* the ECJ stated:

> "A taxable person who knew, or ought to have known, that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of Directive 2006/112, be regarded as a **participant** (our emphasis) in that fraud, irrespective of whether or not he profited by the sale of the goods or use of the services in the context of the taxable transaction subsequently carried out by him (see *Kittel and Recolta Recycling*.paragraph 56)".

125. Both of the ECJ cases involved invoices, which on the face it, were in order and the appellants had no means of knowing that there was anything wrong with the transaction into which they entered. MTIC cases are quite different. As Mr Bridge has indicated, the market appears to have been awash with mobile phones to the extent that he considered very few transactions were not tainted with fraud. Mr Spurgeon, as an experienced trader, knew very well that he had to take care, which he did.

126. Mr Bridge believes that HMRC had a policy, which it made available to its officers, to prevent repayments of VAT. No evidence of such policy has been produced to this tribunal and, as far as we are aware, no evidence of such a policy has been produced in any of the MTIC cases heard so far. In fact, both HMRC and Mr Stone have consistently denied that such a policy exists. In those circumstances we are unable to rule as to the lawfulness or otherwise of such a policy.

127. The parties have accepted that there have been tax losses arising from the transactions leading up to the deals the subject of these appeals and that such losses have arisen through fraud. We have not therefore needed to consider the various chains to establish those facts.

128. We are satisfied that Mr Spurgeon has considerable experience of the mobile phone market. We have found his evidence to be convincing and succinct. We have been told that when he worked at European Telecom PLC, he was dealing in 100,000 units at a time. We note that the average price per unit of the mobile phones in the deals, the subject of this appeal appears to have been £165. If that was the average price with which he was working at European Telecom PLC, then he was handling transactions in excess of £16 million pounds. He started with European Telecom PLC in 1996/7 and left in 1999/2000 to start up Trading. He told us that his accountants had recommended the dealers, who gave the references for VAT purposes. It would appear that those references were untrue, but we accept that Mr Spurgeon relied on the advice of his accountants

129. Trading had suggested that its turnover for the first year would be £2,500,000. We note from the figures provided by Mr Christopher for the periods 1 May 2001 to

30 April 2006 that Trading turned over a total of £439,481,091. Judge Porter had asked Mr Spurgeon, that as Trading appears to have made a profit of approximately £13 million, why it had been necessary for Trading to borrow money from Mr Case and Cairns. Mr Spurgeon had answered that with hindsight perhaps he did not need to have done. He indicated, however, that he had always borrowed money on this basis and that he continued to do so in his present business.

130. Mr Mandalia had sought to suggest the transactions from 1 May 2001 must also have been fraudulent. The Tribunal had not allowed him to do so, as that had not been pleaded in the statement of case, and no evidence to that effect was before the Tribunal. The only evidence that we did have was that the Companies had presented over 90 VAT returns over the period giving rise to several repayments with out any suggestion of fraud by HMRC. In fact HMRC had written to Trading's accountants, McIntyre Hudson, towards the end of 2004, advising that the deals in 05/04 originated with a missing or hijacked trader. The letter went onto say that HMRC assumed that Trading was unaware of that. Given that HMRC, with all its resources, had been prepared to make appropriate repayments in the earlier transactions; was in receipt of details of the deals as they occurred; was satisfied with the way in which the Companies were trading, as evidenced by the letter, it is not surprising that Mr Spurgeon believed his transaction were free from fraud.

131. We are satisfied that Mr Spurgeon, Mr Hussey and his mother provided funds to set up Group and that the business had not been successful. We have not seen any accounts for that business, but we have been told that Group made a loss. In those circumstances, Mr Spurgeon had been advised that if he traded in mobile phones, any profit Group made could be set off against that loss. No evidence has been provided by HMRC to refute that suggestion, other than Mr Christopher's opinion, that Group had been set up to divide the turnover between the two Companies so that HMRC would not query the VAT returns. We cannot accept Mr Christopher's opinion in that regard, as mentioned earlier. It seems to us that it is as likely that the business continued to take advantage of the losses.

132. At the time of the deals, the subject of this appeal, the Companies were aware of the difficulties in the market place. They had a good working relationship with HMRC. They had provided HMRC with details of their deals throughout the period that they had been operating. We have not been shown any due diligence enquiries which the Companies have made both with regard to their suppliers and customers. Mr Spurgeon explained that he had been working with all his customers and suppliers for many years and knew them well. He had been encouraged by HMRC, in its warnings with regard to MTIC fraud, that the Companies should not deal with many traders. Mr Spurgeon had followed that advice.

133. He had no reason to believe that the traders he dealt with were less than honest and commercially viable. Significantly Group, Aircall and Sunico are still in the mobile trade business even after the introduction of the reverse charge. Mr Stone has identified that only a very small number of traders were still trading after the reverse charge was introduced.

134. We have set out above at paragraph 52 the details of several of the deal packs relating to the transactions in this appeal. Whilst some of the documentation is incomplete, we are satisfied that Mr Spurgeon believed the transactions to be genuine. We do not accept, as suggested by Mr Mandalia, that Mr Spurgeon was –"extremely vague and inconsistent in answering questions put to him about the Appellant's trading model, and the transactions in particular". We found that he had a very thorough knowledge of all the deals. He had been able to explain discrepancies where they had arisen. Much of the documentation, in any event, has cross-references to earlier deals to explain such discrepancies.

135. At the front of each deal pack the invoices carried a 'Tick Box' identifying the export sales. The boxes required Mr Spurgeon, Mr Hussey and the other members of staff to tick the appropriate box to confirm compliance as the transaction progressed. It is clear from the evidence that such checks have been made. As Mr Bridge has pointed out, it is unlikely that the members of staff would be parties to the fraud, as they were going about their usual business. Appropriate insurance cover was taken out for each of the deals. There is evidence that the Companies asked for details of 10 IMEI numbers before the transactions were entered into so that they could check that the phones existed and whether the Companies had dealt with the phones before.

136. The Companies had only used Hawk as their freight forwarders in spite of the fact that there had been several customers and suppliers. We have found the Video evidence to be unsatisfactory. Mr Spurgeon indicated that he never looked at it. It had been produced to HMRC and the Tribunal very late in this appeal and we have decided to take no note of it.

137. We have found Mr Christopher's evidence to be unsatisfactory. It appeared that he was not entirely familiar with the matters that he had been asked to consider. He appears to have been given the packs by other officers at HMRC. Mr Spurgeon produced evidence of standard documentation that he always provided to Hawk. Although most of those documents produced to the Tribunal did not relate to the deals the subject of this appeal, we are satisfied, from the evidence he has produced, and his concern to ensure that the Companies were not dealing with transactions that might be involved with fraud, that similar documentation was used in the appeal deals. The evidence showed that the Companies had not released any of the goods until they had been paid.

138. Mr Spurgeon has also produced a list of telephone calls. We were surprised that these were not sequential. We are satisfied that the details of the telephone calls reveal that telephonic negotiations were entered into with traders. In the light of Mr Spurgeon's answers to cross-examination, we are satisfied that similar negotiations took place with regard to the appeal deals. The evidence from the telephone list of calls reveals the three deals with World Communications numbered 1, 2 and 3 for the period 05/06 for Trading at paragraph 51 above. Those negotiations would be finalised on the day the transactions took place, which would explain why all the deals appear to have taken place on the same day.

139. Mr Japes gave evidence as to the circularity of the funds. In many of the MTIC cases all the traders have accounts with the FCIB. Mr Spurgeon was adamant that the Companies only dealt with traders operating a United Kingdom bank account. The

Companies operated through Barclays Bank and payments to that bank were always through another United Kingdom Bank. Mr Mandalia submitted that as there were several occasions in the packs where evidence of an FCIB account appeared Mr Spurgeon should have been put on notice that the Companies were involved with traders, who were involved in MTIC fraud. Mr Spurgeon conceded that he had not noticed those. He insisted, that even where a payment was made from an FCIB account, it invariably passed through a United Kingdom Bank, in most of those cases the HSBC Bank, before any payments were made to the Companies. He had stated that several traders had had their accounts terminated by United Kingdom banks. Where a United Kingdom bank was being used he considered it was safe to deal with those traders. We accept that as the payments were all made through United Kingdom banks, even where they originated from an FCIB account, it would not have been possible for the Companies accounts to have been manipulated by a third party. Further, if the banks were prepared to accept payments from the traders without question, it would be unreasonable to expect Mr Spurgeon to be put on enquiry.

140. Mr Japes' evidence is inconclusive. We have checked though several of the payments and although they do suggest circularity of the movement of the funds, they also identify that other transactions were taking place at the same time. For example, in deal 6 the transaction giving rise to the litigation, to which we refer later, the payment by DVB to New Way is unidentified. Furthermore, New Way paid Diginett £557,530. Mr Japes relies on Mr Christopher's invoice for Diginett in relation to the 1000 Nokia 9300i phones valued at £349,563.50. Trading had received £318,000 from DRT and paid £356,025 to DVB. None of the figures are the same.

141. Even more telling is that all these transaction passed through the Companies Barclays' account. If the fraudsters were concerned that they should receive a return of the money that they had introduced, they were severely at risk in allowing the same to pass through an independent United Kingdom bank account. If either of the Companies were at their overdraft limit there would have been every chance that the money would not have been returned to the fraudsters. Mr Spurgeon, anxious to avoid any risk of becoming involved in MTIC fraud, rightly insisted that all payments should pass through the Companies bank accounts.

142. Mr Spurgeon has produced evidence of the action brought by DTR against Trading for breach of contract. We have not seen the court documents, but he has produced correspondence through two substantial firms of solicitors and we have no reason to suppose that the action never took place. HMRC have failed to produced any evidence to suggest that such an action did not take place. As Mr Bridge has submitted, it is unlikely that a business involved in MTIC fraud would risk highlighting its transactions in open court.

143. The evidence with regard to the loans is unsatisfactory. We fail to understand why the Companies needed to take the loans nor, indeed, why they would be prepared to pay such large sums by way of commission for the use of the money. We have not been provided with a copy of the debenture and it is peculiar that Mr Case appears to have been prepared to advance further sums to the Companies when he was aware of the litigation with DRT. Mr Spurgeon has suggested that he has defended this case because he is concerned to repay the £1,500,000 owed to Mr Case. If, as we understand it, Trading is in liquidation part of the repayment will be paid to the

liquidator. In those circumstances it is unlikely that Mr Case will necessarily receive his full entitlement. Mr Spurgeon has told us that he financed the Companies from loans both during the appeal deals and subsequently.

144. Even though some of the evidence is unsatisfactory we need to consider all of the evidence in the round. We are satisfied from the evidence that the Companies, through Mr Spurgeon, did not know that the transactions that they entered into were connected with the fraudulent evasion of VAT. We have also decided that HMRC have not proved on the balance of probabilities, that the Companies, through Mr Spurgeon, ought to have known that the transactions that they entered into were connected with the fraudulent evasion of VAT and we allow the appeals.

145. We have not been addressed as to the position with regard to costs. We understand that the position has been agreed between the parties. If that is not the case then the parties shall apply to the Tribunal for the matter of costs to be considered. In that context the parties will consider the implications of Mr Justice Warren's observations in the case of *The Commissioners for Her Majesty's Revenue and Customs v Atlantic Electronics Limited* FTC/29/2011.

145. 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 S PORTER
TRIBUNAL JUDGE

RELEASE DATE: 19 February 2013