[2011] UKFTT 860 (TC)

TC01694

Appeal numbers
LON/2008/1273, 1482 & 1502

VAT – input tax – right to deduct – MTIC fraud alleged – Mobilx guidelines – standard of proof – particularity of fraud needed – late evidence - appeals allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

H T PURSER LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS (*value added tax*) **Respondents**

TRIBUNAL: Judge Malachy Cornwell-Kelly
Mr Michael Templeman

Sitting in public in London on 13, 14, 15, 16, 17, 20, 21 June and 30 August 2011

Mr Simon Farrell QC and Mr Robert Morris instructed by Colin Peters, VAT Consultant, for the taxpayer

Mr Christopher Kerr and Ms Margia Mostafa for the Crown

DECISION

Introduction

1 These appeals concern refusals by the commissioners to refund input tax of £318,485 for the period 06/06, £179,805 for the period 07/06 and £187,775 for the period 08/06. The refusal decisions were issued on 28 April, 13 June and 30 June 2008 respectively, and were stated to be on the ground that the transactions in question were part of overall schemes to defraud the public revenue which the appellant knew or should have known of.

2 The issue is therefore whether the Crown has proved, on the balance of probabilities, that the appellant knew that its transactions were connected with tax fraud or whether the only reasonable explanation of them was that they were so connected. It is common ground that Mr David Purser was the guiding mind in control of the appellant. Unless otherwise indicated, we have found all the facts stated hereafter as proved on the balance of probabilities.

3 The appellant was registered for value added tax purposes with effect from 1 March 1975 with an intended business as dairy farming and an expected turnover for the first year of £20,000. On 2 August 2004 a request was made to change the company's business activity by adding "other wholesale activity", which presaged dealings in mobile phones. Since 3 August 2004, Mr David Purser has been a director of the company in addition to his father, Mr Henry Thomas Purser, whose wife Mrs Susan Purser is the company secretary. We refer to Mr David Purser hereafter as 'Mr Purser'.

4 For the three periods at issue, the appellant's trading activity involved buying mobile phones from UK suppliers and immediately exporting them outside the EU. There were 34 transactions in all; they are summarised in the appendix on the basis of the deal sheets we received.

The legal framework

5 The various uncertainties and issues which had built up in this area of the law have fortunately been resolved by the recent decisions of the European Court in *Axel Kittel v Belgium; Belgium v Recolta Recycling Sprl* [2006] ECR 1-6161 and of the Court of Appeal in *Mobilx Limited (in administration) v HMRC & Ors.* [2010] All ER (D) 104, interpreting *Kittel*.

6 In view of this very helpful clarification of the position, it suffices to draw the essential features of the law as it affects these appeals from the judgment of the Court of Appeals, delivered by Moses LJ, as follows (the words in italics are our summary headings):-

> *The legal basis of the right to deduct input tax*
> [46] S.1 of the Value Added Tax Act 1994 provides that VAT should be charged, in accordance with the provisions of the 1994 Act, on, amongst other things, the supply of goods in the United Kingdom, and s.1(2) establishes that liability to account for VAT on the supply of goods within the United Kingdom is on the supplier. S.4 provides that VAT should be charged on any taxable supply of goods made by a taxable person in the course or furtherance of a business carried on by him. S.24 defines input tax:-
>
> "(1) Subject to the following provisions of this section, 'input tax', in relation to a taxable person, means the following tax, that is to say –
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> (a) VAT on the supply to him of any goods or services;
>
> (b) VAT on the acquisition by him from another Member State of any goods; and
>
> (c) VAT paid or payable by him on the importation of any goods from a place outside the Member States,
>
> being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him."
>
> S.25(1) sets out the obligation on taxable persons to account for and pay VAT in respect of supplies made by them for each prescribed accounting period and also

provides for credit in respect of input tax (see s.25(2)(3)).

The fraud may not be in the proximate link in the chain

[41] In *Kittel* after §55 the [European] 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:-

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

The words I have emphasised "in the same way" and "therefore" link those paragraphs to the earlier paragraphs between 53-55. They demonstrate the basis for the development of the Court's approach. 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.

[42] By the concluding words of §59 the Court must be taken to mean that even where the *transaction in question* would otherwise meet the objective criteria which the Court identified, it will not do so in a case where a person is to be regarded, by reason of his state of knowledge, as a participant.

Economic activity contrasted with fraudulent activity

[43] 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.

[47] Accordingly, the objective criteria which form the basis of concepts used in the Sixth Directive form the basis of the concepts which limit the scope of VAT and the right to deduct under ss. 1, 4 and 24 of the 1994 Act. Applying the principle in *Kittel*, the objective criteria are not met where a taxable person knew or should have known that by his purchase he was participating in a transaction connected with fraudulent evasion of VAT. That principle merely requires consideration of whether the objective criteria relevant to those provisions of the VAT Act 1994 are met. It does not require the introduction of any further domestic legislation.

The nature of the fault

[48] The traders contend that to enlarge the category of participants in the fraud to those who should have known that by their purchase they were taking part in a transaction connected with fraud is to impose a new accessory liability for fraud which does not exist in

domestic law; it imposes, so they assert, a negligent standard for fraud by the back door.

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

Knowledge of the details of the fraud not required

[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 losses 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.

[59] The test in *Kittel* is simple and should not be over-refined. It embraces not only those who know of the connection but those who "should have known". Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it

was connected with fraud, and if it turns out that the transaction was connected with fraudulent evasion of VAT and he should have known of that fact, he may properly be regarded as a participant for the reasons explained in *Kittel*.

The need for certainty as to the existence of fraud

[56] It must be remembered that the approach of the court in *Kittel* was to enlarge the category of participants. A trader who should have known that he was running the risk that by his purchase he *might* be taking part in a transaction connected with fraudulent evasion of VAT, cannot be regarded as a participant in that fraud. The highest it could be put is that he was running the risk that he might be a participant. That is not the approach of the Court in *Kittel*, nor is it the language it used. In those circumstances, I am of the view 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, as the Chancellor concluded in his judgment in *BSG*:-

> "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." (§ 52)

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

The time factor in identifying a connected fraud

[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 should know that his purchase is or will be connected with fraudulent evasion, it cannot matter a jot that that evasion precedes or follows that purchase. That trader's knowledge brings him within the category of participant. He is a

participant whatever the stage at which the evasion occurs.

The irrelevance of tax loss computations

[65] The *Kittel* principle is not concerned with penalty. It is true that there may well be no correlation between the amount of output tax of which the fraudulent trader has defrauded HMRC and the amount of input tax which another trader has been denied. But the principle is concerned with identifying the objective criteria which must be met before the right to deduct input tax arises. Those criteria are not met, as I have emphasised, where the trader is regarded as a participant in the fraud. No penalty is imposed; his transaction falls outwith the scope of VAT and, accordingly, he is denied the right to deduct input tax by reason of his participation.

The role of 'due diligence' in the analysis

[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.

The burden of proof

[81] HMRC raised in writing the question as to where the burden of proof lies. It is plain that if HMRC wishes to assert that a trader's state of knowledge was such that his purchase is outwith the scope of the right to deduct it must prove that assertion. No sensible argument was advanced to the contrary.

The relevance of the surrounding circumstances

[82] But that is far from saying that the surrounding circumstances cannot establish sufficient knowledge to treat the trader as a participant. As I indicated in relation to the BSG appeals, Tribunals should not unduly focus on the question whether a trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is that his transactions have been or will be connected to fraud. The danger in focussing on the question of due diligence is that it may deflect a Tribunal from asking the essential question posed in *Kittel*, namely, whether the trader should have known that by his purchase he was taking part in a transaction connected with fraudulent evasion of VAT.

The circumstances may well establish that he was.

[83] The questions posed in BSG (quoted here at § 72) by the Tribunal were important questions which may often need to be asked in relation to the issue of the trader's state of knowledge. I can do no better than repeat the words of Christopher Clarke J in *Red12 v HMRC* [2009] EWHC 2563:-

> "109 Examining individual transactions on their merits does not, however, require them to be regarded in isolation without regard to their attendant circumstances and context. Nor does it require the tribunal to ignore compelling similarities between one transaction and another or preclude the drawing of inferences, where appropriate, from a pattern of transactions of which the individual transaction in question forms part, as to its true nature e.g. that it is part of a fraudulent scheme. The character of an individual transaction may be discerned from material other than the bare facts of the transaction itself, including circumstantial and "similar fact" evidence. That is not to alter its character by reference to earlier or later transactions but to discern it.
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> 110 To look only at the purchase in respect of which input tax was sought to be deducted would be wholly artificial. A sale of 1,000 mobile telephones may be entirely regular, or entirely regular so far as the taxpayer is (or ought to be) aware. If so, the fact that there is fraud somewhere else in the chain cannot disentitle the taxpayer to a return of input tax. The same transaction may be viewed differently if it is the fourth in line of a chain of transactions all of which have identical percentage mark ups, made by a trader who has practically no capital as part of a huge and unexplained turnover with no left over stock, and mirrored by over 40 other similar chains in all of which the taxpayer has participated and in each of which there has been a defaulting trader. A tribunal could legitimately think it unlikely that the fact that all 46 of the transactions in issue can be traced to tax losses to HMRC is a result of innocent coincidence. Similarly, three suspicious involvements may pale into insignificance if the trader has been obviously honest in thousands.

> 111 Further in determining what it was that the taxpayer knew or ought to have known the tribunal is entitled to look at the totality of the deals effected by the taxpayer (and their characteristics), and at what the taxpayer did or omitted to do, and what it could have done, together with the surrounding circumstances in respect of all of them."

The standard of proof

7 It remains only to note that the contention that there must be some specially refined standard of proof in civil cases where the allegation is in essence that the taxpayer knowingly etc. took part in a transaction connected with fraud has been finally disavowed at the highest level. In *In Re B* [2009] 1 AC11, Lord Hoffman said at paragraph [13]:

> I think the time has come to say once and for all that there is only one standard of proof and that is proof that the fact in issue more probably occurred than not.

Late evidence

8 On 16 June, three days into the hearing itself, the Crown pursued a formal application lodged just before the hearing commenced to admit late evidence in relation to deals 1520 and 1570, on which we heard argument from both counsel. The evidence in question related to proof of tax loss in the chains leading to these deals and it was said that, although it was most regrettable that it should be introduced at this stage, this was evidence that the appellant could not reasonably challenge. The appellant opposed the application on the ground principally that it was made too late, after opening speeches had been made, and well after the point at which in accordance with previous directions of the tribunal any final evidence should be served; there would be no opportunity to examine it critically or decide whether it should be accepted. Our ruling on the matter was as follows:-

> The last late introduction of evidence was the subject of directions by Judge Bishopp on 19 May and the latest date that he permitted was 27 May [2011]. This application is made three weeks after that directions hearing and two days before the hearing of the appeals was due to begin.

> We have seen the evidence in question, and it is tempting to conclude that because it seems straightforward and easily assimilated it should therefore be admitted in the interests of doing justice in the matter as comprehensively as possible. But the appellant points out that it is, in some degree, contradicted by evidence already submitted by the respondents, which they now say is incorrect.
>
> That fact illustrates clearly the object of the tribunal in imposing deadlines for the submission of evidence, namely the need in the interests of procedural fairness, to give each party a proper chance to examine and consider the evidence put forward and to take such steps as they may choose to contest it.
>
> That remains the case here, even though in one of the two instances the appellant appears willing to accept the new evidence. In making this application, the respondents have said: "The appellant should easily be able to assimilate the information contained therein and make a decision on whether it accepts that the documents prove a connection with fraud."
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> Mr Kerr put it even more strongly when he remarked, in making the application, that the appellant could not challenge the evidence now adduced. If the appellant did accept this evidence in the summary manner which the respondents urge, it would be putting itself at a significant disadvantage in the appeals so far as the two transactions in question are concerned.
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> In our assessment of the matter, pressure should not be put on the appellant to make a rapid decision in this way. Although the risk of unfairness to the appellant appears small, neither the tribunal nor the appellant should be put in the position of having to guess that evidence, which on its face appears plausible, can in fact be accepted without reflection or challenge.
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> In the circumstances, we prefer to err on the side of caution and accordingly refuse the application pursuant to rule 15(2)(b)(iii) on the ground that, if admitted, it would be unfair to the appellant.

9 We add only that in considering the evidence of tax loss offered in these cases, both the taxpayer and the tribunal are heavily dependent on the thoroughness and integrity of the officers who exhibit the documents and testify to the fraud. It involves reaching a conclusion

as to the existence of that fraud on the basis of *ex parte* evidence, which has not been open to challenge or response on the part of those alleged to be in the conspiracy to cheat the revenue - and yet, as in this case, the evidence is not always factually correct. It is right therefore to take particular care in regard to it.

Context

10 A brief recapitulation of the principal concepts - though well known in cases such as this - is appropriate to make our decision intelligible without the reader having to refer elsewhere.

11 MITC fraud is the name given by HMRC to refer to 'missing trader intra-Community' fraud. In its simplest form, the fraud is said to consist in (i) the acquisition of goods from an EU state, (ii) their onward sale in the UK, accompanied by a default in the payment of the output tax in respect of that sale by the trader who acquired the goods, who then goes missing – but whose purchaser is nonetheless entitled to reclaim input tax on the sale to it notwithstanding the seller's default, (iii) usually several more onward sales of the goods in the UK, and (iv) their re-export (in this case outside the EU). The export is zero-rated and the exporter reclaims the input tax on the immediately preceding purchase. That reclaim is, in principle, legitimate but it assumes a potentially sinister character if it is connected with the default at (ii); even more so if there is evidence of a 'carousel' in which the goods are then traded in the same chain again.

12 The trader at (ii) is called the defaulter, the traders at (iii) are called the buffers and the trader at (iv) is called the broker. If the broker, who is the one claiming the repayment of input tax, knew or ought to have known that its purchase actually *was* (not that there was a risk that it *might be*) connected to the fraudulent evasion of VAT, it loses its right to reclaim its input tax. Why this is so is explained in the case law cited above.

13 It is alleged that the appellant knew or ought to have known that its transactions were connected to a fraud; if actual knowledge cannot be proved, then it must be shown that the appellant should have known, had it made reasonable enquiries and taken reasonable precautions, that there was no other reasonable explanation for its transactions than that they were connected to a fraud on the revenue.

14 The burden of proving this is agreed to be on HMRC. The Tribunal must be satisfied to the civil standard of proof, the balance of probabilities, that the case against the taxpayer is made out; otherwise, the taxpayer is entitled to its denied input tax repayments. It was common ground that, in a company such as the appellant, the mind of the company is that of its sole controlling director, Mr David Purser.

The issues

15 A variety of issues emerged in the course of the evidence, which consisted of some 40 lever-arch files of documents, and seven days of oral testimony, itself supported by written statements. Of particular significance were:-

- The nature and operation of the grey market in which the appellant traded.

- The extent of the 'due diligence' undertaken by the appellant.

- The commerciality of the appellant's trading.

- Whether HMRC led the appellant to think that it was keeping clear of trouble.

- Whether the appellant, through Mr Purser, did actually know of the frauds taking place or should have known that there was no reasonable explanation for the transactions except that they were connected with frauds on the revenue.

Evidence of tax loss in the deal chains due to fraud

16 We consider first the series of transactions leading to the appellant's acquisitions and the evidence that they were tainted by fraud. All the transactions are listed in the appendix and are identified first by the appellant's invoice number, e.g. invoice 1503, and secondly by showing in brackets the consecutive number of the deal in the overall series for the three periods. Thus, the first deal appears as 1503(1) and the last one as 1575(34). An invoice number appearing more than once indicates that the invoice covered more than one consignment.

17 Counsel for the appellant accepted that the appellant's purchases were at the end of chains connected to fraudulent transactions in 32 of the 34 deals, save for deals 1520(7) and 1570(33). The circumstances concerning these two deals are discussed at paragraphs 35 and 36 below. For all the 32 other deals, counsel for the appellant accepted the connection to the alleged tax losses and the evidence concerning the defaulting companies contained in the witness statements of 15 officers of HMRC. We accepted that the connection with tax losses was proved in 31 of the 32 deals, the exception was deal 1569(32) where the identity of the defaulter is not established, (paragraphs 32 & 33 below). The evidence is summarised in the following paragraphs.

Deals 1503(1) and 1509(4)

18 Both of these deals were traced back to the VAT number for a company called Teknic Limited. We received a statement from officer Andrew Mark Chisman that Teknic Limited purported to be a struggling clothing manufacturer; that the documents relating to mobile phones imported from Estonia did not show the correct address or telephone number for the company and that following detailed enquiries it was concluded that the VAT number for Teknic had been hijacked and assessments were issued in an attempt to recover the VAT lost. In respect of these deals the amount of tax was £67,193;

none of this tax has been paid. We accept that the connection with fraudulent tax losses is proved.

Deal 1505(2)

19 This was traced back to the VAT number of a company called Subbuma Limited. We received a statement from officer Barry Michael Patterson that Subbuma had been a trader making small repayment claims in the periods before the end of 2005; the only evidence of subsequent activity was a series of allocation and release notes allegedly issued to a freight forwarder called Interken by Subbuma. In subsequent meetings, the sole director of Subbuma convinced officers of HMRC that these documents were forgeries and that the VAT number of Subbuma had been hijacked. No tax has been paid by the hijacker. In our view the connection with a fraudulent tax loss is proved.

Deal 1507(3)

20 This was traced back to a company called Crossview Consortium Limited. We received a statement from officer Kastur Hirani that information was obtained from purchases apparently made by Akorn UK Limited in the period from 1 June to 12 June 2006 which seemed to give rise to VAT liability of more than £1m; these transactions include those phones subsequently acquired by the appellant. A deregistration letter was issued to the company on 5 June 2006 but all further attempts to contact them or obtain payment of outstanding VAT of more than £5m were unsuccessful. We accept that the phones in this deal were linked to a fraudulent tax loss.

Deals 1511(5) and 1520(8)

21 Both deals were traced to ICM (UK) Limited. We received a statement from officer Karen Bradley that the officers of the company had denied importing mobile phones, but evidence from the freight forwarders and from invoices issued to a company called Skysat Limited suggested otherwise. A payment of more than £10,000 from Skysat was discovered in the company's bank account by HMRC

officers. Taking into account all invoices apparently issued by the company, assessments to VAT of about £8.4m were issued. The company became insolvent and no payments were made. The link between the phones sold by the appellant and a fraudulent tax loss through the insolvent importer is confirmed by the invoice trail.

Deals 1516(6) and 1546(19)

22 Both deals were traced to Knightswood Limited. We received a statement from officer Anthony Peter Mullarkey that the company had been dealing in mobile phones for several years before the end of 2005. The director acknowledged in discussions with HMRC officers in late 2005 that he had accepted instructions to make payments to third parties which had left him with a commission only, which meant that if he had imported goods on this basis he would be unable to pay the resulting VAT. Nevertheless, in 2006 evidence from freight forwarders established that the company had imported goods from Estonian suppliers. A liability to VAT of £8.5m was assessed and never paid. We accept the connection of fraudulent tax loss to the phones acquired by the appellant.

Deals 1528(9), 1535(12), 1537(13), 1538(14) and 1539(15)

23 All of these deals were traced to RS Sales Agency Limited. We received a statement from officer Vivien Barbara Parsons that a business carried on by R Sodawala t/a RS Sales Agency was registered for VAT in 2003 and, up to 30 September 2005, as an agent in clothing; the turnover was £115,141. Mr Sodawala sought to transfer the VAT number for RS Sales Agency to a new company, RS Sales Agency Limited, trading in mobile phones. This was refused on 18 April 2006 as the new business was different from the business to which the old number applied. However between 26 April and 4 July 2006, RS Sales Agency Limited had a turnover of £169.7m using the VAT number relating to the previous business.

24 VAT liability of £29.7m was assessed and has never been paid. The company was wound up on 13 December 2006. The report from

the Official Receiver suggests that Mr Sodawala claimed someone else carried out the deals leading to the VAT liability in the company's name. This person has not been found. The clear conclusion is that someone, either Mr Sodawala or someone else, fraudulently issued invoices in the name of RS Sales Agency Limited and these invoices include the phones in the five deals above. We accept that this establishes the connection to fraudulent tax losses.

Deals 1534(10), 1534(11) and 1541(16)

25 All three of these deals were traced to JD Telecom Limited. We received a statement from officer Simon Marsh that VAT returns were submitted for the relevant period which excluded the invoices for the phones passed on to the appellant and others. Examination of these invoices led HMRC to the conclusion that the VAT number of JD Telecom Limited had been hijacked by persons unknown. Assessments for VAT of £6.8m have been raised on the hijacked number and remain unpaid. We are satisfied that the link to fraudulent tax losses has been established.

Deals 1543(17), 1543(18) and 1549(20)

26 These have been traced to a company called Vision Soft UK Limited. We received a statement from officer Dean Maurice Walton that the company had made a series of nil returns for VAT until a Mr Shafiq became a director on 1 June 2006; almost immediately evidence from freight forwarders suggested phones, memory cards and CPUs were being released to the company from a company in the Czech Republic and another in Germany. Assessments to VAT were made for the period for £12.2m. It was established that at least one customer of the company had made payments into the personal FCIB[1] account of Mr Shafiq and had not paid anything into the company's account. There was no payment of the outstanding VAT and no trace

[1] The First Curacao International Bank, an electronic bank situated in the Netherlands Antilles, and subsequently closed down by the authorities for facilitating fraud.

of the director. We accept that there was a fraudulent tax loss in the activities of Vision Soft UK Limited and that this was connected with the phones supplied to the appellant.

Deals 1552(21), 1553(22), 1555(23) and 1555(24)

27 These deals have all been traced to a company called Phone City Limited. We received a statement from officer George John Edwards that the relevant period is the final period of trading from 1 June 2006 to 25 July 2006; the VAT return showed a repayment claim of £246,970.37, but sales to UK customers identified from their records indicate output tax exceeding the amount declared by £4.2m. In addition reports from freight forwarders show acquisitions from the EU. No records were produced by the company and the directors denied having anything to do with the transactions on the return. The total VAT still owing by the company is £34m and the four deals that ended up with the appellant are included in that figure. We accept the connection with fraudulent tax losses.

Deals 1558(25) and 1564(29)

28 Both of these deals have been traced to Bluestar Communications GB Limited. We received a statement from officer Douglas Armstrong that for the period of trading up to 31 August 2006 there was VAT liability of £1.5m, which included the goods supplied ultimately to the appellant. The director had admitted to Mr Armstrong very early during his period of trading that he was required to make third party payments in connection with his transactions. Despite being warned that such payments would make meeting his VAT liability very difficult, he continued to trade on this basis. Subsequently when examined by the Insolvency Service he admitted trading fraudulently and was disqualified as a Director for 12 years. We find the connection of the transactions to tax lost due to fraud established.

Deals 1559(26), 1560(27) and 1563(28)

29 These deals have been traced to ET Phones.Com Limited. We received a statement from officer Ian Henderson that on 31 May 2006 the company appears to have changed ownership and new directors were appointed; information from freight forwarders indicates that immediately after the change of ownership consignments of mobile phones from an unidentified Latvian company were released to the company. No VAT return was made for the period to include these trades. However based on information from purchasers from the company, an assessment of £9.3m was made to cover VAT lost which includes the two deals where the goods eventually reached the appellant; it has not been paid. We accept the connection to fraudulent tax losses.

Deal 1565(30)

30 This deal was traced to Kaymore Export Limited. We received a statement from officer Sarah Barker that the company had been incorporated on 9 November 2000 and carried on a business of dealing in used car parts; in July 2006, the director was approached by a former employee who suggested that if he was allowed to trade in mobile phones through the company he would give the company a commission of 10p per phone. In the period between 17 July 2006 and 11 August 2006, trades totalling £22m were carried out. Evidence from freight forwarders suggested the supplier was based in Sweden. The person allegedly responsible for the trades disappeared before investigations began. The company went into compulsory liquidation in November 2006 and VAT of £3.9m remains unpaid; the amount assessed includes the transaction which finally reached the appellant. We accept the connection with a fraudulent tax loss.

Deal 1565(31)

31 This deal was traced to a company called Jeck-Link Services Limited. We received a statement from officer Beryl Gibson that on 2 January 2006 a trader called Rebecca Ikwueto trading as Fastnet, an internet café, applied to transfer its business to Jeck-Link Services

Limited as a going concern. This was refused and it seems that Ms Ikwueto never traded through this company but instead someone called Major Singh used it to import mobile phones from Germany and Spain, using the VAT number of the business owned by Ms Ikwueto. Assessments for underdeclared VAT of some £222,000 were made in respect of sales by Jeck-Link Limited in July and August 2006. The assessments include the phones which reached the appellant. We accept the connection to a fraudulent tax loss.

Deal 1569(32)

32 The deal was traced to Highbeam UK Limited. We received a statement from officer Phillip Bennett that the company was registered for VAT from 1 November 2005, with the principal director a former estate agent; sales of mobile phones rose quickly to £68m in the period to 31 March 2006 and £482m in the period to 30 June 2006. These transactions were all apparently first line buffer transactions and there is no tax lost. It is worth noting that in three transactions set out earlier - deals 1528(9), 1535(12) and 1539(15), (see paragraph 23) - the first buffer was Highbeam UK Limited. Similarly the same position applies to the two deals traced to Bluestar Communications Limited on 28 July 2006 and 2 August 2006, (see paragraph 28 above).

33 The problem that Mr Bennett highlights in his statement is that there was no return for the final period for Highbeam UK Limited and, although there is evidence of supply of goods by Highbeam to the next buffer up the chain, there is no evidence that Highbeam itself was the importer or defaulter. There were 121 deals in the period from 1 July 2006 to 31 August 2006, however only 88 of them have been linked definitively to other defaulters, including the two linked to Bluestar Communications Limited mentioned above. The conclusion reached by Mr Bennett is that Highbeam was a buffer in the other 33 transactions, but the defaulters have not been identified. In a second statement dated 17 May 2011, Mr Bennett expressed the view that it

was more probable than not that the importer in a significant number of deals at the end of July and beginning of August 2006 was Bluestar Communications Limited. This is not, in our view, sufficient to prove a connection with tax lost. Our conclusion must be, therefore, that the respondents have failed to prove that this deal was connected with a fraudulent tax loss.

Deal 1575(34)

34 This deal was linked to Cybersol UK Limited. We received a statement from officer Matthew Quinn that the company did less than £40,000 of business in each of the periods up to 31 May 2006, but appears to have incurred a VAT liability in excess of £6m for the period to 31 August 2006. There were a number of directors appointed for a few days during this period, including Mr Major Singh who also appears as the operator of Jeck-Link Services Limited. Deal (31) involved a sale to All Name Products Limited on 3 August and Deal (34) a sale to the same buffer on 9 August. Cybersol was placed in compulsory liquidation on 20 September 2006 with the outstanding VAT unpaid. We accept the connection to a fraudulent tax loss for deal (34).

Deal 1520(7)

35 The original deal sheet traced this deal to a defaulter, UA Distribution Limited. In his closing submission Mr Farrell QC argued that the chain was incomplete because there was no invoice to support the claimed sale from a buffer called Diginett to New Way Associates Limited, who sold to the appellant. Furthermore the only FCIB payment from New Way to Diginett is for £745,911 when the amount for the sale to the appellant would have been only £15,900. Finally the earlier transactions in the deal chain are all dated 26 April 2006 whereas the appellant purchased from New Way on 13 June 2006. Such a long delay in the chain suggests strongly that the earlier part of the chain does not relate to the phones acquired by the appellant. Mr Kerr accepted that there were gaps in the chain, but argued that it was

more probable than not that the acquisition by the appellant related to a defaulter as all the other chains from New Way had been traced to a defaulter. We agree with Mr Farrell that the connection with fraudulent tax loss has not been proved in respect of this deal.

Deal 1570(33)

36 Originally this deal was traced to a defaulter called Zeetta Limited. In evidence put before us the deal was traced through a buffer called Mana Enterprises Limited to Highbeam UK Limited and through this company to the defaulter, Bluestar Communications Limited. Mr Farrell QC argued that there was no evidence of any supply from Highbeam to Mana Enterprises either through an invoice or FCIB evidence. Furthermore this deal was dated 7 August 2006 and is one of those discussed in paragraph 33 where Mr Bennett thought it was more probable than not that the supplier to Highbeam was Bluestar. Taking into account not only the break in the invoice chain but also lack of evidence that the importer was Bluestar, we agree with Mr Farrell QC that the connection with fraudulent tax loss has not been established for this deal.

Witness evidence

37 In addition to the written evidence from the officers which we have referred to in connection with the deal chains, we received written and oral evidence from the following officers: Mr Ian Simmons, the principal case officer, Mr Steven Kendrick, Mr Christopher Cartner, Mr Toby Wells, Mr Stephen Faulkner, Mr Geoffrey Swinden, Mr John Fletcher, Mr David Purser and Mr Joseph Craker. Lastly, there were the customary witness statements from Mr Roderick Stone, to which we refer later.

The appellant's background

38 Mr Purser began in the mobile phone business in 1999, a year after leaving school, with a company called Eastways Export, a small

wholesale mobile phone export business to the Far East, the Middle East and Africa. There Mr Purser started at the bottom being, as he put it, a "dogsbody" and learning the business as he went along.

39 In 2001, the business was acquired along with Mr Purser's services by the multinational company Shields Environmental Limited where he continued to work on phone exports, checking, unlocking handsets and by natural progression became involved in the pricing and control of stocks and as a salesman. Shields was a company with 100 or so staff and offices in the UK, North America and Belgium, trading in stock surplus to the UK market at a time when the industry was expanding rapidly and new lines were appearing in rapid succession. Mr Purser said that he had no awareness of tax fraud at this period.

40 In 2003, Shields began preparing for a flotation of the business but Mr Purser decided not to tie himself in because, at the same period, the boss he had worked for at Eastways and who had gone to Shields when they purchased his company decided to leave and Mr Purser did not find it easy to work with his successor. Also at about this time, a man of Russian extraction, Mr George Limberis, who was a customer of Shields and a director of Capewater Limited, got to know Mr Purser and from 2003 to the end of 2004, Mr Purser was an employee and then a director of the company, effectively in partnership with Mr Limberis trading in mobile phones.

41 At Capewater, Mr Purser was able to use the contacts he had made while at Shields with companies like O^2 and Vodafone and a company called Novatech Communications. There, the volume of business was much smaller again, more like that at Eastways or the subsequent turnover at H T Purser. When Mr Purser started at Capewater, he began to become aware of the fraud problem through the visits of the company's assurance officer Mr Geoffrey Swinden.

42 Officer Geoffrey Swinden was the assurance officer for Capewater from January 2002; by the time of the hearing, Mr Swinden had had over 37 years' experience working for Customs and Excise and then for HMRC. Mr Swinden said that contact with the company was about once a month, sometimes by telephone and sometimes by visit, and he would offer advice and assistance as required. When matters had arisen where Mr Swinden felt that more should be done by the company there was a good response and what was needed was done. In one case, a sale to a company called Sunico in Denmark was queried as it was not a sale outside the EU and did not fit the pattern of trading and the input tax repayment was initially refused; Capewater took the hint, and no more business was then done with that company. Mr Swinden confirmed that if anything untoward appeared in Capewater's papers each month, he would hope to pick it up.

43 The greater part of the company's business had been in used handsets from Novatech and O^2; the phones were returns which had come back to the main operators for one reason or another and were being re-marketed. Novatech lost an important contract in this connection and, at about the same time, Mr Purser and Mr Limberis began to drift apart. Since the used phone supply line had now disappeared, the trade turned to new phones with customers being in the Middle East, the Far East and in Eastern Europe and Russia with Mr Limberis's connections there, though some sales were in the UK.

44 Typically, Mr Purser would seek details of stock available in the UK and then offer it to his overseas customers; at first, sales were shipped on hold but soon came to be shipped direct as relationships developed, and payment was received from the customer the next day. Customers carried over from Shields included those the appellant still deals with, such as Papita Trading in Dubai, M J in Singapore and Cell Avenue in Dubai. The contact with Cell Avenue, for example, was built on a telephone-only relationship through others Mr Purser

had seen in Dubai. Others, such as the principal of Papita, Mr Purser met at the CeBIT trade fair in Hanover.

45 In October 2003, Capewater started to do business with New Way Associates and Lexus Telecom. Mr Swinden urged them to make more substantive checks at Companies House and with Dun & Bradstreet, which they immediately did; as Mr Swinden put it "they did really good checks". This was particularly in the context of the enhanced danger to traders following the introduction of joint and several liability – explained in connection with Notice 726 below.

46 As a follow up to this, Mr Swinden made a control visit to Capewater on 8 December 2003 reviewing what he described as their "enhanced checks" and he stated that "Mr Purser had taken the lead in this project and he showed me the comprehensive data they had collected. I have noted that I found the level of checks they were making to be impressive. . . The documentation included reports from Dun & Bradstreet and Companies House, banking details and cross-checks on named directors and company officials to ensure that there were no obvious links between companies they were dealing with. . . . They did further checks on all named directors to ensure they did not have links with other known trading companies . . . They also checked the bank details on record against the bank details they had been provided with."

47 By late 2004, Capewater had really ceased to exist as such with Mr Purser and Mr Limberis trading each on his own account. Mr Purser, who left with a commission of £162,000 that was due to him then set up his own business within the legal form of his father's farming company, H T Purser Limited, having prepared the way for that in August 2004; the trading style 'Global Trading Consortium' was adopted for the phone trading to avoid confusion with the farming business.

48 At the appellant company, Mr Purser continued the checks on suppliers he had been making at Capewater – Dun & Bradstreet reports, Companies House searches, direct enquiries to the selling business, including thrice weekly checks on VAT registration at Redhill. Mr Purser said he did not record the IMEI numbers of each phone because of time pressure and the size of his operation – essentially just himself and a Mr Joe Craker, who had been at school with Mr Purser; he had been recruited to assist at Capewater and had stayed on to do the same at the appellant company, checking stock, keeping the accounts and helping with collection and packing. Since the goods were going outside the EU, Mr Purser believed that there was effectively no risk of getting into a carousel fraud, which was another reason for not keeping the numbers. In any event, his insurance cover did not require the IMEI numbers.

49 The premium for the appellant's insurance cover for freight transport was £30,000 a year and could need topping up each quarter if more than a certain amount of business had been done; the policy also covered non-payment where the buyer had supplied documentary evidence of transfer of the funds – an MT100 - but they didn't arrive. The relevant clause provided:-

> Cover includes losses resulting from negligent release defined as follows: Losses directly resulting from non-adherence to agreed clearance procedures; cover also includes fraudulent release subject to the assured having no involvement therein. This extension does not cover the risks of non-payment of the goods by the buyer unless the release of the goods was made in good faith on the basis of documents subsequently found to be fraudulent. The assured shall take all reasonable precautions to verify the authenticity of any documents purporting to confirm transfer of funds in payments of the goods.

50 In one instance, a buyer called Motec, had faxed what turned out to be a false document purporting to show that payment had been authorised; in this case, the appellant had not claimed on the policy but had resold the goods – at a loss – to another customer, Papita, but

Mr Purser had subsequently been informed by the insurance broker responsible for the policy that cover would have been available. It was put to Mr Purser that the legal effect of the policy was a matter for the tribunal but, in the circumstances of these appeals, the relevant issue seems to us to be what Mr Purser actually understood the clause to cover, and we are satisfied that he did indeed understand it to cover a failure of payment following the receipt by him of the form MT100 indicating that payment was to be made.

51 In view of the Sunico experience at Capewater, Mr Purser decided not to trade into the EU but to concentrate on exporting outside Europe, believing that the carousel frauds he had now learnt about mainly involved intra-EU trade. Mr Purser said that he understood in particular that any export outside the EU could only re-enter the Union by paying VAT on import, which would obviously be impractical in a carousel fraud. On the other hand, Dubai, Hong and Singapore being trading hubs, exports to them could be expected to go on to other markets further away still.

52 The two suppliers that subsequently caused problems – New Way and Lexus – were companies that had been suppliers at Capewater, and the appellant continued to deal with them, especially as they seemed to be a safe contact and appeared not to involve the risk of joint and several liability inherent in taking on new contacts. The overall profit per deal aimed at was between 4% and 5% but freight, insurance and handling costs generally had to be taken into account and the company's total net profit on turnover for 2006 was some 0.8% and in 2007 1.12%.

53 The business was conducted from the family farm in converted barns, fitted up with security devices and closed circuit TV and they had three vans. Typically, Mr Purser or Mr Craker collected stock from their supplier or a freight forwarder, brought it back to the farm and re-packaged it for export, packed it into large cardboard boxes and

strapped it onto a pallet, then took it off to the freight forwarder they used at the airport, usually Hellman's Worldwide near Slough. If, as was often the case, the consignment was held by customs officials for a 'route 2' inspection, it would be necessary for it to be repacked afterwards; since the freight forwarder's premises were within the security cordon of the airport, that work had to be done by the forwarder's agent (and paid for). Necessarily, the appellant's own tape could not then be used, which explained why the tape employed was described as 'foreign' tape.

54 To demonstrate how business was conducted, Mr Purser appended to one of his witness statements the reconstructed working timelines of how deals 1 and 2 came about: the receipt of the stock list from New Way, then a call to them to clarify some details, a text to Cell Avenue in Dubai to see if they were interested, a telephone call with Cell Avenue, a telephone call back to New Way to confirm purchase and preparation and the faxing of the purchase order; a call to Interken freight forwarders to check on the sale stock, then a note of collection of the stock and its journey to the farm. This was vouched by reference to the contemporaneous records and phone bills. There was no formal contract for the onward sale: Mr Purser said that he only dealt with buyers that he was satisfied were trustworthy.

55 The due diligence was the same as that at Capewater, which had been approved by Mr Swinden. The suggestion now made by the respondents that he should have gone to New Way and asked who their suppliers were was obviously commercially impracticable: no dealer was going to risk being cut out by his buyer going over his head to his supplier. Asked why Cell Avenue and New Way didn't deal direct, Mr Purser replied: "It was not like there was 50 or 100 people. To date, there are hundreds and hundreds of companies in the UK alone, let alone overseas, that are buying and selling and trading mobile phones and accessories, and so you have your niche almost you know, and when over time a customer does disappear you either

assume they have found somebody else cheaper to supply them or they have changed business or whatever."

56 Mr Purser described New Way's premises at Southall, their principal Mandeep Singh, their Head Trader Kam, a later director called Mr E J Wrigley (a retired manager of their bankers Clydesdale), the stock room and offices, their contact at the freight forwarders Interken to whom he spoke about them and checked out their bankers, but he did not enquire about the company's antecedents; he understood that they were sourcing their stock in greater volume than he could afford, including from the continent. Mr Purser admitted that he often had not kept written records of everything; it was his own company and he was satisfied by his enquiries and he did not have to prove that to anyone else.

57 The evidence was that Mr Purser did not however make exhaustive enquiries into the company's business and finances and that he used the Dun & Bradstreet reports "as a face value tool"; he noted the main features such as that they were increasing turnover and that the credit rating was up to £4M; he attached no particular significance to the profitability falling, saying that that could well happen even on an increased turnover on account of the very thin margins in the industry. The report would verify names and addresses so that it could be seen whether the information in other documents tallied. Mr Purser also obtained his supplier's declaration that they had themselves done due diligence on their own suppliers and seen that there was nothing untoward about them in the trade press.

58 Mr Purser knew Lexus Telecom through his previous partner Mr Limberis; he visited their offices and warehouse in Harrow, met the Chawda brothers who ran the company, knew something of their trading history but again made no exhaustive enquiries into their business and finances and approached the data as he had that on New Way, not being especially concerned that an increased turnover had

resulted in a loss in one period; their credit rating had increased to £1M which seemed more significant. There were two companies, Lexus Telecommunications and Lexus Telecommunications Export; Mr Purser treated them as effectively one and did not make particular enquiries about the difference between them, but he did make checks with others in the industry to see that others had traded with them.

59 Mr Purser met Top Telecoms at the premises of one of the freight forwarders by a chance encounter, though he did not visit their premises because they did not keep stock at their principal place of business and there was no reason therefore to go there – but he saw their stock of course at freight forwarders when he went to collect it. Their chief officer was called Hussein Awad, who was of UK nationality, but 55% of the shareholders were in Sharjah which Mr Purser did see anything particularly suspicious about. The routine enquiries were made of them and, again, Mr Purser saw nothing untoward in the pattern shown in the Dun & Bradstreet report of the turnover increasing but the rate of profit falling. Proof of identity was not requested, as in copies of passports or driving licences; Mr Purser did not see it as necessary, and he commented that he had met the directors personally and if someone had asked him for such details he would not have given them: "It's one of those things that you're never really told to hand out because of identity theft".

60 Mr Purser pointed out that as far as anyone knew, neither New Way, nor Lexus nor Top Telecom were accused of fraud, and he said that as far as he was concerned he approached the task of due diligence pragmatically having regard to who he was dealing with. If they made – or said they made – further or better enquiries of their own suppliers that was a matter for them.

61 Mr Purser was dealing with Papita Trading in Dubai from the time he was at Shields and at Capewater, since 2000 in effect, and he corresponded with Mr Tarun Balani who Mr Purser understood to be

one of the company's principals; they had met in Dubai and at several trade fairs and there was an ongoing personal relationship. There was no paperwork in evidence about Papita and no Dun & Bradstreet checks had been run on them.

62 The same was true of other customers, Emjay Enterprises in Singapore, where the contact was Mr Mahoub 'Mike' Mawani whom Mr Purser did not meet (but whom he was "ninety per cent confident" he had first dealt with at Shields, and definitely at Capewater); of Utone in Hong Kong, where the contact was Mrs Emily Lam or Mrs Garfield Lam, who Mr Purser did not meet, but again had dealt with probably at Shields and definitely at Capewater; and of Vahedna in Dubai, in regard to which Mr Purser could not at first recall the name of his contact, but thought it was 'Azim' whom he recalled dealing with at Capewater. In all four cases, there was no due diligence paperwork available and apparently none ever done apart from certain informal enquiries made, for example, of freight forwarders.

63 In regard to Cell Avenue, the contact person was Mrs Gada Lopez, a Lebanese woman, for one of whose colleagues Mr Purser gave a visa reference to enable her to visit the UK. There was, in this case also, no due diligence paperwork at all save for a commercial licence which had expired in February 2005 - but had been current when it was obtained, and Mr Purser had not troubled to seek an update of it.

64 Mr Purser could not recall exactly how he had first made contact with Amrit FZE and there was very little paperwork about them beyond some letters of introduction and their invitation to do business. Their commercial licence had also expired before the periods under appeal.

65 Contact was first made with Al Badari in March 2006, though Mr Purser was not sure how; his contact there was a Mr Singh. Goods were released to them before payment in six deals during the appeal

period, which Mr Purser explained as following earlier satisfactory trading.

66 Mana Trading in Hong Kong and Jai Enterprises in Singapore were both new customers about whom little or nothing appears to have been known when the appellant traded with them, and Mr Purser could not recall how they had come into contact.

67 Referring to the export trade overall, Mr Purser did not accept the thesis repeatedly put to him that it was suspicious that his suppliers had not chosen themselves to do the export deals he had done. Mr Purser's reply was that he didn't know what opportunities they did or did not have or had indeed taken; there was a very large and rapidly evolving market at this period, and it was impossible to speculate as to what could or should have happened in a perfectly rational and calm analysis of it. Often, customers were not interested in what was offered, and then sometimes they were and a deal was done. Mr Purser understood that he was buying from much larger businesses purchasing in bulk at a good price and then splitting it onward, and that his overseas customers were buying both for retail and wholesale purposes, but largely the latter supplying Asian and African markets.

68 Responding to criticism that he often released goods before payment had been received, and that that was non-commercial, Mr Purser said it happened that way because of the pressures caused when customs officials held the goods for inspection before export on 'route 2'. That resulted in a delay which the buyer was not expecting and that put him under pressure with his buyer, which fed back quickly as a complaint to the appellant, who then to mitigate the delay would – if the buyer was by then known and trusted – release the goods as soon as they had arrived overseas.

69 In one case concerning Cell Avenue, Mr Purser explained that there had been an instance in 2005 in which the appellant had been

overpaid by Cell Avenue in consequence of a quantity of goods which had been stolen never having reached them, so the release of goods to them before payment compensated for that occurrence and both events illustrated the relationship of trust which existed. In any event, the appellant had according to Mr Purser the financial ability to weather a payment failure – it could still have paid its supplier – and he chose to take that risk. Following his practice of keeping within the company's financial means, Mr Purser avoided larger deals than the ones in fact undertaken so that he could be sure of being able to finance the VAT outlay involved, and he rejected the suggestion put to him that this was a ruse to avoid triggering suspicion by making big repayment claims.

70 The issue of two pin or three pin chargers had never been raised by HMRC with Capewater or the appellant company. If there was a problem in relation to this it would be dealt with by changing the accessories, which the company dealt in and could easily obtain. Mr Purser stressed that they were trading in a global industry and that the issue had to be seen in that perspective.

71 Dealing with the absence of warranties with the goods sold, Mr Purser explained that that was a feature of the grey trade: the phones were effectively brand new SIM-free telephones and he could not remember an example of early-life failures amongst them; even if there had been, in the markets they were sold to that was a matter for the local supplier: "I don't think there's any implication that the grey trade honours warranty in that sense. We're not authorised distributors." Nokia did not put a warranty card inside their boxes.

72 "Central European spec" was their own term used by the appellant as shorthand to describe phones with a European core pack of languages and a two pin charger, in effect western European languages like French, German, Spanish, Portuguese and English, rather than 'eastern' European ones as generally understood to mean

languages like Hungarian and Polish. Mr Purser explained that very often the customer would be adapting the goods to his onward market. Thus: "It depends who the ultimate customer is. I don't know my customer's customers, so if they're selling to, as an example, a Syrian company or an Iraqi company or an Iranian company, then they're interested purely in the brand new handset, they're going to adapt it for their customer's use and make that sale. . . . they could do those alterations for less money than we could afford to in this country".

73 The lack of formal purchase orders from customers was, Mr Purser said, characteristic of the way his business was done; his comment was: "These are genuine *bona fide* traders who I've known for years, and if they've said to me by telephone, and then maybe confirmed to me by text to say 'Yeah we're gonna do that', then we'd do that. I still deal with customers that there's no purchase order".

74 The mirror image of that was the absence of contract terms for sales, in regard to which Mr Purser said: "I'm not a sort of contract law specialist. I was, you know, a mobile phone trader. My documents still now don't go into passing of title". As far as Mr Purser was concerned, the position was obvious: title passed when the goods were paid for. As for any faulty goods, that would be dealt with pragmatically as and when the problem arose but in fact it had not done so. Out of the eight customers in the appeals period, five of them went back to 2004 or 2005, and relations were "relatively friendly, because we're constantly dealing with each other".

75 Mr Purser described his *modus operandi* thus: he would fax over a pro-forma invoice to his buyer, they would sometimes revert with a formal purchase order, the goods were shipped to the freight forwarder at the destination 'on hold', the buyer inspected the goods and made payment, and they were then released; he added "to date, the company's invoices still don't have written terms because of the

relationship with the customer". Neither his accountants nor his auditors had commented on the matter.

76 On the first day of the hearing, a list of further matters to be raised was given by counsel for the respondents to counsel for the appellant. It emerged in cross-examination of Mr Purser that this related to questions on various matters contained in the appellant's bank statements around the appeals periods, concerning in particular two loans to the appellant, a commission paid by it and a significant number of further queries suggested by an examination of the statements. Counsel for the appellant later objected that these matters had not been pleaded in connection with the allegations made against the appellant, notwithstanding two directions by the tribunal to the respondents requiring them to particularise their case as fully as possible; at the time of the cross-examination, however, that objection was not taken and we did not prevent Mr Purser being questioned on these matters.

77 It is apparent on reviewing the course of the cross-examination that the appellant, through Mr Purser, was substantially taken by surprise in relation to the matters raised; that the loans and commission in question had been fully disclosed in the appellant's audited accounts and had also been specifically reported to HMRC in the course of tax returns and investigations pertaining to them and had not then been the subject of further enquiry. Mr Purser was plainly at a disadvantage in trying to deal with the accusation put to him that these payments and receipts were the proceeds of fraudulent trading passing in and out of his firm's bank accounts, and he said more than once that if he had been given proper notice of them he could have sought the surrounding details relevant and obtained the assistance of his accountant who could easily have provided full answers.

78 By the time re-examination had arrived, Mr Purser was saying: "Yes, again, I really wish – if I had known this was coming I could

have asked [the accountant] to be here to answer these questions fuller than I can answer them". The fact of raising the issues we describe was clearly designed to be adverse to the appellant's case, and the failure of the respondents to give adequate notice of them prevented Mr Purser and his advisers having a satisfactory opportunity of responding - and the tribunal of having a proper account of matters. In the circumstances, we have decided to exclude from our consideration any of the matters relating to loans, the commission or other payments arising from the appellant's bank statements on the ground that to admit this evidence would be unfair to the appellant within the meaning of rule 15(2)(b)(iii).

79 The evidence showed that there was in the deals under appeal one third party payment made by the appellant. Third party payments are seen by the respondents as an indicator of uncommerciality and a pointer to fraud. Mr Purser's evidence was that he had only ever made two third party payments, one at the request of the trader Carphone, and the one in these appeals on behalf of Telecom Supplies who had asked the appellant to make payment direct to 20/20 Solutions; the explanation was that Telecom Supplies had money tied up in a large consignment of stock and had therefore asked for the direct payment to be made. Mr Purser added: "I may have directly benefited from the stock that was being purchased. It may have been that some of what was being purchased I had an interest in. I don't know." 20/20 Solutions was a Nokia authorised dealer, and were understood by Mr Purser to be the UK's largest authorised distributor.

80 Mr Purser confirmed that his business was still continuing, but without any of the companies who figured in the appeals save Papita; current suppliers include O^2, Hutchinson 3G, Vodaphone, T-Mobile, and the company still buys within the UK on the grey market and exports outside the EU, still selling to Papita for example. The appellant had ceased trading with New Way and Lexus after it was apparent that deals with them were regarded amiss by the respondents.

Apart from three points on his driving licence, Mr Purser said he had no convictions of any kind and claimed that he was the victim of the fraud: "It's like jumping in a taxi and the person before you didn't pay, so when you get to your destination the taxi driver – he has already got you locked in the back of the car – and he says 'Right, you have to pay up'."

81 The final witness who gave oral evidence was Mr Joseph Craker. Mr Craker has been a full-time police officer for over three years; he went to school with Mr Purser and in 2003 he joined the staff at Capewater at Mr Purser's invitation, where he did basic bookkeeping, stock control and helping with the collection and shipment of freight. In 2004, Mr Craker left Capewater and worked for the appellant until some point in 2007, by which time the workload had tailed off as a result of the financial squeeze imposed by the withholding of the tax under appeal and it was time for Mr Craker to move on and develop his career.

82 At H T Purser, Mr Craker functioned as office manager, keeping track of day to day bookkeeping, reconciling bank accounts, checking suppliers' VAT credentials with the Customs & Excise office at Redhill, collecting goods from the supplier or its warehouse, checking, packing and dispatching stock, checking payment and finally releasing goods to the buyer overseas. It was a busy time, often involving a new export each day and Mr Craker would find himself getting back from the export freight forwarders late at night or very early in the morning. Stock was not held for any great period and Mr Craker did not recall a case in which he had released stock to a buyer before payment had been received.

83 Going to detail about the work he did, Mr Craker explained that in checking the goods he would open each box and ensure that everything was there – handset, charger, manuals, memory cards – and check that the phone was unlocked. Sometimes boxes would be

squashed or kinked, but Mr Craker was not particularly concerned to note it because "that's not where the value of the product was"; the value was in the equipment itself. The repacking for export was evidently thorough: the phones were packed into large cardboard boxes, often doubled-up, taped with branded security tape four times round, the access straps spray painted to reveal any tampering, and the whole black-wrapped onto the pallet.

84 Dealings were with regular suppliers with whom Mr Craker became familiar and he did not think they were dishonest. Mr Purser's warning to him that there was mistrust between people in the industry Mr Craker understood to refer principally to the need to verify stock before accepting it, since no-one would believe later that part of an agreed consignment had been missing. Mr Craker's testimony about Mr Purser personally was unequivocal: "in the three years I worked there, nothing that I heard or saw made me think that David was involved in any way in anything like [VAT fraud]" and he added "sometimes David is a little bit too honest for his own good".

85 Officer Christopher Cartner first visited the appellant on 5 July 2006 as its assurance officer, which he continued to be until October 2007 and always found Mr Purser cooperative and helpful. On 22 August, the officer having made enquiries about the appellant's due diligence noted that the checks made appeared comprehensive, but that he would need to see the supporting paperwork. Mr Cartner was also the officer in charge of the extended verification of the claims giving rise to these appeals until April 2008, and therefore of much of the work involved.

86 On 28 September 2004, Mr Purser was issued with Notice 726 about 'joint and several liability' in cases of VAT fraud.

Notice 726

87 Notice 726 was published by the commissioners of Customs & Excise in August 2003. It followed the enactment of section 77A of the Value Added Tax Act 1994, which provided with effect from April 2003 that in the case of supplies of certain telephone and computer equipment VAT unpaid in a chain could be recovered jointly and severally from the person primarily liable to pay it *and* from any person to whom a supply of the goods was made who at the time of the supply "knew or had reasonable grounds to suspect that some or all of the VAT payable in respect of that supply, or on any previous or subsequent supply, of those goods would go unpaid".

88 Subsection (6) of section 77A provided a rebuttable presumption that a person had reasonable grounds for suspecting that VAT would go unpaid if the price at which he bought was (i) less than the lowest price which could reasonably be expected to be payable on the open market, or (ii) was less than the price payable on any previous supply of the goods. The presumption was without prejudice to any other way of establishing reasonable grounds for suspicion, and the amount payable in the event of the section applying was the net tax unpaid on the goods.

89 Notice 726 explained section 77A and laid down guidelines which were designed to assist traders in avoiding liability under the section. The section was not, however, invoked in the cases under appeal, and no joint and several liability was pursued. In practice this Notice had come to be used for a rather different purpose, namely as a reference point for traders such as the appellant who were liable to be denied repayments of input tax in situations where VAT had gone unpaid in the chain either before them or after them. This approach derived from a legal analysis confirmed by the European Court in 2006, and later by the Court of Appeal in 2010, which has been explained above.

90 The Notice emphasised the need for a trader to be circumspect about its trading connections. Under the heading "How will you establish 'reasonable grounds to suspect'?" section 2.5 of the Notice said:-

> You shall be presumed to have reasonable grounds for suspecting that the VAT on the supply would go unpaid if you have purchased the specified goods for less than:
>
> - The lowest market value of the goods; or
> - The price paid for them by any previous supplier
>
> These tests, which are rebuttable presumptions, are made without prejudice to any other way of establishing reasonable grounds for suspicion.

91 Section 3.3 of the Notice continued:-

> It is clear, from consultation, that businesses involved in the affected sectors are aware of the problems [of MTIC fraud]. In order for the fraud to be perpetrated the price has to be cut within the supply chain. This measure is aimed at businesses that either know who is carrying out the frauds, or choose to turn a blind eye. These businesses, if they do get caught up in the fraud, will have purchased goods that are priced either below the market price or at a lower price than that paid by a previous supplier in the chain. This is to the detriment of legitimate trade. Businesses that check the integrity of their supplies and the supply chain should not be affected by this measure.

92 For the purpose of checking the integrity of their supplies and the supply chain, section 4.4 of the Notice advised traders that they should take "reasonable steps" to establish the integrity of their customers, suppliers and supplies. In cross-examination, Mr Simmons agreed that this referred to a trader's "immediate customer" and "immediate supplier"; he also agreed that a trader's enquiries could not be expected to go further than one up or one down the chain, commercial logic suggesting that it would be unrealistic to expect suppliers to disclose their sources for fear of being cut out in future. Section 4.5 of the Notice in fact made the same point.

93 Section 8 of the Notice gave examples of some 18 checks or reference points to which it would be prudent to have regard. It was emphasised that this was not an exhaustive list of boxes to tick, but suggestions as to the areas of enquiry likely to be relevant. In summary, they are:-

i. The supplier's history
ii. The arrangements for financing and insurance
iii. Recourse if the goods are not as described
iv. The existence of a current market for the goods
v. Whether price increases in the chain are commercially viable
vi. Normal commercial price negotiations
vii. Reasons for any third party payments
viii. Existence of the goods
ix. Previous supplies of the goods to the trader
x. The condition of goods
xi. Certificates of incorporation and VAT registration
xii. Check on xi with HMRC
xiii. Letters of introduction on headed stationery
xiv. Trade references, written or oral
xv. Credit or background checks
xvi. Personal contact with senior officers, and visit to premises if possible
xvii. Bank details
xviii. Cross-checks of the above

The challenge to the appellant's claims

94 Mr Simmons, as the case officer, had been lastly responsible for the extended verification of the appellant's refund claims since April 2008 and had taken the decisions to refuse the input tax claims for the three periods in question, but he had not, however, had any contact with Mr Purser or his company at the time of the events under appeal.

95 Mr Simmons corrected a number of factual mistakes in his principal witness statement, including significant errors as to the appellant's due diligence documentation. His statements, after reviewing the evidence relating to the appellant's transactions, concluded that they were "not by way of normal commercial trading and are (sic) being contrived to assist with a scheme to extract VAT from HM Revenue and Customs by way of contra-trading"; but he admitted that that statement was incorrect and might well have been a "cut and paste" from other statements that he had made.

96 Mr Simmons agreed that HMRC looked much more closely at repayment claims from April and May 2006 onwards than they had done before that, in response to the outcome of litigation then current. Up until then, the appellant had been visited by an assurance officer monthly to collect the paperwork relative to that month's trade, and the same had been true of Mr Purser's time at Capewater.

97 Mr Simmons agreed that the relationship which would emerge from those visits would be as cordial as possible, but he denied that the trader would have been given comfort as to his manner of trading; indeed, Mr Simmons's view was that at the time of these transactions he did not himself recall coming across many, if any, traders who struck him as legitimate.

98 No revenue officer could, moreover, warn a trader off a particular supplier without breaching taxpayer confidentiality, which he could not do. When asked about this in relation to one of the appellant's main suppliers, New Way Associates - still trading in 2011 - Mr Simmons agreed that there had been no warning to the appellant to make deeper checks on them and commented that the fact that the company was till trading five years later "doesn't mean that they are not involved in fraud".

99 Mr Simmons added: "Personally – I would imagine a lot of other officers are the same - I tried to steer away from advising precisely

what checks to carry out, because the danger is if you start listing checks the appellant will then do exactly those checks, nothing more and nothing less, and it will come back to haunt you ... all they can do is seek to do those checks and still carry on committing the fraud".

100 Asked whether any warning letters had ever been sent to the appellant with regard to his suppliers Lexus and New Way Associates, Mr Simmons replied that they had not. In one case, while Mr Purser was still at Capewater, a warning letter had been sent out in regard to New Way and there was eventually no more trade with that company, although a claim in respect of the purchase from it had been the subject of extended verification and had in due course been paid.

101 Speaking about the checks done at Capewater, Mr Simmons commented: "They were at their most thorough at Capewater when they were involved in a fraudulent supply chain; so far as I am concerned, the thorough checks had been tried and tested at that stage and failed, because regardless of those checks they were still able to find themselves in a fraudulent chain." Asked whether he could think of further checks which could have been done, Mr Simmons replied: "No, not off the top of my head", but he criticised the appellant's decision to trade with New Way subsequently after Mr Purser had left Capewater.

102 On the overall utility of the due diligence checks, we asked Mr Simmons if he considered it likely that a trader, dealing in a market where he knew that there was fraud taking place, would receive truthful or useful answers to questions put to traders who were in fact part of the fraud. In reply, Mr Simmons said that "if the appellant was not involved in the fraud, then I would say that if his supplier is a fraudster then he can lie as he wishes to ensure that trader doesn't become aware [of the fraud]"; he added that "if the trader asks his supplier a question and the question he asks doesn't make any difference whether or not the two companies can become involved in

a fraud, so if it doesn't fundamentally affect whether or not the fraud can go ahead, then there's no reason to lie".

103 Turning to the timing of the payments made by the appellant for its purchases, Mr Simmons agreed that payments up the chain all on the same day were typical in MTIC frauds and that in this case there were 19 occasions - deals 1, 2, 4, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 22, 26, 29, 30 & 31 - on which that did not happen and the appellant paid later; some of the gaps, in which the appellant paid later than the earlier payments, were small though some were larger. Similarly, in 16 cases the appellant made payment to its own supplier before receiving payment from its customer. All those upwards in the chain banked with FCIB, though the appellant's payments to New Way and Lexus were not made to their FCIB accounts but, at the appellant's insistence, to their UK accounts instead. In addition to this, we note that in deals 1, 2, 6, 8, 9, 12, 13, 14, 15, 16, 19, 26, 29 and 32 the quantities of goods sold along the chain reduced on reaching the appellant's supplier and – in deals 13 and 14 - again after that point.

104 Where the appellant recorded a loss in its trading – e.g. deals 7 and 8 – Mr Simmons would not agree that this indicated legitimate trading; they might, he thought, merely be manufactured for the sake of appearing more legitimate. Mr Simmons would not accept that the £30,000 spent by the appellant on insurance for goods in international transit was inconsistent with non-commercial trading, saying the cover was really needed for the transit of the goods from warehouse to the appellant's premises and onwards in a van, since there was an obvious danger that they might be stolen then.

105 Mr Simmons accepted that the issue of the two pin chargers typically associated with the appellant's goods had not been raised in any of the previous visit reports by assurance officers and, when it was put to him that this was a problem only raised with hindsight and had not been seen as an issue at the time, Mr Simmons's answer was that "I personally can see no reason why two pin phones would be

traded in the UK or ever enter the UK because we're a three pin country". The assurance visits, he said, had been principally to collect records and no more.

106 Mr Simmons was critical of the appellant's failure to record the IMEI numbers of goods purchased. These numbers were each unique to each handset and their recording by the appellant would ensure that no item would be traded more than once, thereby eliminating the possibility of being involved in a second-time-round carousel fraud. They could have been recorded using a hand held scanner and uploaded onto a computer database; or the freight forwarder in question would have done the same on behalf of the trader.

107 The appellant's failure to take this action was, in Mr Simmons's view, an indication that it wished to avoid having incriminating information which could be seen by HMRC; but he agreed that there was no evidence that the appellant had ever been asked to do this by its assurance officer (though it appeared that it had been asked in 2004 *whether* it was being done), and that there was no evidence that it had traded the same goods twice. Recording IMEI numbers only became obligatory in October 2006, following a change in the law.

108 The information about IMEI numbers traded was always available on HMRC's Nemesis database - to the extent that official scanning at airports had captured it - but traders did not have access to that database, so if they were to take advantage of the possibility of using it they had to make arrangements themselves. The Nemesis database information indicated that some of the goods sold to the appellant had previously been traded in the UK, but there was no evidence of circularity of trading leading back to the defaulters in the 34 chains in this case.

109 On the prices paid by the appellant, Mr Simmons agreed that there was no evidence that they were at rates lower than the current

market rates, so as to be suspicious in the terms suggested by Notice 726.

110 There was evidence given, principally by officers Kenrick and Faulkner, with regard to the appellant's exports being on occasion in damaged or poorly packed boxes when examined prior to export, and it was suggested by Mr Simmons that this again indicated that the trading was non-commercial, since a genuine customer would have required the goods to be in pristine condition for onward sale.

111 The 'damage' appeared largely to consist of the cutting out of customs or manufacturers' stamps on packaging, and whether this was done for fiscal or commercial purposes was unclear. The re-taping of boxes with what was called 'foreign' taping was, Mr Simmons agreed, possibly as a result of a customs inspection at the airport prior to export or even of an inspection by traders themselves. Mr Simmons speculated that goods may have been made in China and that the evidence of this was being suppressed as they were going to be re-exported there in a carousel. We record that none of the evidence on damage to packaging was clear enough for us to reach firm conclusions on it.

The Grey Market

112 As is typical in cases such as this, the appellant was what is known as a grey market trader, that is to say that he was buying and selling for the most part outside the manufacturer's authorised distribution systems supported by a contractual network designed to maintain sales territories and wholesale and retail prices. Effectively, the grey market operates to circumvent these restrictions and to maximise the immediacy and sufficiency of supply to the markets.

113 Evidence on this came essentially from Mr Purser, and from Mr John Fletcher who was put forward by the Crown as an expert witness - though some further background information was available in the witness statements of Mr Roderick Stone, which we deal with

elsewhere. Mr Fletcher submitted three witness statements and gave oral evidence in addition. The first and third statements addressed the development and structure of the mobile handset industry generally and the size of the market in them, and the second statement was designed to focus on the circumstances of this particular case.

114 Mr Fletcher is a chartered accountant, a director at KPMG, and has given evidence for the commissioners in some 20 cases hitherto. His statements utilised "work performed by a team of industry specialists, forensic accountants and economists who have worked under my direction and supervision" and who had reported back to him on their findings. Overall, Mr Fletcher said that the grey market provided four types of trading opportunity: arbitrage, box breaking, volume shortages and dumping; he then attempted, without success, to identify which of these opportunities the appellant was taking.

115 In each market, Nokia supplies handsets typically to the mobile network operators in Europe, who may require small modifications to them and to the packaging and instruction manual. They may also require changes to the menus of the phones specific to their network e.g. in relation to the home page of the internet browser, the customer services number, the voicemail service and so on. As a result, there are often for each Nokia handset up to a dozen slight variations for each operator.

116 Referring to a description used on many of the invoices in the appellant's transactions, that they were "Central European" or "CE" specification, Mr Fetcher said that these were not terms used by Nokia themselves. The chargers could be either two pin or three pin, depending on the market for which they were destined; for the European markets, that means that they are either the continental two pin type or the UK three pin type. For North America and Australia, there is a separate type of two pin plug, and in Asia both two pin and three pin types are used. Africa was not considered.

117 It is a straightforward matter to obtain one or the other type and there are businesses offering the service of doing so for grey market traders. The cost would be between £1.20 and £1.50, but it would eat into the already thin margins of the grey trade; moreover, the absence of the right fitting would call in question the commerciality of the transaction. Mr Fletcher agreed, however, that chargers with the wrong number of pins for the market in which they ended up could easily be made usable with an adaptor.

118 Mr Fletcher's statements included an overview of the mobile phone handset market in what set out to be a comprehensive analysis of its size and characteristics, with a view to showing that the volumes said to be traded on the grey market and the manner in which many transactions were structured indicated a degree of unlikelihood and unreality, suggestive of much of the recorded trading being fraudulent and non-commercial. He accepted, however that there had been a global explosion of the market in these goods since the 1990s and that "there are now more phones than humans". Mr Fletcher's overview was drawn from a number of sources, whose work he had relied on in reaching his conclusions.

119 Given the extent of the information marshalled and the generally known fact of widespread fraud in this area, it is clearly the case that Mr Fletcher's evidence lends weight to a concern that any trader in this particular grey market at this particular time could be involved to one extent or another in non-commercial activity, typified by long supply chains with many intermediaries, insufficiency of documentation for commercial purposes, a lack of commercial rationale and the channels by which goods become available.

120 Concern about such matters underlies the encouragement in Notice 726 for the trader to undertake 'due diligence' in regard to his counterparts, and is illustrated in the tax loss chains in this case. The burden of proof in the appeals however lies on the commissioners and the circumstances of most concern to us must be those of this trader

and these transactions. We turn therefore to the criticisms Mr Fletcher made of the appellant's business and the challenges to them.

121 Firstly, Mr Fletcher pointed out that the appellant's sale invoices failed to give more than the briefest specification of the goods and did not cover consistently matters such as accessories, whether the phones were SIM-free, what languages they were set for, the country of manufacture, type of charger or the warranty, and contained no terms as to title, terms of payment, missing or faulty goods or the settlement of disputes. These were all matters which would routinely be dealt with in a *bona fide* commercial context and were relevant to whether or not the goods were fully tradable; their absence was suggestive of non-commercial trading.

122 Second, Mr Fletcher queried the use by Mr Purser of telephone enquiries to two of his suppliers instead of using websites such as GSM Exchange or IPTCC where traders advertise the stock they have available; he would have expected the use of more efficient and less disruptive methods than constant telephone enquiries. Mr Fletcher said he made this observation as a chartered account with extensive experience of advising business, though he accepted that this point did not have the strength of being a negative indicator.

123 Thirdly, there appeared to be little commercial rationale for the routing of exports outside the EU from continental Europe via the UK. In so far as the appellant was in arbitrage trading, the pricing policy adopted by Nokia seldom provided the opportunity for such business and it was moreover not consistent with stock being held for minimal periods as here. Mr Fletcher accepted that box breaking and dumping (where excess supply in one sales territory would be grey-market exported to another), or volume shortages where goods destined for one territory were illicitly diverted to another, could be relevant factors.

124 Box breaking involved the purchase from retailers of phones sold to them with a subsidy attached (in which the phones would typically be locked into a particular network, from the use of which the real profit would be made); accordingly, the phones would in such a case need to be manipulated to unlock the tie. Free to use on any GSM network, the phones are then exported from markets such as the UK with relatively high levels of subsidy to foreign markets where there is no subsidy.

125 Taking the TIM (Telecom Italiana Mobile) handsets bought in 11 of the appellant's deals, this process would not make commercial sense: the level of subsidy in Italy was lower than in the UK, so there would be no incentive for box breaking; it would appear therefore that in these cases therefore the phones were being dumped, but the statistics for the period did not indicate that there had been too many Nokia phones on the Italian market. This was thus an example of what Mr Fletcher saw as trading lacking a commercial rationale but he conceded that he had not looked at the size of the appellant's deals in the context of the market for the phone type in question at the time, and that he was not able to comment on the suggestion that TIM stock was always unlocked. Nor had he looked specifically at the prospect of phones being acquired outside the UK, imported to the UK and exported outside the EU, all on the grey market.

126 Mr Fletcher remarked that the appellant seemed frequently not to have been concerned with regard to the adequacy of the language selected for the phones or their instruction manuals, while these features would be of great importance to the end users. Though typically a handset would be equipped with nine or ten languages, Mr Fletcher could only say in the case of one type (which he did not specify) that it would not include non-European languages – except English: English would generally feature in all handsets, even those destined for markets in Asia.

127 Mr Fletcher's independence and competence as an expert witness was forcefully challenged by counsel for the appellant. In response, Mr Fletcher agreed that KPMG acted for Nokia, that they had not given evidence for a trader in any case and that they would indeed see a conflict of interest in their doing so; he conceded that he had no experience of acting for grey market traders in respect of matters germane to these appeals.

128 Mr Fletcher also accepted that there was no established body of knowledge or academic research on the grey market, but he said that colleagues whose information he had drawn on in his statements had worked in the grey market on secondment to two large distributors – 2020 Logistics and Data Select – which traded in the grey market as well as the white market; what he had looked at was only the market which he considered would be addressed by a grey market trader in the UK buying from the white market in the UK. Mr Fletcher had not, however, conducted research with a company such as the appellant whose business was exclusively in the grey market, nor had he studied the export market.

129 In particular, though he was aware that Dubai was a trading hub, Mr Fletcher had not looked at the export statistics from Dubai and where the phones imported there were going to, and he accepted that Dubai was indeed a transhipment point for export to other markets whose consumers were often poorer than those in Europe, have less to spend and are more willing to put up with the need for an adaptor for a charger with the wrong number of pins.

130 In regard to his research, Mr Fletcher agreed that though he had drawn on the work of colleagues he had not generally stated who they were, not set out the work they had done or indicated where it could be consulted. These persons would not, any more than he, have had experience of how a company such as the appellant would operate and it would have helped him give a more balanced expert opinion if they

had had such information – but Mr Fletcher insisted that his opinion was not biased.

131 In focussing on the appellant's trade, Mr Fletcher had examined only ten deals and based his opinion on that sample; none of those in the sample had been 'clean' deals done by the appellant i.e. those which did not go back to a tax loss. In one such example, phones had originated from O^2 which had come down the chain to the appellant in the UK and been exported; Mr Fletcher was surprised by it and said that he would not have expected to see phones moving down chains and did not know why O^2 had disposed of them: presumably they were old stock being dumped, or for which they could find no demand in the UK, but then Mr Fletcher would have expected a direct export to get rid of them. On further questioning, Mr Fletcher accepted that manufacturers who had excess goods to dispose of would on occasion deliberately sell them into the grey market in order not to be seen to be acting in disregard of their own distribution network agreements in their various sales territories.

132 With regard to the business model adopted by the appellant Mr Fletcher repeated his view that it was not rational or sustainable, in spite of being informed that it was still continuing at the time of the hearing; he agreed, however, that there was a vibrant grey market and that phones were regularly traded in it.

Mr Stone's evidence

133 As is customary in MTIC cases, the respondents submitted three witness statements from Mr Roderick Stone giving an overview of the course of their policy towards what was undoubtedly a serious and persistent challenge to the integrity of the public revenue. It would be wrong to deny that Mr Stone's witness statements have provided a helpful perspective on what is often a complicated situation, and a useful description of the process known by the respondents as 'extended verification' which precedes these appeals. In that sense the

witness statements are not irrelevant to the appeals, but it remains the case that there is little or nothing in Mr Stone's statements that is immediately connected with the issues that we are to determine.

134 Counsel for the appellant urged us to conclude that Mr Stone's evidence was simply not admissible, he being neither an expert witness, nor a witness to any of the facts before us, and his testimony essentially consisting of comment and opinion only. Mr Farrell QC put that point thus: "We say that there is enough for us to consider in this case without these sorts of matters being placed before you as they really don't assist you one way or another". This was referring in particular to Mr Stone's evidence regarding the trading patterns typically found in MTIC fraud (e.g. long chains and third party payments), their modification in the light of the respondents' actions, and a memorandum of understanding within the mobile phone industry in June 2000 which he said – and Mr Kerr did not disagree – was moribund by 2002, four years before the facts we have to consider.

135 The appellant accepts that the chains disclosed by the respondents' researches are – save in the cases specifically mentioned above – characterised by fraud, and that a single third party payment is involved here in respect of which the appellant's submissions are recorded below. These are really the only points at which Mr Stone's evidence particularly relates to this case and, even so, it tends to the general and non-specific and does little more than indicate that there are lines of enquiry with regard to the appellant and Mr Purser which need to be examined – which is exactly what the commissioners' investigation has already done.

136 First instance authorities were cited to us in support of the proposition that Mr Stone's evidence is inadmissible; we do not doubt that such a conclusion may properly be reached in suitable cases on the basis of the present rules governing the tribunal's proceedings, but

we do not need to go that far in these appeals. Mr Farrell QC made it clear that the entirety of Mr Stone's evidence is formally challenged and, in the circumstances, we do no more than indicate that we do not see it in this case as of material assistance in determining the appeals.

Submissions

137 Both counsel assisted us by making extensive closing submissions in writing and orally, and the following is necessarily a summary of them.

138 For the Crown, Mr Kerr in closing submitted firstly that all 34 of the deals in the appendix below were connected to frauds on the revenue. Since that was conceded in relation to 32 of the deals, and our reasons for rejecting that conclusion in the case of three of the deals have already been stated, we will not rehearse the detail of Mr Kerr's reasoning about the underlying frauds.

139 Secondly, the major allegation was that Mr Purser actually knew that his company's deals were connected with the frauds because the objective indications were that that trade was plainly uncommercial, for the following reasons:-

- The due diligence done by the appellant was so far below the standard consistent with commercial practice that it was only consistent with an indifference characteristic of non-commercial trading. In the case of the appellant's buyers, the due diligence was virtually non-existent, and in the case of its suppliers it was very little more than perfunctory and superficial, and no real attempt at probing surface appearances had been made. In particular, there were no records of references being taken up, no checks that people were who they said they were and no enquiry into the aspects of a company's financial position suggested by the Dun & Bradstreet reports.

- The deal documentation was skeletal to non-existent, and was not sufficient for commercial purposes. Mr Kerr relied in this respect largely on the evidence of Mr Fletcher as to what he would expect to see in the market. In particular, the use of descriptions such as "Central European spec" which had no industry-recognised meaning, and the lack of other details such as the languages involved, showed that the trading done was not of a *bona fide* commercial kind.
- The trading model was "irrational": the appellant's profits and opportunities were "too good to be true", its suppliers' failures to take the same opportunities themselves were inexplicable, the correspondence between the quantities bought and those sold was beyond coincidence, the easiness of the suppliers' and the appellant's release of goods - often before clear evidence of payment - was uncommercial, and the volumes of goods bought and sold were suspicious.
- The fact of the goods being not suitable for the UK market strongly suggested artificiality, since the UK was not a trading hub for the transhipment of mobile phones.
- The failure of the appellant to record IMEI numbers when it would have been prudent to do so suggested an unwillingness to acquire information which would interfere with the fraud.
- The likelihood was that circularity of trading was also a feature of the business in question. The notion that circularity was not possible was effectively disproved by reference to the possibility of re-import to the EU pursuant to the provisions of regulations 121D and 123 of the Value Added Tax Regulations 1995 on returned goods relief and onward supply relief, which together enable customs duty and value added tax on import in these circumstances to go unpaid; this, taken with a further fraudulent evasion of tax on re-import to the UK, would enable a circular scheme to work.

- The notion, propounded by the appellant, that the instant fraud was a partly organised fraud of which it was the victim did not make financial sense for the organisers, but it did not in any event matter whether the appellant thought there was a carousel fraud or any other kind of fraud; it mattered only that it was or would have been obvious that some kind of fraud was afoot.

140 All these factors taken together, and added to the existence of the admittedly fraudulent supply chains, indicated that it was at the least more probable than not that Mr Purser was not trading in good faith but actively participating in a pretended trade designed to facilitate the fraud.

141 In the alternative, the very low standard of due diligence and non-commerciality of the documentation used meant that it would have been obvious to the appellant that its trading was connected to transactions whose *raison d'être* was tax fraud. Typical of this were the exports of goods from Top Telecoms whose shareholders were located in the UAE, and who could very profitably have made the exports to that location themselves.

142 For the appellant, Mr Farrell QC argued that the case fell to be regarded as one in which the respondents had simply failed to prove either actual knowledge on the part of his client, or that the appellant should have known that its dealings were connected with fraud, and in particular that there had been no direct evidence of participation. As we have already indicated that we do not accept a connection to fraud in deals 7 and 33, we do not repeat Mr Farrell's submissions that these two cases should be excluded *in limine*; for the other 32 deals, the appellant accepted (we believe in one case, wrongly) that a connection with tax fraud through its suppliers is made out. The issues therefore remaining were seen as the two fundamental ones, whether actual

knowledge could be inferred from the evidence, or whether the appellant ought to have known of a connection.

143 On proving fraud, it was submitted that the tribunal should have regard to the approach of the civil courts and in particular to the dicta of Lord Millett in *Three Rivers District Council v. Bank of England (No 3)* [2003] AC 1, at [183], that 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". Although evidently strict rules of pleading do not apply to the tribunal's proceedings, the same effect was produced in the instant case by the directions respectively of Judge Wallace on 13 April 2011 requiring an amended statement of case to be served particularising the matters relied on in support of the allegation that the appellant had actual knowledge of a connection to fraud, and by Judge Bishopp on 19 May 2011 requiring the respondents to set out the facts and matters on which they relied in support of the allegation of actual knowledge.

144 Mr Farrell argued that the respondents' allegation was in effect one of carousel fraud, whereas the evidence did not display contrivance at every step or depend on the appellant securing a VAT repayment. This was what Mr Farrell termed a "partly organised acquisition fraud", which had operated by distancing the innocent customer – the appellant – from the defaulter so that the former does not know that an acquisition fraud is occurring. The indications opposing a carousel fraud were very considerable and the behaviour of the appellant was contrary to that to be expected in a carousel fraud in various respects.

145 First, the existence of losses in deals 7 and 8: either the appellant made a loss or its supplier or both; then, in 14 of the deals, the appellant did not purchase all the goods in the chain; next, export outside the EU would make a carousel fraud more, not less, difficult to

execute and the suggestion that the returned goods and onward supply reliefs could be used for the purpose was implausible and had not, in any event, been pleaded.

146 Secondly, there was no actual evidence of circularity of funds, notwithstanding the availability of FCIB data, but merely an unsuccessful attempt to infer circularity from the likelihood of a connection between the appellant's customer and the parties who received funds. The evidence showed that the appellant's suppliers paid their suppliers before receiving payment in 19 of the deals – 1, 2, 4, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 22, 26, 29, 30 and 31; and that the appellant paid its supplier before receiving funds from its customer in 16 deals – 1, 7, 8, 9, 10, 11, 17, 18, 20, 23, 24, 25, 27, 28, 32 and 33 - further factors inconsistent with a contrived carousel. Moreover, although there was very limited evidence that some of the appellant's goods had been in the UK before, there was none that the goods it had exported had been re-imported to the EU.

147 Thirdly, the patterns of trading were not suggestive of a carousel: the appellant's mark-ups varied, there were gaps in the invoice dates, the transactions were spread over each month (instead of being bunched at the end to minimise cashflow before repayment) and 8 credit notes had been issued to customers.

148 Referring to Mr Fletcher's evidence on the grey market, Mr Farrell submitted that his analysis was abstract and simplistic, and that Mr Fletcher himself was not a proper expert witness on account of his lack of independence and the absence of any recognised body of learning or information on which he could draw; he had, moreover, no direct knowledge of the trading conditions experienced by a business in the position of the appellant.

149 Other matters relied upon by Mr Farrell included the role of Mr Craker, who it was not alleged was dishonest, whose role would

therefore have been contra-indicated in an organised carousel; the inconclusive evidence about: damage to the packaging and the significance of two pin plugs, the keeping of IMEI numbers, the character of the deal documentation and the appellant's checks on suppliers and customers.

150 A *bona fide* trader was entitled to take commercial risks in its business, and if the appellant on occasion released goods before payment that was a matter related to customer relations in particular cases. The basic checks on suppliers at Redhill, their Dun & Bradstreet reports and the frequent visits to them or their freight forwarders sufficed to underscore the actual relationships established. The further probing suggested would have been unlikely to make the appellant any the better informed, and nothing he did know or might have discovered came near to establishing that, through Mr Purser, it ought to have known that the deals were connected with actual fraud.

151 In relation to the two loans and a commission referred to above, Mr Farrell submitted that the appellant had been severely prejudiced by the extreme lateness of the respondents' attack on these matters, and had not pleaded them in anticipation of the hearing. (It will be seen above that we have dealt with this issue in connection with the admissibility of evidence.)

Conclusions

1 The underlying frauds

152 We have already indicated our conclusions with regard to each of the 34 deals the subject of these appeals. In sum, we have accepted that all the deals except 7, 32 and 33 were connected with frauds on the revenue. The reasons why we do not accept that conclusion in regard to deals 7, 32 and 33 are stated above.

2 Mr Purser's character

153 Overall, we saw Mr Purser as a straightforward witness, whose reactions to questioning were characteristic of a person who had behaved honestly, but in some respects unexpectedly. For example, Mr Purser's attitude to his sales documentation, or rather the lack of it, caused us concern in particular and it is true that, as the Crown have urged, it does not appear typical of the precautions and formalities that one would expect in sizeable international transactions in the context of mainstream business. It does seem remarkable that tens or hundreds of thousands of pounds worth of goods should be traded without any explicit provision regarding the passing of title, times and methods of payment, quality, provision for dispute resolution, and so on.

154 That said, we are conscious that there has been no adequate evidence before us of what was normal commercial practice in this type of trade by a small trader in the grey market. Mr Fletcher's evidence, valuable up to a point, does not on his own admission fill this gap and we are lacking direct evidence except from Mr Purser on the matter. It is not enough, in the absence of direct evidence of how legitimate grey traders in this market actually behaved – and Mr Purser's business is entitled to be seen as legitimate unless the contrary is shown - to project onto the appellant our own notions, or those of the revenue officers who gave evidence, of what could reasonably be expected in this marketplace.

155 Having observed Mr Purser in the witness box for a considerable period, under prolonged and searching cross-examination, our assessment is that though his manner of doing business seems to us to have been rough and ready, that does not in the circumstances imply dishonesty on his part. In short, we believe that Mr Purser was an honest trader. Mr Craker appeared to us as a transparently honest witness and his endorsement of Mr Purser's character, though not conclusive of the matter, reinforces that perception.

156 We come back later to the question whether, looking at matters objectively, Mr Purser should have known that the only reasonable explanation for the business he did was that it was connected with fraud.

3 'Due diligence'

157 The Court of Appeal, as will have been seen, has warned against an excessive focus on 'due diligence' in MTIC cases and urged a more general realistic overview of the steps actually taken by a trader to avoid involvement in fraud in the commercial context in which it operated, thus very much reinforcing HMRC's own warning that a merely formal compliance with the guidelines in Notice 726 was not what they were inviting. Moreover, it is apparent that Notice 726 was not designed to address the type of liability which arises in these appeals and in some of its parts was clearly inappropriate e.g. the expectation that fraud would be characterised by price reductions in the chain.

158 In addition to that, the expression 'due diligence', borrowed as it is from the unconnected sphere of company takeovers and acquisitions, is not very helpful. As the case law makes clear, what is required is perhaps better described as a 'duty of responsible enquiry' in all the circumstances of the case. Bearing this in mind, we now look at the way in which the appellant approached its trade relationships.

159 As a routine, the appellant could have aimed to establish the following details of all its suppliers or customers following the suggestions in Notice 726:

a. Trading address, registered address, website, email, date of incorporation and nature of business;

b. Company registration number and certificate of incorporation;

c. VAT registration certificate and number;

d. Directors' details;

e. Contact names and details;

f. Bank details;

g. Copies of utility bills;

h. Letters of introduction on headed stationery.

4 The adequacy of the 'due diligence' checks

160 In the case of New Way Associates, the supplier in 15 of the 34 chains, it does not appear that checks were made on all the directors and that no attempt was made to probe the significance of the figures revealed by the Dun & Bradstreet reports. Lexus Telecom Export Limited was the supplier in 14 of the 34 deals and the picture was much the same with, in particular, a failure to follow up details of an associated company, Lexus Telecommunications Limited. Top Telecoms Limited was the supplier in 5 of the 34 deals and, again, no enquiries were made about associated companies, or the peculiarity that the majority shareholders in this company were in the United Arab Emirates, and yet the company was not to exporting there while the appellant was.

161 Overall, the formalities of 'due diligence' checks on the lines suggested by Notice 726 were accomplished rather superficially and without, it appears, very much thoroughness. In general, there is no record of references being taken up either - though it must be said that Notice 726 did not require them to be pursued in writing and there is some evidence that this aspect was dealt with informally. When this has been noted, however, we are not satisfied that there is any degree of probability that, had a more demanding approach been taken to this work, the appellant would have been much the wiser. The principal Crown witness, Mr Simmons, agreed that people actually involved in

fraud would be likely to respond to queries with lies; it is incumbent upon the respondents to show that a more vigorous approach to due diligence would probably have borne fruit, and we do not see that as having been established.

162 The due diligence position with regard to the appellant's buyers was even looser (though it must be acknowledged that checking overseas companies was also much more difficult). In the case of six of them, Jai International FZE, Manner Trading Co., Vahedna Trading Company Limited, Utone Telecom (HK) Limited, Emjay Enterprises PTE Limited and Papita Trading LLC, there is no record of any checks being made. For Al Badari Trading Co. LLC, the checks were minimal and the renewal of the buyer's commercial licence was not verified; for Cell Avenue LLC, the renewal of their commercial licence again was not verified but there was a letter of introduction; Amrit FZE produced only an unconvincing letter of introduction, describing themselves as one of the largest suppliers in Dubai when they had only been established three weeks earlier.

163 However, as Notice 726 made clear and as officer Simmons also considered, a more fundamental assessment was needed than mere tick-box compliance with due diligence enquiries and it was up to each trader to deal with matters as he thought appropriate. The personal contact, trust and familiarity that Mr Purser claimed to have with almost all those he dealt with would we think, for an honest trader, enable a much more realistic assessment of the businesses it was dealing with than the largely formal series of enquiries associated with 'due diligence'. We recall that when speaking about the checks done at Capewater, which had been praised by Mr Swinden, Mr Simmons commented: "They were at their most thorough at Capewater when they were involved in a fraudulent supply chain; so far as I am concerned, the thorough checks had been tried and tested at that stage and failed, because regardless of those checks they were still able to find themselves in a fraudulent chain."

164 It must be said, however, that in regard to suppliers and buyers there was no evidence to support the taking up of references other than Mr Purser's assertion (though we accept that this may be due to the unavailability now of contemporary emails which were not kept in hard copy). In every sphere of life, the taking up of references is an important check and since the good standing of traders in a market Mr Purser knew to be tainted with fraud was important, there should have been a written record. But while it was evident that Mr Purser's record keeping generally was of the most skeletal kind, and the matter of references was no exception, our conclusion remains that he dealt in good faith with both the appellant's suppliers and buyers.

5 Reliance on HMRC

165 Considerable reliance was placed on Mr Purser's relationship with Mr Swinden who, as has been seen, was the officer who, over the years, dealt most with Mr Purser and who monitored much of the activity. The burden of the taxpayer's argument in this regard is effectively that Mr Swinden led Mr Purser to suppose that he was not in danger of being seen as culpably involved in any fraudulent chains that might exist and had done all that could be expected of him, so that in the circumstances the appellant following in those footsteps should be seen as having done all it could in the way of 'due diligence' and prudent enquiry.

166 We do not see Mr Swinden's helpful approach as estopping the commissioners in any sense from arguing that the due diligence was inadequate and should have gone further. The evidence from the period of Mr Swinden's involvement however does point to Mr Purser's good faith and genuine belief that the action he was taking regarding due diligence was adequate.

6 Payment patterns, trading terms and commerciality

167 Much was made by HMRC of the fact that none of the transactions was the subject of formal written terms, and we have

already indicated our finding in regard to that. We have accepted that 31 of the 34 deals were connected with fraud and the obvious possibility is that the fraud continued with the overseas purchasers and became circular, leading to re-import to the EU.

168 In that regard, we note first that there is no evidence at all that any of the appellant's buyers were themselves involved in fraud. There cannot be a general assumption that anyone involved in this trade at this time must have been involved in fraud, and the burden of proving it to be so is on the respondents. We come back here to the point that we have no adequate evidence of the ways in which legitimate grey market traders at this period conducted their business.

169 To speculate as to what would or could have happened in that market is merely to make an intelligent guess at the matter, and it is not appropriate for us to do so. We do not have the evidence on which we can safely conclude, even on the balance of probabilities, that the appellant's opportunities for business were "too good to be true" or that its trading pattern was "irrational"; faced with a person we regard as an honest witness, we are not in a position to conclude that his assertion, that the business he did – and still does - was fully commercial and at arm's length, is probably false. There can indeed be many different types of market at various times in various goods and it is quite possible that the appellant was dealing legitimately and normally in such a market.

170 Mr Fletcher's evidence tending to the contrary is not convincing because he is not properly an 'expert witness', being through his firm committed to a major manufacturer/distributor in the white market; and his reports are, moreover, lacking direct evidence of or experience in trading on the grey market – a market which, in principle, it is not in the interests of his firm's client to encourage. Mr Fletcher's perception of the position is thus necessarily partial and cannot directly gainsay the evidence we have heard from Mr Purser, which we have accepted. For these reasons, we see the respondents'

submissions that the appellant's trading followed an 'irrational model' as speculations which may or may not be justified, but which in this case are not sufficiently supported by the evidence.

171 The respondents' demonstration that it would be possible in certain limited circumstances to re-import goods to the EU without payment of VAT, after having exported them, does not lead to the conclusion that the appellant would have known that exporting the goods from the EU would not necessarily keep it clear, so far as its export customers were concerned, of tax fraud. Clearly, Mr Purser thought otherwise and we accept his evidence that he believed that export of the goods was a fraud-safe way of doing business as regards his non-EU business partners; indeed, it required the very deliberate researches of Crown counsel before the final adjourned hearing to establish the possibility of re-import without payment of VAT, and we cannot criticise Mr Purser for believing the position to be as the layman fairly might have expected it to be.

172 Nor do the variations in the quantities of goods as they passed to the appellant and from it, in no fewer than 14 cases out of the 34, appear at all typical of a carousel fraud in which the broker is a knowing participant; on the contrary, these variations are more likely to indicate authentic trading by a business whose sale opportunities were frequently not coincident with the quantities available from its suppliers. In that connection, Mr Purser's explanation of why his trading kept within broad financial limits is more persuasive than the speculation that his policy was to avoid larger repayment claims in order not to trigger suspicion.

173 We do not consider that the appellant's decision not to keep records of the phones' IMEI numbers necessarily points to dishonest knowledge or to a desire simply 'not to know'. There is no evidence that it was normal or usual for traders to record these numbers, and the fact that doing so was made obligatory by the commissioners in October 2006 suggests the contrary. The appellant's business was a

relatively small one and the extra cost and trouble of scanning, uploading and organising this information was understandably seen as something the skeletal staff involved could do without.

7 Languages and two pins plugs

174 The evidence that there was a certain absence of concern about the exact languages with which the handsets were equipped seems to us to show very little, bearing in mind that the trade was in the grey market with a view to export beyond Europe, and bearing in mind also the evidence that every handset was equipped with English. We are entitled to take into account as a matter of general knowledge that English is a world language, very widely understood and used in the Middle East and Asia, at any rate in its basic forms.

175 It has not been shown that the likely purchasers of goods traded in unofficial channels and without warranties, as these goods were, would have been unwilling to accept phones operable in English – or that they would have found unacceptable the need (if it arose) to use adaptors for their chargers. The assumptions that may be made with regard to the marketability of goods in, for example, the UK market cannot without more be made for what are likely to be quite different markets, and Mr Fletcher's evidence does not deal adequately with that specific issue. Mr Purser indicated, moreover, that in any event goods would often be adapted to the market they were destined for, the cost of doing so *in situ* being very much less than it would be in the UK.

8 The 'should have known' test

176 Our finding is that the appellant, through the controlling mind of Mr David Purser, was not knowingly concerned in transactions connected with VAT fraud. The final question for decision is: should the appellant, through the controlling mind of Mr David Purser, have known that the only reasonable explanation of matters was that its transactions were connected with tax fraud?

177 The principal way in which the appellant could have discovered that it was at the end of 31 or 32 chains of dealing which were connected to fraud was by discovering the existence and character of those chains. Whether or not the appellant's immediate suppliers were consciously involved in the frauds, the probability is clearly that for commercial reasons alone the information needed to establish that that *was* – not might have been – the position would not have been forthcoming; and there is the additional probability that those involved in the conspiracy would have made every effort to conceal the reality of the situation from an innocent participant.

178 It is suggested that the very fact of the goods having been imported from outside the UK and being unsuitable for the domestic market e.g. because of the two pin plugs, indicated that fraud was taking place. As Mr Simmons put it, "I personally can see no reason why two pin phones would be traded in the UK or ever enter the UK because we're a three pin country". We see this as a supposition at odds with the evidence of the grey market as an opportunity to trade across frontiers and sales territories and to undercut authorised prices or supply chains. If Dubai was acknowledged as an international trading hub, it is credible that the UK market should play a similar type of role, at least within Europe. The non-UK character of the goods does not indicate that the appellant should have seen that it was necessarily connected with fraudulent trading.

179 It is common ground that the appellant was trading, as Mr Farrell QC put it, "in shark infested waters" but it is necessary for the respondents to show more than that the appellant should have known that there was a risk of connection with fraud; that it should have known that the probability that its trading *was* so connected has not been established. The argument from possible circularity is not in our judgment supported by the evidence; there is no complete audit trail of payments to establish it, and the possibility of circularity remains no more than that.

180 Likewise, the evidence regarding the onward losses in two of the cases under appeal, the timing of the payments to and from the appellant, the variations in the deal mark-ups, the satisfactory explanation of the third party payment to the reputable 20/20 Solutions, and the significant role allowed to the appellant's obviously honest employee Mr Craker, all suggest to us that this is a case in which the objective evidence cannot lead to a finding that the appellant should have known that the only reasonable explanation of matters was that its trading was connected to fraud. Our conclusion therefore is that the appeals must be allowed in full.

Costs

181 A direction has been made pursuant to the Transfer of Functions and Revenue and Customs Appeals Order 2009 applying rule 29 of the Value Added Tax Tribunals Rules 1986 to the case as a transitional case. The effect of this direction is that costs follow the event, unless there is good reason to the contrary; we direct that the parties may within thirty days of the release of this decision make submissions on this issue and indicate whether they wish it to be the subject of a further hearing. In the light of that, we will issue a direction on the apportionment of costs.

Appeal rights

182 This document contains the 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 no 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.

Malachy Cornwell-Kelly
Tribunal judge

Release date: 21 December 2011

A P P E N D I X

MOBILE PHONES SOLD TO AND SUPPLIED BY H T PURSER IN PERIODS 06/06, 07/06 & 08/06

(Price = exclusive of VAT; Profit = approximate mark up)

Deal 1503(1)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
Tecknic	-	-	-	-
Infotel	31.05.06	Nokia 7610 x 2000	206,700	-
FoneDealers	31.05.06	Nokia 7610 x 2000	207,000	0.15
Emmen	31.05.06	Nokia 7610 x 2000	207,400	0.19
Mana Ent.	31.05.06	Nokia 7610 x 2000	208,000	0.28
New Way	31.05.06	Nokia 7610 x 1500	156,750	0.48
Purser	01.06.06	Nokia 7610 x 1500	165,000	5.20
Cell Avenue	-	-	-	-

Deal 1505(2)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
Subbuma	01.06.06	Nokia 7610 x 2014	206,132.90	-
FoneDealers	01.06.06	Nokia 7610 x 2014	206,435	0.14
Emmen	01.06.06	Nokia 7610 x 2014	206,837.80	0.19
Diginett	01.06.06	Nokia 7610 x 2014	207,442	0.29
New Way	01.06.06	Nokia 7610 x 2000	208,000	0.97
Purser	01.06.06	Nokia 7610 x 2000	220,000	5.76
Cell Avenue	-	-	-	-

Deal 1507(3)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
Crossview	01.06.06	SamD820 x 2000	262,100	-
Akorn	01.06.06	SamD820 x 2000	262,300	0.08
Connect	01.06.06	SamD820 x 2000	262,600	0.11
Maximize	01.06.06	SamD820 x 2000	263,000	0.15
Just Smooth	01.06.06	SamD820 x 2000	264,000	0.38
Lexus Tel.	01.06.06	SamD820 x 2000	266,000	0.75
Purser	02.06.06	SamD820 x 2000	280,000	5.20
Manner Trdg	-	-	-	-

Deal 1509(4)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
Teknic			177,560	
Subbuma	05.06.06	Nokia N90 x 767	177,675.55	-
FoneDealers	05.06.06	Nokia N90 x 767	177,790.60	0.06
Emmen	05.06.06	Nokia N90 x 767	177,944	0.08
Diginett	05.06.06	Nokia N90 x 767	178,711	0.43
New Way	05.06.06	Nokia N90 x 767	180,245	0.85
Purser	06.06.06	Nokia N90 x 767	190,216	5.50
Al Badari	-	-	-	-

Deal 1511(5)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
ICM	-	-	148,575	-
Subbuma	-	-	-	-
Sundial	07.06.06	Nokia 6230i x 1500	149,175	0.20
Emmen	07.06.06	Nokia 6230i x 1500	149,475	0.20
Diginett	07.06.06	Nokia 6230i x 1500	150,000	0.35
New Way	07.06.06	Nokia 6230i x 1500	151,500	1.00
Purser	07.06.06	Nokia 6230i x 1500	159,000	4.90
Al Badari	-	-	-	-

Deal 1516(6)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
Knightswood	09.06.06	Nokia 7610 x 3000	313,050	-
Fonefingz	09.06.06	Nokia 7610 x 3000	313,350	0.09
Sundial	09.06.06	Nokia 7610 x 3000	313,650	0.09
Worldwide	09.06.06	Nokia 7610 x 3000	314,100	0.14
Diginett	09.06.06	Nokia 7610 x 3000	315,000	0.28
New Way	12.06.06	Nokia 7610 x 1300	137,800	0.95
Purser	12.06.06	Nokia 7610 x 1300	145,275	5.40
Al Badari	-	-	-	-

Deal 1520(7)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
UA Dist.	*26.04.06*	*Moto V3 black x 150*	*13,372.50*	-
USM	*26.04.06*	*MOT V3 x 150*	*13,402.50*	*0.22*
FoneDealers	*26.04.06*	*Moto V3 black x 150*	*13,425*	*0.16*
Emmen	*26.04.06*	*MOT V3 x 150*	*13,455*	*0.22*
Diginett	*26.04.06*	*MOT V3 x 150*	*13,500*	*0.33*
New Way	*07.06.06*	*Moto V3 black x 150*	*12,000*	*-11.10*
Purser	*13.06.06*	*Moto V3 black x 150*	*11,550*	*-3.70*
Papita	-	-	-	-

Deal 1520(8)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
ICM	06.06.06	SE W8 10i x 499	85,653.35	-
Subbuma	06.06.06	SE W8 10i x 499	85,902.85	-
FoneDealers	06.06.06	SE W8 10i x 499	85,977.70	0.08
Emmen	06.06.06	SE W8 10i x 499	86,077.50	0.11
Diginett	06.06.06	SE W8 10i x 499	86,327	0.28
New Way	07.06.06	SE W8 10i x 300	52,200	0.57
Purser	13.06.06	SE W8 10i x 300	48,900	-0.57
Papita	-	-	-	-

Deal 1528(9)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
R S Sales	21.06.06	Nokia 7610 x 1750	180,425	-
Highbeam	21.06.06	Nokia 7610 x 1750	181,300	0.48
Mana	21.06.06	Nokia 7610 x 850	88,400	0.38
New Way	21.06.06	Nokia 7610 x 850	90,950	2.80
Purser	22.06.06	Nokia 7610 x 850	96,050	5.60
Emjay	-	-	-	-

Deal 1534(10)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
J D Telecom	27.06.06	Nokia N70 x 370	60,254.50	-
Atlantic	27.06.06	Nokia N70 x 370	60,328.50	0.12
A W Assoc.	27.06.06	Nokia N70 x 370	60,421	0.15
Maximize	27.06.06	Nokia N70 x 370	60,495	0.12
Linkup	27.06.06	Nokia N70 x 370	60,680	0.30
Lexus	27.06.06	Nokia N70 x 370	61,420	1.20
Purser	27.06.06	Nokia N70 x 370	65,120	6.00
Emjay	-	-	-	-

Deal 1534(11)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
J D Telecom	27.06.06	Nokia 6630 x 500	48,425	-
Atlantic	27.06.06	Nokia 6630 x 500	48,525	0.20
A W Assoc.	27.06.06	Nokia 6630 x 500	48,650	0.25
Maximize	27.06.06	Nokia 6630 x 500	48,750	0.20
Linkup	27.06.06	Nokia 6630 x 500	49,000	0.51
Lexus	27.06.06	Nokia 6630 x 500	49,750	1.50
Purser	27.06.06	Nokia 6630 x 500	52,750	6.00
Emjay	-	-	-	-

Deal 1535(12)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
R S Sales	28.06.06	Nokia N70 x 1000	163,300	-
Highbeam	28.06.06	Nokia N70 x 1000	163,800	0.30
Mana	28.06.06	Nokia N70 x 1000	165,000	0.73
New Way	28.06.06	Nokia N70 x 300	49,800	0.60
Purser	29.06.06	Nokia N70 x 300	52,800	6.00
Al Badari	-	-	-	-

Deal 1537(13)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
R S Sales	29.06.06	Nokia 6680 x 3000	397,200	-
V2	29.06.06	Nokia 6680 x 3000	398,700	0.37
Mana	29.06.06	Nokia 6680 x 3000	402,000	0.82
New Way	30.06.06	Nokia 6680 x 2000	269,000	0.37
Purser	30.06.06	Nokia 6680 x 1000	141,000	4.80
Al Badari	-	-	-	-

Deal 1538(14)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
R S Sales	29.06.06	Nokia 6680 x 3000	397,200	-
V2	29.06.06	Nokia 6680 x 3000	398,700	0.37
Mana	29.06.06	Nokia 6680 x 3000	402,000	0.82
New Way	30.06.06	Nokia 6680 x 2000	269,000	0.37
Purser	30.06.06	Nokia 6680 x 1000	141,000	4.80
Al Badari	-	-	-	-

Deal 1539(15)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
R S Sales	29.06.06	Nokia 6680 x 2000	264,800	-
Highbeam	29.06.06	Nokia 6680 x 2000	265,800	0.37
Mana	29.06.06	Nokia 6680 x 2000	268,000	0.82
New Way	29.06.06	Nokia 6680 x 1000	134,500	0.37
Purser	30.06.06	Nokia 6680 x 1000	141,000	4.80
Utone Tel	-	-	-	-

Deal 1541(16)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
J D Telecom	30.06.06	Samsung D600 x 1405	178,926.75	-
Atlantic	30.06.06	Samsung D600 x 1405	179,207.75	0.15
A W Assoc	03.07.06	Samsung D600 x 1405	179,559	0.19
Emmen	03.07.06	Samsung D600 x 1405	179,840	0.15
E-Tel UK	03.07.06	Samsung D600 x 1405	180,542.50	0.30
Lexus	03.07.06	Samsung D600 x 905	117,197.50	0.70
Purser	04.07.06	Samsung D600 x 905	123,080	5.00
JAI	-	-	-	-

Deal 1543(17)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
Vision Soft	07.07.06	Nokia N70 x 280	45,337.60	-
All Name	07.07.06	Nokia N70 x 280	45,407.60	0.15
Regal	07.07.06	Nokia N70 x 280	45,920	1.10
Linkup	07.07.06	Nokia N70 x 280	46,200	0.60
Lexus	07.07.06	Nokia N70 x 280	46,760	1.20
Purser	07.07.06	Nokia N70 x 280	49,280	5.30
Emjay	-	-	-	-

Deal 1543(18)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
Vision Soft	07.07.06	Nokia 6630 x 200	19,270	-
All Name	07.07.06	Nokia 6630 x 200	19,320	0.50
Regal	07.07.06	Nokia 6630 x 200	19,500	0.60
Linkup	07.07.06	Nokia 6630 x 200	19,700	1.00
Lexus	07.07.06	Nokia 6630 x 200	19,900	1.00
Purser	07.07.06	Nokia 6630 x 200	??????	6.00
Emjay	-	-	-	-

Deal 1546(19)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
Knightswood	08.06.06	Nokia 6111 x 1000	120,100	-
Fonefingz	09.06.06	Nokia 6111 x 1000	120,200	-
Sundial	08.06.06	Nokia 6111 x 1000	120,300	-
Emmen	08.06.06	Nokia 6111 x 1000	120,500	0.10
Priceways	08.06.06	Nokia 6111 x 1000	121,000	0.40
New Way	10.07.06	Nokia 6111 x 840	74,760	-
Purser	11.07.06	Nokia 6111 x 840	78,540	5.00
Amrit	-	-	-	-

Deal 1549(20)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
Vision Soft	10.07.06	Nokia 6630TIM x 1000	95,180	-
All Name	10.07.06	Nokia 6630 x 1000	95,430	0.20
Regal	11.07.06	Nokia 6630TIM x 1000	96,000	0.50
E-Tel UK	11.07.06	Nokia 6630 x 1000	97,000	1.00
Lexus	14.07.06	Nokia 6630 x 1000	99,000	2.00
Purser	14.07.06	Nokia 6630 x 1000	103,000	4.00
Emjay	-	-	-	-

Deal 1552(21)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
Phone City	18.07.06	Nokia 6630 x 297	28,413.99	-
All Name	18.07.06	Nokia 6630 TIM x 297	28,488.24	0.20
Regal	18.07.06	Nokia 6630 TIM x 297	28,660.50	0.60
E-Tel	18.07.06	Nokia 6630 x 297	28,957.50	1.00
Lexus	18.07.06	Nokia 6630 x 297	29,403	1.50
Purser	18.07.06	Nokia 6630 x 297	30,888	5.00
Utone	-	-	-	-

Deal 1553(22)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
Phone City	18.07.06	Nokia 6233 x 1500	225,900	-
All Name	18.07.06	Nokia 6233 x 1500	226,275	0.10
Regal	18.07.06	Nokia 6233 x 1500	228,750	1.00
Just Smooth	18.07.06	Nokia 6233 x 1500	229,500	0.30
Lexus	18.07.06	Nokia 6233 x 1500	231,000	0.60
Purser	18.07.06	Nokia 6233 x 1500	243,000	4.70
JAI	-	-	-	-

Deal 1555(23)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
Phone City	25.07.06	Nokia N70 x 200	33,092	-
All Name	25.07.06	Nokia N70 x 200	33,142	0.15
Regal	25.07.06	Nokia N70 x 200	33,500	1.08
E-Tel	25.07.06	Nokia N70 x 200	33,600	0.29
Lexus	25.07.06	Nokia N70 x 200	33,800	0.60
Purser	25.07.06	Nokia N70 x 200	35,400	4.70
Emjay	-	-	-	-

Deal 1555(24)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
Phone City	25.07.06	Nokia 6630 x 388	37,899.84	-
All Name	25.07.06	Nokia 6630 TIM x 388	37,996.84	0.20
Regal	25.07.06	Nokia 6630 TIM x 388	38,218	0.50
E-Tel	25.07.06	Nokia 6630 x 388	38,412	0.50
Lexus	25.07.06	Nokia 6630 x 388	38,800	1.00
Purser	25.07.06	Nokia 6630 x 388	39,964	3.00
Emjay	-	-	-	-

Deal 1558(25)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
Bluestar	28.07.06	Nokia N70 x 499	79,840	-
Highbeam	28.07.06	Nokia N70 x 499	80,089.50	-
Mana	28.07.06	Nokia N70 x 499	80,588.50	0.60
Top Tel.	28.07.06	Nokia N70 x 499	80,838	0.30
Purser	28.07.06	Nokia N70 x 499	85,578.50	5.80
Amrit	-	-	-	-

Deal 1559(26)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
E T Phones	31.07.06	Nokia N80 x 1500	375,855	-
All Name	31.07.06	Nokia N80 x 1500	376,230	0.10
Regal	31.07.06	Nokia N80 x 1500	381,750	1.40
Just Smooth	31.07.06	Nokia N80 x 1500	382,500	0.20
Lexus	31.07.06	Nokia N80 x 1000	256,000	0.40
Purser	31.07.06	Nokia N80 x 1000	267,000	4.20
JAI	-	-	-	-

Deal 1560(27)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
E T Phones	01.08.06	SE K750i x 2000	203,200	-
Cirex	01.08.06	SE K750i x 2000	203,600	-
Data Sols.	01.08.06	SE K750i x 2000	204,000	-
Topbrandz	01.08.06	SE K750i x 2000	204,500	-
Princeways	01.08.06	SE K750i x 2000	205,000	-
Top Tel.	01.08.06	SE K750i x 2000	206,000	0.40
Purser	01.08.06	SE K750i x 2000	218,000	5.80
Amrit	-	-	-	-

Deal 1563(28)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
E T Phones	02.08.06	Nokia N70 x 1000	170,600	-
Cirex	02.08.06	Nokia N70 x 1000	170,800	-
Data Sols.	02.08.06	Nokia N70 x 1000	171,000	-
Topbrandz	02.08.06	Nokia N70 x 1000	171,250	-
Diginett	02.08.06	Nokia N70 x 1000	171,750	-
Top Tel.	02.08.06	Nokia N70 x 1000	172,500	0.40
Purser	02.08.06	Nokia N70 x 1000	181,000	4.90
Cell Avenue	-	-	-	-

Deal 1564(29)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
Bluestar	02.08.06	Nokia 6230i x 1000	99,000	-
Highbeam	02.08.06	Nokia 6230i x 1000	99,500	-
Mana	02.08.06	Nokia 6230i x 1000	100,000	0.50
New Way	03.08.06	Nokia 6230i x 670	67,335	0.50
Purser	03.08.06	Nokia 6230i x 670	70,350	4.40
Papita	-	-	-	-

Deal 1565(30)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
Kaymore	03.08.06	Nokia N70 x 498	84,435.90	-
SimplyConnect	02.08.06	Nokia N70 x 498	84,460.80	0.02
Imang	02.08.06	Nokia N70 x 498	84,485.70	0.02
Ultimate	02.08.09	Nokia N70 x 498	84,535.50	0.05
Bluestar	02.08.06	Nokia N70 x 498	84,660	0.14
New Order	03.08.06	Nokia N70 x 498	85,158	0.60
New Way	02.08.06	Nokia N70 x 498	86,154	1.10
Purser	03.08.06	Nokia N70 x 498	90,138	4.60
Vahedna	-	-	-	-

Deal 1565(31)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
Jeck-Link	03.08.06	Nokia 6630 x 343	32,334.61	-
All Name	03.08.06	Nokia 6630 x 343	32,420.36	0.20
Regal	03.08.06	Nokia 6630 x 343	32,585	0.50
Fortune	03.08.06	Nokia 6630 x 343	32,928	1.00
Lexus	03.08.06	Nokia 6630 x 343	33,614	2.00
Purser	03.08.06	Nokia 6630 x 343	35,157.50	4.50
Vahedna	-	-	-	-

Deal 1569(32)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
Highbeam	*04.08.06*	*Nokia 7610 x 3000*	*306,900*	-
Mana	*04.08.06*	*Nokia 7610 x 3000*	*308,400*	*0.50*
Top Tel.	*04.08.06*	*Nokia 7610 x 1500*	*155,400*	-
Purser	*04.08.06*	*Nokia 7610 x 1500*	*164,250*	*5.60*
Amrit	-	-	-	-

Deal 1570(33)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
Highbeam	*07.08.06*	*Nokia 7610 x 2000*	*208,000*	-
Mana	*07.08.06*	*Nokia 7610 x 2000*	*209,000*	*0.86*
Top Tel.	*07.08.06*	*Nokia 7610 x 2000*	*212,000*	*1.50*
Purser	*07.08.06*	*Nokia 7610 x 2000*	*224,000*	*5.60*
Cell Avenue	-	-	-	-

Deal 1575(34)

Seller	*Invoice*	*Goods*	*Price*	*Profit*
Cybersol	09.08.06	Sam E900 x 1000	136,420	-
All Name	09.08.06	Sam E900 x 1000	136,670	0.18
Regal	09.08.06	Sam E900 x 1000	138,000	1.00
Just Smooth	09.08.06	Sam E900 x 1000	138,500	0.36
Lexus	09.08.06	Sam E900 x 1000	140,000	1.00
Purser	09.08.06	Sam E900 x 1000	147,000	5.00
Manner Tdg	-	-	-	-