TC03106

Appeal number: LON/2008/00499 & LON/2009/00481

VAT – MTIC – Whether transactions connected with fraudulent evasion of VAT – Yes – whether appellant should have known this – Yes – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GURMINDER RATTAN (trading as "Susvin2") **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT
SONIA GABLE

Sitting in public at Royal Courts of Justice, The Strand, London on 11 March 2013

Having heard Mr Rattan, the Appellant and Mr Simon Baker, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction and Preliminary Matters

1. This case concerned two joined appeals namely LON/2008/0499 ("Appeal 1") and LON/2008/0481 ("Appeal 2"). These were appeals against the refusal by the Respondents ("HMRC") to make repayments of input tax of £343,350.00 in Appeal 1 and £819,000 and £942,812.50 for Appeal 2. Appeal 1 related to the VAT period 07/06 and Appeal 2 related to the VAT periods 10/06 and 01/07 respectively. The total value of the repayment claims is £2,105,162.50. The relevant decisions were issued on 16 January and 21 April 2008.

2. The hearing of these appeals was listed to take place between 11 and 26 March 2013. Mr Rattan was represented by Mr Imran Khan in a very late application to adjourn the final hearing of these appeals. That was dealt with as a preliminary matter. Only weeks before, Mr Rattan had sought a postponement of the hearing and, in Directions issued on 22 September 2013, that had been refused. Mr Khan was not retained for the substantive hearing and he departed when the Tribunal withdrew to consider the decision on the application. The Tribunal decided that the application should be refused and that the substantive hearing should proceed. The full written decision on that application (the adjournment decision) is annexed hereto at Appendix 1.

3. Mr Rattan was advised orally that his application had been unsuccessful. He was not given the full reasons for the failure of his application. He was simply told that it turned on the particular facts found by the Tribunal and two salient points were drawn to his attention. Firstly, his core argument for the adjournment was that he had not known until very recently that his then agents ("CTM") had allegedly failed to represent him appropriately yet his own production GR/8 was a letter from the Tribunal sent to CTM pointing to the failure to co-operate. Crucially that letter, dated 15 May 2012, had been copied to him. Therefore, the Tribunal did not accept that he had been unaware of an alleged failure to prepare for the appeal. Secondly, he had stated at paragraph 10 of his witness statement, in support of the application, that he had had no idea that his appeal had previously been struck out. However, he had retained CTM to act in the reinstatement and argue his position before Judge Wallace in 2009. The detail of the other inconsistencies, which led the Tribunal to doubt his credibility, and therefore the basis for the application, was not intimated to him.

4. The Tribunal told him that the substantive hearing would commence. At that stage he was no longer represented.

5. Mr Rattan made a short statement and, in the course of that, he chose to tell the Tribunal that, although he now knew that the transactions had been connected with the fraudulent evasion of VAT, he had not known so at the time and could not have known so. He stated that he wished to seek legal advice about how to proceed and requested that the hearing be adjourned until the following day. Mr Baker readily agreed. The Tribunal, and he, agreed that there was provision within the scheduled hearing days for reading days so the adjournment would be treated as such.

6. Mr Rattan had attended the adjournment application but he had declined to give evidence. Nevertheless he had heard all of the arguments for both parties. One of those arguments had concerned the question as to precisely which issues would fall to be considered by the Tribunal in the substantive hearing. HMRC had stressed that, notwithstanding Mr Khan's arguments about the work that would have to be done to prepare for a hearing, the issues were in fact limited to whether Mr Rattan knew or ought to have known that these transactions were connected with the fraudulent evasion of Value Added Tax ("VAT"). HMRC argued that although at the outset, the Notice of Issues had amounted to little more than putting HMRC to proof of all issues CTM had subsequently conceded each and every fraudulent tax loss identified by the Commissioner. There was some debate about whether or not CTM had had the authority to make the concessions and Mr Baker had indicated that although he could not make Mr Rattan give evidence, he would have liked to have had the opportunity to ask him about that.

7. It was presumably in response to that, that Mr Rattan decided to clarify that although he now knew that his transactions were connected with MTIC fraud he had not and could not have known that at the time.

8. The following day, 12 March 2013, Mr Baker advised the Tribunal that Mr Rattan, who was present, had intimated to him that he wished the hearing to proceed in his absence. He had no wish to take part in the process. The Tribunal then explained to Mr Rattan that since, on the previous day, he had intimated that the primary issue was whether he knew, or ought to have known, whether the transactions were fraudulent then his evidence could be absolutely crucial since he would be the best person to speak to what his own state of mind had been at the relevant time. It was explained to him, in layman's terms, that the Tribunal was well accustomed to hearing from appellants who were unrepresented. He would be afforded every assistance in making it possible for him to explain how he had become involved in these transactions, to explain his state of knowledge or thought processes and motives at each and any stage and to explain what he had done when, and with what motive.

9. He was told that unlike Court proceedings, with which he was familiar, the Tribunal acted inquisitorially. In other words, the Tribunal itself would ask questions to assist him. He was assured that, although the Tribunal was in very formal surroundings, every effort would be made to make it as easy as possible for him and to ensure that he could participate fully in the proceedings. Mr Baker helpfully agreed that the proceedings could continue on that basis and in an informal fashion. Rule 2 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") and its implications were explained to Mr Rattan. Mr Rattan declined to remain and simply stated that he felt that he was being denied justice because he wanted to obtain further evidence, he did not have legal representation and therefore he could not participate fully. He left the hearing.

10. Mr Baker requested that the hearing proceed in the absence of Mr Rattan. The Tribunal had due regard to Rules 33 and 2 of the Rules. Mr Rattan had had very fair notice of the Hearing, and of the high likelihood, identified by Judge Sinfield, that he would be very unlikely to obtain representation. Further, as had been noted in the

hearing on the adjournment, as long ago as 2009, Judge Wallace had been told by CTM that the only way that Mr Rattan would be able to get representation would be on a contingency basis. For all of the reasons set out in the adjournment decision, which are adopted and deemed to be incorporated herein, the Tribunal decided that it was in the interests of justice to proceed to determine the appeals.

The Hearing

11. The bundles, in numerous lever arch files, which had been produced to the Tribunal and Mr Rattan, included the witness statements with the exhibits thereto and those are detailed at Appendix 2.

12. Prior to the compilation of his own witness statement, Mr Rattan had had sight of, and the opportunity to discuss with CTM, all of these save the second, third and fourth witness statements of Officer Danson with their exhibits. The second statement was produced in response to Mr Rattan's own witness statement, the third clarified some issues in the first statement and corrected a number of points and the last expanded on the information available about banking arrangements. Mr Khan had argued that there was a requirement to access banking information so the Tribunal found that it was more likely than not that these further witness statements had been considered prior to the adjournment application. In the context of the totality of the evidence, these supplementary statements were by no means extensive or detailed.

13. Both the Tribunal, and Mr Baker, made it explicit that it was appropriate at all times to conduct the hearing, and therefore to identify matters, in such a manner that any issues that could, or should, have been raised by Mr Rattan (or by a representative on his behalf) were addressed.

14. The Tribunal had had the opportunity to read some considerable part of the bundles during the adjournment. The Tribunal required clarification on a number of matters and therefore decided that it was appropriate to hear oral evidence from Officer Danson and Officer Morehead. As an example, that is why Officer Morehead was asked to give evidence. It is why he was asked about the freight forwarders 1st Freight Limited ("1st Freight") and, in particular, whether, in his opinion, there was anything Mr Rattan could have found easily that suggested that they were not all they seemed. (For the record, the response was that if Mr Rattan had visited the premises, which he did not, he should have realised that they could not physically manage to do that which they purported to do.)

15. It was decided that there was no requirement to hear oral evidence from anyone else and those other statements had not been challenged. The only other possible challenge had been to the evidence of Mr Stone and, for the reasons set out in the adjournment decision, there was no requirement to hear from Mr Stone. Accordingly, the other witness statements (and relative exhibits) were taken as read and we have found our facts accordingly as noted below.

The legislation and case law

16. The legal framework and relevant legal principles underpinning this appeal were as set out in HMRC's Skeleton Argument dated 13 February 2012. Neither CTM nor Mr Khan has challenged that and Mr Rattan has had fair notice thereof. Latterly, Mr Rattan was unrepresented, and the law in this area is extensive, technical, and, according to Mr Khan, in the adjournment application, outwith the range of lawyers who are non-specialists. Therefore, whether or not we agree with Mr Khan, we decided that it is more appropriate, in general, to cite the relevant legislation and case law in Appendix 3, together with most of our observations and conclusions thereon. In this decision, in order to make it more comprehensible, we have deliberately tried to refer to the law in terms that attempt to avoid a "legal" style and language, other than in the last paragraph. We have referred to the cases by the abbreviations set out in Appendix 3.

MTIC Fraud

17. Although Mr Rattan conceded at paragraph 46 in his witness statement "I understood missing trader fraud in general terms…" it is appropriate to summarise precisely what is involved.

18. There are two main versions of MTIC fraud, namely the so-called "classic" variety and the "contra-trading" variety. We are dealing with both in these appeals. The judgment of Christopher Clarke J in *Red 12* at paragraphs 2-6 sets out in plain English the overview of the classic variety of the fraud:

> "2. The classic way in which the fraud works is as follows. Trader A imports goods, commonly computer chips and mobile telephones, into the United Kingdom from the European Union ("EU"). Such an importation does not require the importer to pay any VAT on the goods. A then sells the goods to B, charging VAT on the transaction. B pays the VAT to A, for which A is bound to account to HMRC. There are then a series of sales from B to C to D to E (or more). These sales are accounted for in the ordinary way. Thus C will pay B an amount which includes VAT. B will account to HMRC for the VAT it has received from C, but will claim to deduct (as an input tax) the output tax that A has charged to B. The same will happen, *mutatis mutandis*, as between C and D. The company at the end of the chain – E – will then export the goods to a purchaser in the EU. Exports are zero-rated for tax purposes, so Trader E will receive no VAT. He will have paid input tax but because the goods have been exported he is entitled to claim it back from HMRC. The chains in question may be quite long. The deals giving rise to them may be effected within a single day. Often none of the traders themselves take delivery of the goods which are held by freight forwarders.
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> 3. The way that the fraud works is that A, the importer, goes missing. It does not account to HMRC for the tax paid to it by B. When HMRC tries to obtain the tax from A it can neither find A nor any of A's documents. In an alternative version of the fraud (which can take several forms) the fraudster uses

the VAT registration details of a genuine and innocent trader, who never sees the tax on the sale to B, with which the fraudster makes off. The effect of A not accounting for the tax to HMRC means that HMRC does not receive the tax that it should. The effect of the exportation at the end of the chain is that HMRC pays out a sum, which represents the total sum of the VAT payable down the chain, without having received the major part of the overall VAT due, namely the amount due on the first intra-UK transaction between A and B. This amount is a profit to the fraudsters and a loss to the Revenue....

5. A jargon has developed to describe the participants in the fraud. The importer is known as "the defaulter". The intermediate traders between the defaulter and the exporter are known as "buffers" because they serve to hide the link between the importer and the exporter, and are often numbered "buffer 1, buffer 2" etc. The company which exports the goods is known as the "broker".

6. The manner in which the proceeds of the fraud are shared (if they are) is known only by those who are parties to it. It may be that A takes all the profit or shares it with one or more of those in the chain, typically the broker. Alternatively the others in the chain may only earn a modest profit from a mark-up on the intervening transactions. The fact that there are a series of sales in a chain does not necessarily mean that everyone in the chain is party to the fraud. Some of the members of the chain may be innocent traders."

19. He goes on to explain contra trading in paragraph 7:-

"7. '….Another variant is called 'contra trading'…… Goods are sold in a chain ('the dirty chain') through one or more buffer companies to (in the end) the broker ('Broker 1') which exports them, thus generating a claim for repayment. Broker 1 then acquires (actually or purportedly) goods, not necessarily of the same type, but of equivalent value from an EU trader and sells them, usually through one or more buffer companies, to Broker 2 in the UK for a mark-up. The effect is that Broker 1 has no claim for repayment of input VAT on the sale to it under the dirty chain, because any such claim is matched by the VAT accountable to HMRC in respect of the sale to UK Broker 2. On the contrary a small sum may be due to HMRC from Broker 1. The suspicions of HMRC are, by this means, hopefully not aroused. Broker 2 then exports the goods and claims back the total VAT. The overall effect is the same as in the classic version of the fraud; but the exercise has the effect that the party claiming the repayment is not Broker 1 but Broker 2, who is, apparently, part of a chain without a missing trader ('the clean chain'). Broker 2 is party to the fraud."

20. For simplicity, and in the interests of consistency, without prejudging the issues, we adopt the same terminology of "defaulter(s)", "buffer(s)", "broker(s)" and "EU trader(s)".

Overview

21. HMRC's case is that the transactions underlying the two appeals are nine transactions in mobile telephones.

22. Appeal 1, which involves three transactions in mobile telephones in period 07/06, is alleged to involve "contra trading" and they argue that the chains can be traced back to defaulters.

23. Appeal 2, which involves three transactions in each of periods 10/06 and 01/07, is alleged to be a classic MTIC fraud and it is argued that all six transactions can be traced directly back to two defaulting traders.

24. Mr Rattan started trading as Susvin2 in August 1999 and was registered for VAT on 19 November 1999 under VAT Registration Number 943 8844 00. He was the sole proprietor and signed the application form which stated that the principal place of business was 66A Upper Tooting Road, Tooting, London SW17 7PB and the main business activity was "cellular top up vouchers and international calling card retail sales". The application made it explicit that he did not anticipate purchasing from or selling to other EU countries and he did not expect to be a repayment trader. His turnover was estimated to be in the region of £100,000 per annum. In a letter dated 15 February 2006, he stated that his business was trading mobile phones, SIM cards and International Phone Cards.

25. There was a sudden and dramatic variation in the output and input tax claimed in the VAT periods 04/06 to 01/07 which is wholly inconsistent with the trading history before and since. The overwhelming majority of the input tax in those periods relates to transactions in various mobile phones and coincides with the periods when MTIC trading is alleged to have occurred.

26. As we indicate above, Mr Rattan concedes that he now knows that the transactions were connected with VAT, and specifically MTIC, fraud but that he did not and could not have known that at the time.

The Issues

The first issue

27. Given Mr Rattan's concession, there has been no challenge to the evidence submitted by HMRC relating to the alleged fraudulent evasion of VAT. However, we take the view that since Mr Rattan was unrepresented, it remained necessary for the Tribunal to decide whether or not the evidence before us was sufficient to lead to the conclusion adduced by HMRC, namely that there had been a loss of tax.

The second issue

28. This follows from the first issue and it is for HMRC to establish whether there is sufficient evidence to establish that the loss of tax was the result of fraudulent evasion.

The third issue

29. Mr Rattan has conceded that the transactions were connected with MTIC fraud

30. Accordingly the sole remaining issue is whether Mr Rattan knew or had the means to know that the transactions with which he was involved were connected with the fraudulent evasion of VAT.

Proof and evidence

31. The burden of proof, which is on the balance of probabilities, is on HMRC. The primary question is whether Mr Rattan knew or should have known that, by his purchases, he was participating in a transaction connected with the fraudulent evasion of VAT (see *Kittel* at paragraph 59). HMRC accepted that it was not enough for them to show that Mr Rattan was aware of the risk of VAT fraud but that he should have known, or be deemed to have known, that the transactions were connected to VAT fraud. We find that Mr Rattan was aware of MTIC fraud: he concedes that.

32. We accept that Mr Rattan could not have had access to the information of the type and extent subsequently discovered by HMRC. The test is whether he should, or could, have known that any, or all, of the nine transactions, which are in issue, were connected to VAT fraud, even although we accept that it is unlikely that, in any circumstances, he could have known the full details of that fraud.

33. Fraud is often difficult to detect and to establish. Connection with fraud can take a variety of forms. In the absence of direct evidence, a Tribunal must weigh the facts and circumstances presented to it and draw inferences in one way or the other. It is well established that we are entitled to rely on inferences drawn from the primary facts. We must be careful as to how we do so. It is clear that we should not unduly focus on whether a trader has acted with due diligence but we must consider the totality of the evidence (see *Mobilx* at paragraph 83). Constructive knowledge can take a variety of forms including turning a blind eye to the obvious (see *Mobilx* at paragraphs 61, 82, and 84).

34. A key question for the Tribunal is quite simply:- What conclusion should Mr Rattan have drawn from the circumstances of the transactions? The reason for that is that if the circumstances, which are found to be proved, show that the only reasonable explanation was that the transactions were tainted with fraud and therefore that that would have conveyed a knowledge of fraud to any reasonable person, then the Tribunal would have to find that Mr Rattan had either actual or deemed knowledge of the fraud.

35. What are the circumstances of the transactions? Of course, the starting point is the transactions and those are reflected in the VAT returns. The transactions are well described in what HMRC refer to as the “deals” and the “deal chains”. We adopt that terminology.

The VAT returns and deal chains

Appeal 1

The Return for the 07/06 Period

36. The return for the 07/06 period was received by HMRC on 7 August 2006. The return identified the output tax figure as £1,687.69 and the input tax figure as £348,462.11 and therefore a repayment of £346,774.42 was sought.

37. The overwhelming majority of the input tax claimed (£343,350 which equates to 98.53% of the total input tax claimed) can be attributed to three specific deals relating to mobile telephones:

Deal	Date	Supplier	Product	Mark-up on re sale	Input Tax
1	25.7.06	Trimax	3000 x Nokia N91	7%	£162,750
2	19.7.06	Trimax	1500 x Nokia 8800	7%	£112,875
3	21.7.06	Trimax	900 x Nokia 8800	7%	£67,725

38. Each of the three deals in appeal 1 involve Susvin2 in acquiring Nokia mobile telephones of various specifications from Trimax Trading International Ltd ("Trimax") and then exporting the telephones to Agrupacion De Alimentos Mediterrraneos ("Alimed"), an EU trader based in Spain. Trimax had purchased the telephones in question from Famecraft Ltd (trading as Bristol Cash & Carry) ("Famecraft"), a trader who imported the goods from the EU trader, Sinderby Enterprises Ltd (Cyprus) ("Sinderby").

39. Famecraft was the defaulter and contra-trader, Trimax was the buffer, Alimed the EU trader and Mr Rattan one of three brokers. In each deal precisely the total number of telephones bought by the defaulter, were sold to buffer who in turn sold them all to the brokers who sold all of them to the same EU trader.

Famecraft and Contra trading

40. HMRC argued that Famecraft is a well-known fraudulent contra-trader and has been found to have so acted in a substantial number of other appeals before this Tribunal. HMRC drew the attention of the Tribunal to the following decided cases in which factual findings had been made that Famecraft was a fraudulent contra-trader *DI & GI, Maximum, Active, Davis and JJ Wholesale.* In addition, HMRC pointed out that a number of the other parties identified in these appeals have been found by other Tribunal decisions to have acted fraudulently in MTIC frauds. Every Tribunal comes to its conclusions on the evidence in front of it. The Tribunal has great latitude in what it can admit as evidence but evidence comprising the findings of another Tribunal, rather than the evidence which caused them to reach those findings, is unlikely to be of any great probative weight in any other Tribunal hearing. We have come to our conclusions based on the evidence in front of us having assessed same.

42. We note that it was only in June and July 2006 that Famecraft moved without any experience into the wholesale import of mobile telephones. This was a trade in which those running Famecraft had no experience. Those mobile phones were purchased from Sinderby, based in Cyprus, with whom it had no trading history whatsoever. All 5,400 telephones bought and sold by Mr Rattan, and which can be traced to the allegedly fraudulent tax losses, were traded through Famecraft.

43. We accept the evidence from International Mutual Assistance, in the report dated 17 April 2007, which discloses that Sinderby traded only between 22 June 2006 and 31 July 2006, and the declared sales matched almost exactly the declared purchases and values. Accordingly there was no *bona fide* profit. Further the only supplier to Sinderby was Scorpion Electronics LDA ("Scorpion") and the only customer was Famecraft. The goods traded never entered Cyprus and there were no business premises in Cyprus. We note that as far as Scorpion is concerned, although the company is based in Portugal the sole partner is a Spanish citizen residing in Spain. The authorities could not contact him, the head office corresponded to a house where he had resided when he created the firm and although there was a rented office in Faro there was no warehouse or other premises to receive goods. No goods ever came to Portugal and there was no transport documentation.

44. Mr Rattan has now conceded that Famecraft was acting fraudulently and CTM had conceded in the Notice of Issues dated 11 March 2011 that the fraudulent tax loss had been proved including within the contra chains. However, CTM had taken issue with whether Famecraft was acting fraudulently in the contra chains. Since Mr Rattan was unrepresented, it is appropriate to be very clear as to our findings on this matter.

45. Specifically, as far as the contra trading is concerned, we have given detailed consideration to the witness statements of Officers Peter Cameron Watson and Susan Okolo relating to Famecraft. They both conclusively establish the contrived nature of the trade in razor blades. The former relates to the periods 05/06 but the latter covers both 05/06 and 08/06. We accept their evidence. HMRC have produced details of Famecraft's deal chains in the periods 05/06 and 08/06. Famecraft's activities were considered in some detail in *JJ Wholesale* where the evidence of the same officers was considered in regard to Famecraft. We adopt the extensive Findings in Fact thereon set out at paragraph 66. Paragraphs 67 and 68 set out the reasoning of the Tribunal based thereupon and we record that at Appendix 3. We agree with and adopt that reasoning.

46. We find that HMRC have established that the three deals in Appeal 1 were part of an MTIC fraud. The transactions were traced via Famecraft, acting as a contra-trader to Barato Limited ("Barato"). Barato operated as a defaulter in that it disappeared and failed to account for VAT in the sum of £22,900,000 (see paragraph 48 below).

47. On the evidence before us, we find that Famecraft's 148 deals in 05/06 can be traced back to Barato who in turn purchased from Leeming Distribution Limited ("Leeming") who was the defaulting trader.

48. The VAT registration for Leeming was cancelled on 13 July 2006 and on 8 September 2006 a VAT assessment in the sum of £15,274,236 was issued. It has not been paid so there is a clear loss of tax.

49. Famecraft's 149 deals in 08/06 as a broker trader are equally clearly linked to Barato. Gillette razor blades were involved in 131 and rechargeable toothbrushes in 18 deals. Famecraft sold the goods to Agrupacion Iberica de Ultramar SA ("Agrupacion") during the period 08/06.

We note in that regard that the director of Agrupacion is also the director of Alimed and the business premises are the same. We also note that all deliveries in 08/06 were made to GR Distribution France and that is precisely where the export documentation shows that the deliveries in Appeal 1 were allegedly made. We accept the evidence from International Mutual Assistance which states that "We have vainly tried to clarify their business justification so far" and "GR Distribution is highly suspected to be a buffer company, that has never carried out any actual business".

50. As far as the contra defaulter Barato is concerned we considered and accepted the witness statement and exhibits of Officer Mark Hughes. Barato has an outstanding VAT assessment in the sum of £22,967,287. That has not been paid. There is a clear loss of tax. Barato was compulsorily deregistered (because of suspected MTIC involvement) on 25 October 2006.

51. We agree with the Findings in Fact at paragraph 73 in *JJ Wholesale* and agree and adopt the conclusion at paragraph 74 that the VAT losses incurred by Barato in August 2006 were occasioned by fraud.

52. Therefore, we accept the evidence that Famecraft who acted as the UK acquirer of all of the telephones in Appeal 1 was acting as a contra-trader in the 08/06 period and setting off their VAT liability from the chains in this appeal against VAT which they had paid in a series of deal chains where they had acted as exporting broker in chains which led back to a fraudulent default.

Alimed

53. We accept the evidence from the two reports provided by the Spanish tax authorities dated 3 July 2007 and 20 December 2007 respectively. Those both conclude that Alimed took part in a VAT carousel fraud scheme within the mobile phone sector. It acted as a conduit company located in a different member State than that of the initial supplier and the end recipient of the goods so the goods never entered Spanish territory. Whilst we do not have the detailed evidence underpinning that conclusion it is an interesting adminicle of evidence in these appeals.

54. Although Mr Rattan concedes the point, we have no hesitation in finding that the three deals in Appeal 1 are connected with a loss of tax and that that was the result of fraudulent evasion.

The Deals

Deal 1

55. On 24 July 2006, Sinderby sold 11,000 Nokia N91 mobile telephones to Famecraft for £307.50 per unit. The goods were apparently ready for inspection on 25 July 2006 at 1st Freight Limited ("1st Freight"). Famecraft split the consignment into two consignments of 7,000 and 4,000 units. Both consignments were sold to Trimax on 26 July 2006, for £309 per unit. Trimax then split the first consignment and on the same day sold 3,000 units to Susvin2 and 4,000 units to Teknocom Limited ("Teknocom") for £310 per unit. Both Susvin2 and Teknocom then sold all of those telephones to Alimed for £331.70 per unit. The second consignment of 4,000 telephones were sold by Trimax to the third broker SSR Communications Limited ("SSR") on 26 July 2006, again for £310 per unit and they sold the telephones to Alimed on that day for £314.65 per unit.

Deal 2

56. All the transactions took place on the same day, namely 19 July 2006. Sinderby sold 11,000 Nokia 8,800 mobile telephones to Famecraft for £427.50 per unit. Famecraft split that into two bundles of 10,100 units and 900 units and sold the 10,100 units to Trimax at £429. Trimax split the consignment of 10,100 units further and sold 1,500 units to Susvin2, 2,250 units to Fitzroy Limited ("Fitzroy"), 4,000 units to Nijjers Limited ("Nijjers") and 2,350 units to JJ Wholesale Limited ("JJ Wholesale"). The cost to each of these brokers was £430 and all four of them duly sold the units on to Alimed at a price of £460.10.

Deal 3

57. Trimax sold the remaining 900 units purchased on 19 July to Susvin2 on 21 July, again at a price of £430 and on the same day Susvin2 sold them on to Alimed at £460.10.

Appeal 2

Overview

58. In summary, Appeal 2 involves six transactions each of which involve Susvin2 in acquiring Nokia mobile telephones from Face Off South Ltd ("Face Off") and then selling on to Imanse EURL ("Imanse") which is a Spanish company. Imanse has been identified as involved in MTIC fraud by the French authorities. Mr Khan acted for Face Off in their hearing before the Tribunal in an appeal of a decision to disallow VAT repayments. They did not succeed before the Tribunal. No permission to appeal that decision ([2013] UKFTT 358 (TC)) was granted.

59. All of the six transaction chains can be traced directly back to missing or defaulting traders.

(a) period 10/06

60. In 10/06 the goods have allegedly passed from a Croatian supplier and then between five UK traders, before all being sold or despatched to the same EU customer Imanse. All of the traced deals, up to Susvin2 occurred on the same day. Susvin2's sale or despatch occurred a few days later. There is no indication of any end user.

61. HMRC state that Intelligent Planning Ltd ("IP Ltd") was the defaulter, there were three buffers between the defaulter and Susvin2, the last of whom was Face Off, and the EU trader was Imanse. Susvin2 was the broker. The defaulting trader, buffers and EU trader in each of the three deal chains were identical and the deal chains the same length.

62. In the 10/06 period IP Ltd sold all of the units referred to in these deals on 26 October 2006. The company had been de-registered with effect from 9 October 2006 and the assessment and de-registration have never been appealed. As at 1 November 2007 there was an insolvency claim from HMRC of £9,253,975. There is a very clear loss of tax.

63. The Tribunal accepts the evidence of Officer Staniforth in regard to his review of the business activities and records provided by IP Ltd. He concluded, and we accept that, the transactions relating to the wholesale of mobile telephones had been deliberately omitted from the relevant VAT declarations of IP Ltd and were part of a scheme to defraud the Revenue. The Tribunal accepted HMRC's evidence that investigations had revealed that the company had provided HMRC with false and massively under-declared returns.

64. Accordingly, we find that there was a very significant loss of tax and it was the result of fraudulent evasion.

(b) period 01/07

65. In the 01/07 period there were three deals where two UK suppliers were used and both of these have been identified as defaulting traders.

66. Deal 1 in period 01/07 has been traced back to the defaulting UK trader Powerlink SS Ltd (Powerlink). The Tribunal accepts the evidence of Officer Penry which speaks to the activities of Powerlink SS Ltd ("Powerlink"), demonstrating the tax loss and alleged fraudulent trading identified. Powerlink, the defaulter, was de-registered for VAT on 23 November 2006 and an assessment in the sum of £1,515,106 has never been paid. There was no response to the de-registration. There is a clear loss of tax.

67. Deals 2 and 3 in period 01/07 can be traced back to the defaulting UK trader Compufix Services Limited ("Compufix"). Compufix made nil returns between 1 July 2004 (the date of its VAT registration) and 30 November 2006. The company was de-registered for VAT because of that on 16 January 2007. An assessment was raised in the sum of £1,842,193.75. That de-registration was neither appealed nor was the VAT which was due paid. There is a clear loss of tax.

68. We accept the witness statement of Officer Reardon, which speaks to the activities of this trader.

69. We also accept the evidence of Officer Reardon, that the Customs Handling of Import Freight (CHIEF) database, which records all UK international trade movements by land, sea and air had no record of any imports into the UK by either Compufix or Powerlink in the fourth quarter of 2006.

70. We accepted and agreed with HMRC's argument, which is self-evident, that either

(i) the goods never entered the UK at all in which case the whole chain was a fraudulent fabrication with the trades existing only in the face of false invoices; or

(ii) the goods were smuggled into the UK, in which case the trading is equally fraudulent.

71. There is no doubt that the tax losses identified in Powerlink and Compufix are associated with fraud.

The Returns and deal chains

(a) The Return and deal chains for the 10/06 Period

72. The return for the 10/06 period was received by HMRC on 14 November 2006. The return identified the output tax figure as £1,401.39 and the input tax figure as £1,374,736.96 and therefore a repayment of £1,373,335.57 was sought. These figures were subsequently amended by Mr Rattan on 4 December 2006 by reducing the claim by £551,000 (Mr Rattan explained this as being due to a "Miscalculation (simple")). This led to a repayment claim in the sum of £819,000.

73. The overwhelming majority of the input tax claimed (99.42% of the total input tax claimed) can be attributed to three specific deals relating to mobile telephones:

Deal	Date	Supplier	Product	Mark-up	Input Tax
1	26.10.06	Face Off	10,000 x Nokia 8800	18.3%	£463,750
2	26.10.06	Face Off	5000 x Nokia 9500	15.42%	£239,750
3	26.10.06	Face Off	5000 x Nokia 6233	20.45%	£115,500

There was only one invoice for onward sales to Imanse for all three deals and that was dated 31 October 2006.

74. Eight of the traders in the deal chains leading to Susvin2 showed a mark up of less than 1%, and the remaining transaction involved a mark up of less than 3% whilst Susvin2 achieved a very significant mark up. That is inherently unlikely given the

alleged competitive market in which the transactions were apparently occurring and the fact that the deals were apparently on the same day.

Deal 1

75. IP Ltd had purchased 10,000 Nokia 880 mobile phones from a Croatian supplier Cel Star D.O.O. ("Cel Star"). There were four transactions on 26 October 2006 whereby IP Ltd sold those units to HHCS 149e Limited trading as Clockwork Wholesale ("Clockwork") for £262 per unit and the units were then sold to EP Company Limited ("EP Co") for £262.25 per unit and EP Co sold the units to Face Off for £263 per unit and lastly Face Off sold the units to Susvin2 for £265 per unit. On 31 October 2006 Susvin2 sold those units to Imanse for £313 per unit.

Deal 2

76. Cel Star sold 5,000 Nokia 9,500 telephones to IP Ltd and again on 26 October there were four transactions involving exactly the same companies whereby those units were sold at £271 per unit, then £272, then £272.50 per unit and then lastly from Face Off to Susvin2 for £274 per unit. On 31 October Susvin2 sold those units to Imanse for £316.25 per unit.

Deal 3

77. Cel Star sold 5,000 Nokia 6233 mobile telephones to IP Ltd and again there were four transactions on 26 October 2006 whereby those units were sold by exactly the same companies, firstly for £128 per unit then £128.50 per unit, then £129 per unit and lastly from Face Off to Susvin2 for £132 per unit. Again on 31 October 2006 Susvin2 sold the units to Imanse for £159 per unit.

(b) The Return for the 01/07 Period

78. The return for the 01/07 period was received by HMRC on 7 March 2007. The return identified the output tax figure as £1,120.41 and the input tax figure as £943,344.70 and therefore a repayment of £942,224.29 was sought.

79. The overwhelming majority of the input tax claimed (99.94% of the total input tax claimed) can be attributed to three specific deals relating to mobile telephones:

Deal	Date	Supplier	Product	Mark-up	Input Tax
1	22.11.06	Face Off	7,500 x Nokia N73	19.02%	£296,625
2	6.12.06	Face Off	5000 x Nokia 8800	19.52%	£221,812.50
3	6.12.06	Face Off	10,000 x Nokia N80	18.35%	£424,375

80. All of the traders in the deal chains leading to the Susvin2 showed a mark up of between 0.2% and 1.3% whilst Susvin2 achieved a significant mark up. That is

inherently unlikely given the alleged competitive market in which the transactions were apparently occurring.

Deal 1

81. Cel Star sold 7,500 Nokia N73 mobile telephones to Powerlink and on 21 November 2006 Powerlink sold those units to Exigra Computer Services Limited ("Exigra") for £222 per unit and Exigra sold the units to Jaiden Limited ("Jaiden") for £222.50 per unit. On 23 November 2006 Jaiden sold the units to Face Off for £223 per unit. However, Face Off apparently sold those units to Susvin2 on 22 November 2006 for £226 per unit and Susvin2 sold the units to Imanse on 22 November 2006 for £269 per unit. Every transaction in this deal chain took place on 6 December.

82. With regard to invoices raised to reflect the alleged transactions in this deal, it is difficult to see how Face Off and Susvin2 could sell telephones on 22 November 2006 when the documentation indicates that Jaiden only sold the same telephones to Face Off on 23 November 2006. Whilst the documentation might be wrong, looking to the totality of the evidence we find that that is further evidence that the transactions were not genuine commercial transactions.

Deal 2

83. On 6 December 2006 Compufix sold 5,000 Nokia 8800 mobile phones to Exigra for £249 per unit and Exigra then sold those units to Jaiden for £249.50 per unit and Jaiden sold those units to Face Off for £252 per unit. Face Off then sold those units to Susvin2 for £253.50 per unit and Susvin2 sold them to Imanse for £303 per unit.

Deal 3

84. Every transaction in this deal chain took place on 6 December. Compufix sold 10,000 Nokia N80 phones to Exigra for £238 per unit and Exigra sold the units to Jaiden for £238.50 and the units were then sold to Face Off for £241 per unit. Face Off sold the units to Susvin2 for £242.50 per unit and Susvin2 sold the units to Imanse for £287 per unit.

HMRC contact with Mr Rattan in 2006

85. In summary, in the whole of the period in which Mr Rattan was undertaking trade in the wholesale of mobile telephones he had had three visits by HMRC officers between June and August 2006 when MTIC fraud was discussed and 11 letters from HMRC covering MTIC trading activities were issued over the period June to December 2006.

86. On 13 June 2006 Officer Sayer visited Mr Rattan. He discussed MTIC fraud with him because he had serious concerns that Mr Rattan might be about to become an MTIC trader. The reason for that was that Susvin2 had first traded in mobile

telephones in April 2006 and that was reflected in the VAT return for period 04/06 which coincided with the sudden spike in VAT repayment claims.

87. Officer Sayer issued an MTIC guidance letter on 16 June 2006. That letter was four pages long and set out in detail the reasonable commercial checks, which would be expected of any trader in the mobile phone sector. Mr Rattan was warned that if he did not carry out such checks then he could be jointly and severally liable for any loss of revenue in a transaction chain in which he is involved.

88. On 14 June 2006 HMRC issued a letter refusing a request to move to monthly returns on the basis of potential VAT risks given the trade sector in which Mr Rattan operated.

89. On 20 July 2006 HMRC wrote to Mr Rattan in stark terms pointing out the issues with MTIC fraud, enclosing Notice 726 and listing the type of information, which should be sought by Mr Rattan before trading. That list is annexed at Appendix 4.

90. On 4 August 2006 ("the second visit"), two HMRC officers conducted a post-registration visit. This was prompted by the fact that Mr Rattan had been recorded as undertaking a number of checks to validate VAT registration numbers via the Redhill office, including those for Trimax and Alimed on 24 July 2006. Mr Rattan was not present at his business premises but he requested that the officers visit his home address where all records of the business were retained. He was handed copies of various public notices. He confirmed that his first "mobile phone deal" was carried out in April 2006 and there was a discussion about the checks carried out on suppliers and customers.

91. He confirmed that following the earlier visit, he was aware of the need to make checks on both suppliers and customers. In particular, he stated that he had implemented an application form for new customers and suppliers, he knew that he required to carry out credit checks, that he should ring Redhill (or NAS) and he should check with Companies House. However, he was unable to produce details of any checks that had failed to be satisfactory.

92. A further meeting was held on 7 August 2006 ("the third visit") and he was again given a copy of Notice 726. In the interim the officers had reviewed the records furnished by Mr Rattan. Those records covered the three deals for the period 07/06 (Appeal 1). There was no evidence of the export. On that being pointed out to Mr Rattan, he said that that was not yet available but that the freight forwarders, 1st Freight Limited ("1st Freight"), would send it to him at a later date. He was unsure how the goods had left the country as he had left it entirely to 1st Freight. We find that, at best, that *laissez faire* attitude is indicative of the deals not being genuine commercial transactions.

93. The officers had analysed the records, which showed the transactions for these three deals. As at that date there was still £56,750 outstanding and due to Trimax for the units purchased in deal 2. Mr Rattan told the officers that Trimax had not noticed

that it was outstanding and he did not intend to do anything about it until they chased him.

94. In regard to these transactions, Mr Rattan produced the due diligence checks completed by him in relation to Trimax and Alimed. Although he had phoned Redhill on 19 July, the officers recorded that the rest was done on 31 July 2006 after the three deals had been completed. Mr Rattan supplied the name and address of trade references that had been supplied but he was unable to produce any copies of letters written to or replies received from those.

95. He was asked how he had been able to purchase goods for over £2,000,000 and how he had managed to pay the VAT of £343,000. His explanation was that he had made £137,000 in profit from the three deals in the chain and that Alimed had paid him £150,000 on 26 July as a deposit for stock on an unspecified future deal. He was unable to confirm how he would pay the outstanding amount of £56,700 given that the balance in the bank account used for the deals was only £587.

96. He later emailed the officer to say that it had slipped his mind that he had £35,000 in a Barclay's account and that he hoped to have profitable proceeds from another current deal. Firstly, that did not fit well with the evidence about the Barclay's account provided to the officers, which showed that he had an account with Barclay's that was overdrawn to the extent of more than £12,000. Secondly, it subsequently became clear that there was no such current deal.

97. The annual accounts for Susvin2 showed that he had made a loss for the two previous years.

98. On 24 August 2006 HMRC wrote to Mr Rattan stating that, following the visit on 7 August, an analysis of the IMEI numbers of the mobile phones sold to Spain had shown that a percentage of them had been exported already that year, in some instances more than once. HMRC stated "this is a clear indication of MTIC fraud".

99. From 1 September 2006 he was aware that the 07/06 VAT return was subject to extended verification due to concerns about MTIC fraud and his involvement in that.

Mr Rattan's ability to finance transactions

100. It was not at all obvious how Mr Rattan's ability to finance any of the deals had been achieved. He has not submitted self-assessment returns since 2006-07. There are returns for 2001-02 to 2005-06 and those indicate that Mr Rattan had injected a total of £248,399 of capital but had personal drawings of £243,691 notwithstanding the fact that the business made net trading losses of £38,531 for the same period.

101. Although at paragraph 3 of his witness statement Mr Rattan states that at the peak of his internet café trading activity he employed approximately 26 members of staff, nevertheless the PAYE data base, under Reference 846/TZ40428, shows that in the years 2004-2005 to 2008-2009 he had never declared more than 12 employees.

102. Mr Rattan is also a director of London Print House Ltd and that company had made losses totalling £70,277 since registering for corporation tax and has had no declared taxable profit. There is an entry in the accounts to 31/03/05 showing the director (Mr Rattan) had loaned to the company the sum of £37,085. The turnover in that year was £2,042 and there were no sales in the following three years. We note that Susvin2 employs the company secretary. The accounts to 31/03/08 show a deficit of tangible assets and shareholders funds of £82,706 making it technically insolvent.

103. At the second visit, the officers had identified that Mr Rattan had loans totalling £125,000-£150,000 to finance his businesses including amounts from Egg Loan, Egg credit card, Barclays and a property mortgage loan.

104. Although the only transactions with Alimed were on 19, 21 and 25 July 2006, perusal of the copy bank statement for transactions on Mr Rattan's account from 26 July 2006 to 1 October 2006 shows that Alimed credited the account with £150,000 on 26 July 2006 and that is described as "deposit for stock" and on 25 September 2006 a further £50,000 was credited and that is described as "loan". There is no evidence of any repayment. HMRC wrote to Mr Rattan on 31 January 2007 requesting information about whether the £200,000 had been repaid and no response has ever been received. There was no subsequent deal with Alimed.

105. We find it inherently unlikely that he had the funds, from any source, to finance any of the transactions with which we are concerned other than the £200,000 from Alimed. We find that the very fact that that sum was provided to Mr Rattan is indicative of the fact that they were connected parties and that the transactions were not genuine commercial transactions.

106. In a letter to HMRC dated 8 December 2006 Mr Rattan stated that "The orders are proforma and paid for in advance. As a result there is no financial risk to me …". That is quite simply untrue for periods 07/06 and 01/07. In period 07/06 in deal 1 payment was made the day after the deal, in deal 2 payment was made five days later and in deal 3 payment was three days later. In period 01/07, in deal 1 the payment was made two days after the deal, and in deals 2 and 3 payment was made six days after the deals. We note all of the deals in period 10/06 were on the same day and the payments appear to have been made 19 minutes before payment was made to the supplier.

Mr Rattan's witness statement

107. This witness statement is explicitly stated to be in response to the Commissioners evidence served in September 2009 and particularly in relation to the evidence of Officer Danson dated 9 September 2009. That evidence is extensive and very detailed.

108. In describing his career he confirms at paragraph 5 that he established London Print House Limited and he paints a rosy picture of its activities. That is in stark contrast to the financial information obtained by HMRC and described at paragraph 102 above. We find his witness statement to be incredible on that point.

109. At paragraphs 7 to 16 of his witness statement, when describing his "Telecommunications Experience" he described himself as someone who was experienced and familiar with the business of mobile telephones, having conducted extensive research and having been involved in the industry since 1986. At paragraph 9 he said that "…it was essential to know a great deal about the products." At paragraph 30 he states that he had good product knowledge by the time he dealt with Trimax (July 2006). However, in the course of the third visit, when asked by Officer Richards to identify the manufacturer of a D600, which was noted as "available stock" on the whiteboard in the office, he was unable to do so. He said that product knowledge was not important and that telephones were just goods to be sold although he did use a catalogue "Mobile Choices for Business". We find that the statements in his witness statement are not reliable and the contemporaneous evidence is more likely to be accurate and that he had limited product knowledge.

110. At paragraph 15 he states that he created a website to attract customers in wholesaling in mobile phones. As a matter of fact, HMRC established from the independent website, http://domains.whois.com/domain.php, that the domain registration was created on 2 May 2006 by Rajbinder Hunjan. He gave his personal email address and home address. At that time Mr Hunjan was a director of Teknocom, amongst other companies. Teknocom was one of the parallel brokers to Susvin2, in deal 1, Appeal 1. Teknocom has had input VAT denied by HMRC and that decision is still under appeal. We find that there is a connection between Mr Rattan and Mr Hunjan.

111. At paragraph 16 he states that the website triggered "daily requests for stock and daily stock offers". If a staff member could match supplier and customer together at prices that could make him a profit he took over the calls and dealt with them direct. He was so busy that "I left it to my trading staff to collate the various requests and offers and confirm prices before coming to me." That is not consistent with what he told the Officers at the second visit which was that he had one member of staff who assisted him with the wholesale of telephones; of course, that visit was after the small transaction in April 2006 and the three deals in Appeal 1.

112. At paragraphs 17 and 18, he says it was a fast moving and exciting industry with telephones sold very quickly and that there were many times that he could not match a customer with a supplier. He also said that the majority of the deals did not involve hard negotiating, that the suppliers would offer stock at a price and he would have to take it quickly so that he did not lose the deal. However, we note that by contrast, at the third visit he told the Officers that the price was negotiated and that he set the selling price.

113. Lastly, on the subject of negotiation of the deals he offered a completely different explanation in his letter of 8 December 2006 to HMRC. "In other words, I only buy stock when I have a confirmed order. When an order is confirmed and stock is available, the stock is purchased and allocated to the customer simultaneously." There is very limited consistency in his evidence.

114. At paragraph 21 he said that putting the deals together, as an exporter, was "difficult and hectic on the day of a transaction although I always had staff to assist". He said that he had very little time for the wholesaling of telephones.

115. There were only nine deals in mobile telephones in the period from July 2006 to January 2007 and those were all completed in a matter of days. We find that the account given in the witness statement is inherently improbable and therefore incredible.

116. At paragraph 22 he states that: -"I had no idea that fraud could be so rife in mobile phones". We find that that simply cannot be true. HMRC had repeatedly visited him and written to him in explicit terms. He had been very clearly warned even before the transactions in Appeal 1. He himself states that he used the IPT website which, at that time, highlighted MTIC fraud.

Due diligence

117. Mr Rattan concedes that he did not do all the checks suggested by HMRC for due diligence. That is certainly true.

118. Mr Rattan states categorically that, in the course of the enquiry, he had produced all of his due diligence files to HMRC. In the witness statement produced in support of the adjournment application (his second witness statement), Mr Rattan stated that he required an adjournment to access a witness which was a solicitors firm (unnamed) who had been responsible for doing due diligence for him. For the reasons set out in paragraph 18 of the adjournment decision, we find that the existence of such a firm is inherently very unlikely and that there is no other available information on due diligence.

119. At paragraphs 29 to 37 he describes what he said he did do in regard to Trimax, at paragraphs 38 to 43 for Alimed, paragraphs 44 to 50 for Face Off, and at paragraphs 51 to 60 for Imanse. He does so referring to Officer Danson's productions.

120. He did check the VAT numbers with Redhill but we also note that on every occasion that he did so he failed to provide (a) information as to whether the company to be checked was buying or selling goods, (b) detail as to the nature of the goods, (c) detail as to the quantity of the goods, and (d) detail as to the value of the goods.

Trimax and Alimed

121. As we indicate above, we do not accept that he had good product knowledge so we do not accept that he could tell very quickly by talking to the director (on many occasions) that this (Trimax) was a company that was very experienced in mobile phones.

122. The verification from Redhill for these two companies was on 24 July 2006 and that deals 1 and 2 had already taken place. He is incorrect in saying that it was on the "following day" and that he still had control of the stock when he got the positive

result. He states that I would have enclosed….purchase orders and invoices for the deal….". We accept the clear evidence of Officer Danson that he did not.

123. The factual position is as follows: -

Period 07/06

(a) *Deal chain 1*

124. Mr Rattan shipped the goods before receiving payment from Alimed and before there was full title to the goods. Further the goods were released before full title had been received. Ist Freight's invoice for the release of the goods predated Susvin2's release instructions. Alimed did not comply with Susvin2's payment instructions. Susvin2 underpaid Trimax by some £6,500 and Alimed underpaid Susvin2 by £810. In fact, that underpayment reflects the "credit" caused by the overpayment in deal chain 3.

(b) Deal chain 2

125. Susvin2 shipped the goods before receiving payment from Alimed and before there was full title to the goods. Alimed did not comply with Susvin 2's payment instructions. The shipment date was 19 July 2006, which was before verification was sought.

(c) Deal chain 3

126. The goods were shipped before payment was received and before title had been received. Alimed did not comply with Susvin2's payment instructions. Alimed overpaid Susvin2 by £810. Again, the freight invoice for the release of the goods predated the release instructions.

127. At paragraph 34 Mr Rattan concedes that the written responses that he received were dated and received after the transactions and that he had been trying to bring his due diligence records "up to date". There are no records at all of what Mr Rattan describes as very detailed telephone enquiries.

128. Although Alimed was Susvin2's first significant customer and they appear to have lent Susvin2 £200,000, Mr Rattan cannot recall how they came to deal with each other. That seems inherently unlikely. The sparcity of information from Mr Rattan about Alimed is striking.

Face Off and Imanse

129. Mr Rattan states he had known the director since the 1980's and he secured the trade references and Companies House details on the day of the first deal.

130. Essentially his argument is articulated at paragraph 50 when he says "I would say that my due diligence really wasn't bad at all, if you consider what I knew about each supplier…". We do not accept that. There is very little information indeed

recorded by him about what he knew about those with whom he traded and that little amount is not what would be expected in genuine commercial transactions.

131. At paragraph 52, Mr Rattan states that he did a number of checks before trading with Imanse. That is not supported by the evidence of due diligence that he produced to HMRC. His own "Company Verification Check List" shows very clearly that the checks were done on 26 October 2006. That was the day of the deal.

132. We also note that although Mr Rattan asked Redhill for verification in regard to Imanse and Face Off, HMRC asked for further information, which was never provided. Therefore he did not receive satisfactory verification from HMRC and yet he undertook six deals with a net value of £11,913,750 in periods 01/06 and 01/07.

133. At paragraph 53 he states:- "I was happy with what I heard and saw about this company and, although I would not release stock to it without payment…..it was still a small risk shipping stock to France, but I did not release any goods until payment was made." That is untrue.

134. The factual position is quite simply that for all of the deals in period 10/06, Susvin2 shipped the goods before it raised the invoice or received payment for the goods. Imanse did not comply with the payment instructions.

135. An example is that in deal 1 the goods were shipped on 30 October 2006 by the freight forwarders Jamber Consultancy Limited ("Jamber"). However, no payment had been made by anyone. On 31 October 2006, the payment to Susvin2 was apparently received from Imanse at 11.29am and Susvin2 apparently paid Face Off at 11.48am on that day. Meanwhile the goods had been shipped the day before and the invoice was only raised on 31 October 2006. That beggars belief.

136. As far as 01/07 is concerned, in deals 2 and 3 Susvin2 shipped the goods before receiving payment and before it had full title to the goods. Further there were no release instructions. There is no evidence as to the export of the goods in deal 1. However, payment was received by Susvin2 from Imanse at 9.37am and Susvin2 then paid Face Off at 10.07am. It is the same pattern as in deals 2 and 3.

Freight forwarders

137. Mr Rattan entrusted the goods to Jamber yet his own due diligence in the credit check shows that it was a newly established company and had a nil credit limit.

138. At paragraph 55 of his witness statement Mr Rattan states that "I did not visit the freight forwarders and relied on the fact that my suppliers verified that they had used them previously…".

139. In the letter dated 16 June 2006, issued by Officer Sayer he recommended that:-

"Before deciding whether to proceed with a transaction contact your freight forwarder and obtain from them in writing for each transaction:

1. How long the goods have been on the warehouse premises.

2. The number of times the goods have been traded since arriving in the warehouse and prior to your proposed purchase.

….As you are not asking your freight forwarder to reveal the identities of the other traders within the transaction chain this should not present them with a problem."

Mr Rattan did none of these things.

140. He attempts to rely on a report about 1st Freight Limited (1st Freight) produced to him in 2009. The fact is that he did not do anything other than talk to his suppliers. The sums of money involved were huge and we do not think it credible that a genuine trader would have made no other enquiries.

141. At paragraph 61 he states that "Regarding Jamber Freight and Insight, again everything about them was very professional and I seemed to remember that they were linked in some way and possibly used the same warehouse facility". As we indicate above, this witness statement was drafted after Mr Rattan and CTM had seen the evidence of Officer Danson at paragraph 133 of her witness statement where she records that "enquiries were made by Officer Duggan with regard to Insight International Logistics and …. Officer Duggan visited the alleged principal place of business of the company. He found it to be a residential address. He then … established that the resident was a Mr Jag Gill, who previously worked for Jamber Freight Forwarders … the latter being the freight forwarder used for all deals in period 10/06 and for deal 1 in period 01/07". We find that to say that they "possibly" used the same warehouse is at best disingenuous.

142. At paragraphs 64 to 66 Mr Rattan comments on inspections. He is inherently inconsistent. On the one hand he states that he relied on his suppliers and they had examined the stock prior to offering it to him. Yet when attempting to justify his failure to comply with Officer Sayer's instructions he says that "For all I knew, the goods had been imported that day…". For obvious reasons, if they had been imported that day, given the quantities involved, even if the transactions were genuine, the suppliers may well not have been able to do inspections. Our other findings on the inspections themselves are to be found at paragraph 168 *et seq* below.

143. Although he says that he relied on his suppliers, we find that a genuine trader would wish to protect his own investment; it would be naïve indeed to rely on the supplier. The potential problems in so doing are considerable in the event of any contractual problems. He states that he had lengthy conversations with suppliers, freight forwarders and customers but there is no record of the conversations.

144. We doubt that he had lengthy conversations with any of the freight forwarders. His knowledge of Jamber and Insight is minimal, as we indicate above. As far as 1st Freight is concerned, at the third visit he not only said that he had done no checks on them but he did not even know how the goods (in period 07/06) had left the country. Clearly, since this was after he had ceased to use them he knew very little about them when allegedly trading with them.

145. At paragraph 64 he states that he would have asked for written confirmation "that the stock had been examined and found to be as described." No such reports from either Jamber or Insight have ever been produced.

146. In summary, from his witness statement alone, it is clear that no due diligence of any sort was undertaken in regard to any of the freight forwarders involved in any of the deals in question. Overall, our view of the due diligence he describes was that it was not rigorous, comprehensive or effective. Indeed, it was perfunctory and had many gaps. In particular, in certain instances he did not await the result of due diligence enquiries before releasing the goods.

147. At paragraph 68 Mr Rattan states that insurance was too expensive and because the freight forwarders were specialists in storing and transporting high value goods, he thought that there was limited risk. Given that he had done no due diligence that would not be a reasonable assumption. However, that was not his original explanation. At the third visit he told the Officers that he had no insurance because 1st Freight had insurance; he even confirmed that he had not asked for sight of the policy documents. Certainly Jamber had no insurance. We also note that Mr Rattan wrote to HMRC on 8 December 2006 and his explanation for the lack of insurance was because the deals were "Back 2 Back". There is no consistency in his explanations.

148. Lastly at paragraphs 69-71 he comments on export. He denied that his customers could go to any UK company in his chain and buy the stock cheaper and says "That would be right if they knew the companies in my supply chain". However, the factual position, as oft repeated by Mr Rattan, was that all of the companies advertised on the IPT website and that is precisely how he and his customers and suppliers had apparently made contact.

Banking

149. All of the sales invoices raised by Susvin2 indicate that the business bank account was held with Barclay's Bank.

International Credit Bank Limited (ICB)

150. At the third visit Mr Rattan confirmed that all payment transactions for the three deals in Appeal 1 had been through International Credit Bank Limited (ICB). He had opened the bank account specifically for that purpose on 14 July 2006. He confirms that in his witness statement when he indicates that it was more convenient because he quite openly acknowledges that it was easier to have the same bank accounts as his customers and suppliers.

151. Mr Rattan states at paragraph 32 of his witness statement that Trimax had told him at the outset that they banked with ICB and FCIB.

152. It is noted that Teknocom who was one of the parallel brokers in deal 1 also opened a bank account at ICB and the bank account number is one lower than Mr Rattan's account. That would suggest that they were opened at or about the same time and as we note in paragraph 110 above there is another link with Teknocom.

153. Similarly, we note that JJ Wholesale and Nijjers have sequential numbered accounts and the latter was opened on 24 July 2006. Given the numbering of the accounts, Fitzroy would have opened their account after Mr Rattan and before Nijjers. Famecraft, Sinderby and Alimed also banked with ICB.

154. We note, and on the evidence before us, agree with, endorse and incorporate herein the finding in fact at paragraph 124 in *Radarbeam* that the move to ICB of various traders including Famecraft and Trimax was not a coincidence but rather indicative of fraud.

155. Further, we accept the evidence produced by HMRC to the effect that there was doubt that ICB even existed in July 2006. In particular, it is noted that HMRC had sourced two website references.

156. The first was the Deputy Governor's brief to the creditors of ICB at a meeting on 23 March 2006 at Grand Imperial Hotel Kampala. The bank was then in liquidation and the brief describes it as defunct. The Bank had been placed into liquidation on 18 September 1998. The reason for the closure of the bank was described as "….imprudent banking practices such as insider lending, poor corporate governance and submission of false returns to the Central Bank." The board and senior management was comprised mainly of members of the same family who had no experience or training in running a financial institution. The liquidation process had been greatly hampered because the liabilities exceeded the assets and the assets were either not secured, inadequately secured or not properly documented.

157. The second was an Invitation of Creditors of International Credit Bank Ltd (in liquidation) dated 25 May 2006. That invited creditors to present documentary evidence supporting their claims.

158. On the balance of probabilities, we find that even if an entity called ICB existed in July 2006, even minimal investigation would have disclosed that it was not creditworthy, in any sense. The said brief is easily found by Google search. We find that a genuine businessman would make checks on any bank, let alone a lesser known bank to ensure that it was secure before transferring substantial funds to it.

Atlantic Credit & Trust (ACT)

159. We accept the evidence from the Monetary Authority of Singapore (MAS) who state that under Section 412 of the Banking Act 1970 "no banking business shall be transacted in Singapore except by a company which is in possession of a valid license granted under this Act by the Monetary Authority of Singapore authorising it to conduct business in Singapore." and that MAS has never granted a license to any entity by any such name. Notwithstanding that, it is of course possible that Mr Rattan regarded it as "a Bank".

160. In the periods 10/06 and 01/07 Mr Rattan, his customers and suppliers all used ACT. That "bank" has closed down and the website is no longer available.

First Curacao International Bank (FCIB)

161. Mr Rattan or Susvin 2 also held a bank account with FCIB but it was not utilised for any of the deals with which this appeal is concerned. We are aware that a very significant number of traders suspected of involvement in MTIC fraud held accounts with FCIB.

162. In summary, we find that Mr Rattan stipulated on his invoices that payment should be made to a UK bank, yet he changed the banking arrangements so that he banked with the same banks, if they existed, as everyone else in the chain and we doubt that Mr Rattan made any checks about those banks. Again it is another pointer that these were not genuine commercial transactions.

International Mobile Equipment Identity (IMEI)

163. At the verification visit on 7 August 2006, Mr Rattan indicated that he did not complete any checks on the IMEI numbers that he had obtained. In his witness statement he says that he relied on others to have done so.

164. Analysis of the IMEI numbers provided in August 2006 showed that they were computer generated and had an identical pattern to the sequence of numbers other traders using 1st Freight had received.

165. We accept the evidence from the NEMESIS database that a proportion of the numbers had been scanned previously (ie the units had been exported previously). Curiously, however, two of the units were scanned after the deal:-

(i) One unit was scanned on 20 July 2006 at Freight Forwarders "Secure Freight" yet the unit in question had apparently been sold by Susvin2 the day before and was allegedly in the possession of GR Distribution having been delivered there by Ist Freight on 19 July 2006.

(ii) Another unit was scanned on 3 August 2006 at a different freight forwarder ASR Logistics. It seems inherently unlikely that these units can have formed part of the pallet of units allegedly scanned for Susvin2.

166. In period 10/06, of the 10% of Nokia 6233 sold, whose IMEI numbers were checked, seven were recorded as having been exported at other times, five prior to the deal, and two subsequent to the deal. The phone company records show that three had been blocked, or stolen, one prior to the deal and two after the deal. Again with regard to the 10% of Nokia 8800s checked, 51 IMEI numbers are shown to have been exported at other times; 46 prior to the deal and five subsequent to the deal. Phones have been scanned on departure from the UK between one and six times. The phone company had blocked 24 numbers (19 prior to and five after the deal) and a total of eight had been reported to the police, prior to the deal, as having been stolen.

167. There are numerous other examples of significant inconsistencies in regard to the IMEI numbers. We find that this casts serious doubt on whether, and if, these transactions actually occurred or if they did as to whether they were genuine commercial transactions.

Inspections

Period 07/06

168. In period 07/06 all of the traders within the chain, from the EU supplier Sinderby to the EU customer Alimed used the same freight forwarder, namely 1st Freight

169. 1st Freight were de-registered with effect from 19 September 2008 having "gone missing" owing £382,230.57 to HMRC. We considered the evidence of Officer Moorehead who undertook an inquiry into the records and activities of 1st Freight.

170. On the face of the IMEI inspections, 1st Freight were involved in receiving, inspecting and then exporting mobile phones which had been exported from the UK on several other occasions, ie the phones were being carouselled multiple times. 1st Freight's premises were simply not big enough to store the quantity of the pallets that the paperwork suggested.

171. According to Mr Rattan's own paperwork 1st Freight undertook an inspection level 4 procedure for the deals and provided 100% IMEI information. A level 4 inspection involves a unit count, a 100% physical inspection of the contents and a 100% IMEI check.

172. We find it wholly implausible that 1st Freight was actually able to fully undertake such inspections whilst also undertaking all the other inspections for both suppliers, as averred by Mr Rattan, and also for purchasers. For example, on 25 July 2006 allegedly they did so for 7,000 units (3,000 for Susvin2 and 4,000 for Teknocom). There were 10,000 units involved on another day.

173. On the face of the IMEI inspections 1st Freight were involved in receiving, inspecting and then exporting mobile phones, which had been exported from the UK on several other occasions. There are numerous other deficiencies.

174. HMRC produced an analysis of the timings of faxes available from the documents within the deal packs for that period. Whilst we accept that the record of the times on faxes may be inaccurate for various reasons, nevertheless some of the timings noted are out of sequence for the events and deals purportedly taking place.

175. Officer Moorehead concluded that the business activities and documentation provided by 1st Freight was falsified. Having examined the evidence, we accept and agree with that analysis.

Period 10/06

176. In period 10/06 the freight forwarder used by all traders in the chain was Jamber.

Period 01/07

177. In period 01/07 the freight forwarder used for deal 1 by all traders in the chain was Jamber.

178. The freight forwarder used for deals 2 and 3 in periods 01/07 is said to be Insight International Logistics ("Insight") and Mr Rattan has provided no documentation regarding his dealings with this business other than two international consignment notes. His only evidence on that is to be found at paragraph 61 of his witness statement. Insight has not registered for VAT. We find that it is highly unlikely that it was a genuine business. There was no evidence that they had any warehouse premises.

Conclusion

179. Had Mr Rattan attended the hearing it seemed likely that he might have argued that his deal transactions were not part of a scheme to defraud HMRC and that, in any event, the circumstantial evidence was insufficient to impute the necessary degree of knowledge either to a third party or to himself. At best he was an "innocent dupe"; that was at the heart of his brief statement to the Tribunal.

180. It is evident from the witness statement submitted on his behalf that he would have argued that he had done appropriate due diligence. In that regard he would have been expected to have relied on the judgement in *Kittel* that "traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud … must be able to rely on the legality of those transactions without the risk of losing their right to deduct the input VAT …".

181. It would be expected that he would argue that he would have known little, if anything, of the "chains" beyond the identity of his immediate supplier and customer. Although he had been warned by HMRC about MTIC activity he had not been warned about particular customers or freight forwarders.

The first and second issues

182. In these appeals, the first two issues are inextricably intertwined.

183. We have had no hesitation in finding that there was a loss of tax in every deal chain and that that was the consequence of a fraudulent evasion of VAT, as we indicate above. For the avoidance of doubt, we make it clear that in order to make those findings, it was necessary to look not only at the substance of the appeals but also the whole circumstances surrounding the transactions involved. We did so.

The third issue

184. HMRC conceded that they could not establish circularity of funds. They had to show that Mr Rattan should have known that the transactions were connected with fraud and that is not solely a question of whether he acted with due diligence. In that context however, HMRC argue that he should reasonably have been expected to conduct commercial checks on his business partners at a higher level than could be expected of a trader who was not aware of MTIC fraud and who was not operating in a sector where MTIC fraud was prevalent. Essentially, their case turned on the argument that there was no reasonable explanation for the facts and circumstances surrounding the transactions into which the Appellant entered, which was unconnected with fraud. We carefully looked at all of those circumstances.

185. The only credible explanations for Mr Rattan finding himself in such a situation is that Mr Rattan was either dishonest and/or fraudulent or he was an innocent dupe caught up in the fraud of others. Clearly, had he participated in the Tribunal he would have argued that he was an innocent dupe.

186. We find that the very nature of any of the chains is inconsistent with genuine commercial trading. For example, in Appeal 1, Trimax sell to three different brokers who all sell to the same customer, namely, Alimed. Clearly each of the brokers had a trading relationship with Alimed and one would have expected that they would have been aware that Alimed was in the market to purchase a larger quantity of phones than the size of the individual batches that they sold him. It would have been expected that had there been genuine commercial transactions, all three traders would have been competing to purchase the entirety of Trimax's stock so that the full stock could be sold on to Alimed. In fact, it is even more likely that Trimax would have sold directly to Alimed. This points to a contrived fraud.

187. The characteristics of the pattern of trading which emerge from the nine contested deals are that:-

(i) Mr Rattan was purchasing from one seller a substantial quantity of one type of mobile telephone and with two exceptions, reselling them to a purchaser on the same day. That is perfectly possible but has to be considered in the wider context both of the market and the whole surrounding circumstances,

(ii) none of the telephones were manufactured in the UK (they had two pin plugs) and so they must have been intended for sale outside the UK, and yet for no obvious reason they had been imported into the UK, adding to the cost. Mr Rattan was deriving a substantial mark-up without adding anything to the value on the phones on the re-export and yet he was competing in the same market as the buffer traders who had a minimal mark-up.

(iii) The linked transactions in each of the related chains had all been concluded either on the same day or within a few days,

(iv) The payments for the sequence of sales and purchases of the phones were not matched.

(v) The paperwork did not enable it to be ascertained with any clarity, at any one time, who would suffer the loss in the event of an accident or other cause of loss of supply.

188. The manner of Mr Rattan's trading is not consistent with him being an honest trader engaging in genuine arms-length commercial activity. The factors which point to this are:

(a) Despite the high values of the consignments, Mr Rattan was content to trade without formal written contracts or insurance cover.

(b) In every case the goods were released prior to receipt of payment.

(c) Mr Rattan has a previous conviction for failing to keep proper business records and should therefore have been well aware of the need for appropriate business records.

(d) The unexplained sudden increase in turnover where £14,013,090 was achieved from nine deals in eight months is highly significant; particularly because it seems to have been achieved without product knowledge, increase in staffing or any unique selling point and that in a very competitive market. There was no evidence of added investment, research, advertising or promotion. There was no evidence that he increased either his staff or his premises and according to his own evidence there was only himself and one member of staff involved in this.

(e) It is quite clear to us that at all material times, Mr Rattan must have been aware of the prevalence of MTIC fraud in the mobile phone market. The sudden and dramatic leap in output and input tax claimed in VAT periods 04/06 to 01/07 is completely inconsistent with his trading history before and since, and marks a fundamental change in the nature of his trading. HMRC took immediate action and warned him repeatedly about MTIC fraud before the transactions in Appeal 1. After the second and third visits he still went on to enter the six transactions in Appeal 2.

(f) Due diligence on Alimed was undertaken on or after the date of the first two deals and did not include any sort of credit check. This seems highly unlikely in a commercial environment given that goods worth over £2,000,000 were released to Alimed prior to payment being received.

(g) Due diligence on Face Off was undertaken on or after the date of the first deal and the credit check showed that their rating was "nil". Again it seems highly unlikely that an honest trader would undertake over £7,500,000 worth of business with such a company.

(h) During the third visit in early August 2006 Mr Rattan confirmed that he had undertaken no checks on 1st Freight. Given that he was relying on 1st Freight to store, inspect, insure and transport the goods it would have been

expected that he would have undertaken even minimal, if not, proper checks. He did not.

(i) As a general point, we looked at the due diligence that Mr Rattan states that he did and taken at face value, we find that that amounted to very basic commercial checks. We do not consider that those very basic commercial checks, if indeed they were carried out, were the actions of an ordinary businessman before entering into ordinary commercial deals with new and unfamiliar trading partners. They certainly did not meet the standard expected of a trader who was aware of MTIC fraud and operating in that sector.

(j) During the periods covered by these appeals, Susvin2 traded 47,900 units of mobile phones with a net value of £14,013,090. It would appear that no member of the supply chains ever made a loss or was left with excess or unsold stock. That seems very unlikely in normal commercial activity.

(k) None of the chains can be traced to the manufacture of the goods in question or to an authorised end distributor, retailer or end user. It would appear that none of the members of the supply chain ever took physical possession of the goods. All were held at the premises of freight forwarders for the duration of each deal.

(l) It is difficult to understand how all of the parties could have contacted each other, agreed on terms, undertaken any checks on either the supplier or the customer, arranged for the release of the goods, made payment and negotiated the ancillary contacts such as inspection in the timescale.

(m) the freight forwarders cannot have been able physically to have undertaken the checks, which are alleged, in the described timescale and the combination of the information on the IMEI and CHIEF checks point to very high likelihood of fraud.

(n) the banking arrangements, if they can be described as such since it seems very unlikely that either ICB or ACT were bona fide banks at that time, are not consistent with genuine commercial activity; to entrust huge sums of money to institutions which on a minimal check on Google would look very dubious does not make commercial sense.

(o) the mark ups do not make sense to us. Looking at Appeal 1, irrespective of the model or quantity of phones traded, Famecraft always achieved a £1.50 (excl VAT) mark up, as did Trimax yet, in what purports to be an open market, each of the parallel traders, Susvin2, Teknocom and SSR, who are allegedly independent of each other achieve the same mark up of £21.70. In deals 2 and 3 the allegedly independent parallel traders all achieve the same mark up (excl VAT) was £30.10. That is inherently incredible and improbable.

189. Lastly, there are two crucial factors. Firstly, we turn to Mr Rattan's credibility. It is most unfortunate that he chose not to give evidence. However, looking at the

evidence for these appeals alone, and therefore focussing on his witness statement, we find that, for the reasons set out above and particularly in the paragraphs dealing with his witness statement, he most certainly was not a credible witness. The findings in the adjournment decision simply add even greater weight to that. (For the avoidance of doubt, although clearly we had serious reservations about Mr Rattan's credibility in the context of the adjournment decision, we put that entirely to one side because that could have been attributable to factors that had nothing to do with the situation in 2006-07. In writing this decision we have not considered or looked at the adjournment decision.)

190. Secondly, we find that the £200,000 advance/loan/deposit from Alimed is quite simply inexplicable in the context of a genuine commercial transaction. It was highlighted as an issue in Appendix G to the Respondent's Statement of Case dated 15 May 2008. Therefore Mr Rattan and all of his advisors have been, or should have been aware that it presented quite a problem. It has never been addressed or indeed denied.

191. We accept that there is no one individual factor which is sufficient in itself to lead to a conclusion that Mr Rattan "should have known" of the fraud. However, the totality of the evidence leads us to that conclusion. In our judgement it is simply not credible for any legitimate business to achieve the huge profits that Susvin2 appeared to have done in deals that presented no commercial risk to the company, using "banks" recommended by fellow traders to move funds, being always able to obtain the type and quantity of the stock required by the customer and to make no losses whatsoever on similar deals.

192. Even if we were to accept that Mr Rattan was an innocent dupe, which we do not, we find that given his knowledge and awareness of MTIC fraud in the industry and the circumstances of the deals themselves, he should have known that the only reasonable explanation for the transactions in which he was involved was that they were connected with fraud.

193. Clearly, the opportunity afforded to Mr Rattan was too good to be true. We consider that the only reasonable explanation for these transactions is that they were connected with fraud. The accumulation of all of the factors that we enumerate above has proven to be of such weight that, on the evidence before us, this can be the only conclusion.

194. Quite simply in the words of Mosses LJ in *Mobilx* at 84 this is a case where: "… a trader has chosen to ignore the obvious explanations as to why he was presented with the opportunity to reap a large and predictable award over a short space of time."

195. We are quite clear that Mr Rattan should have known that all of the transactions were connected to the fraudulent evasion of VAT. Looking to all of the circumstances of these appeals, however, we also find that on the balance of probabilities Mr Rattan did indeed know that the transactions were connected to the fraudulent evasion of VAT.

196. Finishing on a legal note, the legal position is that we find that Mr Rattan was assisting, art and part, in the perpetration of fraud in the chain(s) of which he was a part, that is that he is treated as a participant. The overarching principle is that the right of deduction is refused (ie the right to repayments of VAT) where it is established on the basis of objective evidence that the right is being relied on for fraudulent or abusive ends. That is the case in these appeals. The appeals are dismissed for that reason.

Costs

197. In terms of Joint Directions dated 23 July 2010 at Direction 21 it was directed that Rule 29 of the Value Added Tax Tribunals Rules 1986 apply to these appeals. In view of our decision that the appeal is dismissed, and as requested by HMRC, we find that it is appropriate to award HMRC its costs of, and incidental to, and consequent upon the appeal. In the event that those costs cannot be agreed then they are remitted for taxation on the standard basis.

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

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 6 December 2013

APPENDIX 1

Appeal number: LON/2008/00499 & LON/2009/0481

FIRST-TIER TRIBUNAL
TAX CHAMBER

GURMINDER RATTAN **Appellant**

- and -

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

TRIBUNAL: **JUDGE ANNE SCOTT**
SONIA GABLE

Sitting in public at Royal Courts of Justice, The Strand on 11 March 2013

Having heard Mr Imran Khan for the Appellant and Mr Simon Baker, Counsel, instructed by HMRC Solicitor's Office, for the Respondents

1. The Tribunal directs that the application for the adjournment of the final hearing of these appeals, scheduled to take place between 11 and 26 March 2013, is refused.

2. In summary, it was argued for Mr Rattan that his previous agents had failed to represent him appropriately and having withdrawn without good cause, had left him unable to prepare properly for the scheduled hearing, that he had identified preparatory work including witness and bank statements that he did not have time to obtain before the hearing and that in the interests of justice the hearing should be adjourned, since he would not be able to participate fully in the proceedings.

3. The Respondents very vigorously opposed the application, as they had the previous application which had been refused in terms of Directions issued on 22 February 2013, and that on the basis that there had been a persistent and extensive failure by Mr Rattan to comply with Directions issued by the First-tier Tribunal (the

Tribunal) and therefore there had been a failure to co-operate with the Tribunal. It was argued that any adjournment at this juncture would be unlikely to serve any real purpose in advancing the appeal, that it was not a genuine application in good faith, that Mr Rattan had delayed paying costs in the face of an Unless Order, had pled poverty at a previous hearing and it was doubtful that he would be in a position to meet a wasted costs Order, if granted, or to pay for representation and lastly that HMRC would be prejudiced by further delay in a case which had already suffered considerable delay because of Mr Rattan's failure to co-operate.

The law

4. The Tribunal's case management powers are to be found at Rule 5 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") and in particular Rule 5(3)(h) states that the Tribunal may, by direction, adjourn or postpone a hearing.

5. Rule 2 of the Rules provides the overriding objective which is to deal with cases fairly and justly:

> "**2.—**(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> 3. The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.
>
> 4. Parties must—
>
> (a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

6. Mr Khan referred to Rule 3.1(2)(b) of the Civil Procedure Rules which permits a court to adjourn a hearing.

7. Mr Khan relied on Article 6 of the European Convention on Human Rights and the relevant part provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ….".

8. The case law cited by Mr Khan was:-

R J Fox v Graham Group plc (2001) The Times, August 3
Teinaz v Wandsworth London Borough Council [2002] I.C.R. 1471
Vladimir Terluk v Boris Berezovsky [2010] EWCA Civ 1345
Michael Osborn & John Booth v The Parole Board [2010] EWCA Civ 1409
Dhillon v Asiedu [2012] EWCA Civ 1020
Transport for London v Mr Greg O'Cathail [2013] EWCA Civ 21

9. The case of *Teinaz v Wandsworth London Borough Council* was cited in support of the argument that in the interests of fairness and justice the hearing should be adjourned to allow Mr Rattan to call witnesses and that a failure to do so would prevent him from participating fully and would therefore amount to a breach of his rights in terms of Article 6 of the European Convention on Human Rights. In that case, Gibson LJ commenting on Article 6 states at paragraphs 21 and 22 "But the tribunal or court is entitled to be satisfied that the inability of the litigant…is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment…All must depend on the particular circumstances of the case."

10. What then are the particular circumstances of this case? At the core of Mr Rattan's application to adjourn was the assertion that for the second or third time in these appeals he had been let down by his representatives. He was present and chose not to give oral evidence so the inconsistencies, which led the Tribunal to doubt his credibility, as set out below, could not be explored with him. There was no challenge to the account given by HMRC as to the observations by Judge Sinfield at the hearing for the first application for adjournment ("the First Hearing") where Mr Rattan was present and answered questions posed by the Judge. Although not in any way bound by those observations, the Tribunal takes them, as reported, to be an accurate account of what transpired.

11. The history of these cases is relevant. In the period from 7 March 2008 when the first Appeal Notice was served (out of time) Mr Rattan has been represented by three different firms and he has repeatedly failed to comply with Directions issued by the Tribunal. Originally, the appeal for LON 2008/0499 had been struck out on 1 September 2008 (an Unless Order having been served on 5 August 2008 because of

the failure of either Mr Rattan or his then representatives to co-operate with the Tribunal) and reinstated on 13 February 2009 only because Mr Rattan had alleged that the non-compliance had been the fault of his then solicitors. They had ceased to act for him as he had been unable to pay them. In the witness statement ("Second Statement") supporting this application, at paragraph 10 he stated that he only found out that the cases had been struck out when reading the papers relating to the First Hearing more than four years later. We find that to be wholly incredible not least because he instructed his third set of agents (CTM) on 26 August 2008 and they acted in the reinstatement application and in the late appeal for LON 2009/0481. The grounds for that late appeal were that Mr Rattan had a contingency fee arrangement in place with CTM which would enable him to advance the appeal. The Tribunal notes that Judge Sinfield asked Mr Rattan why the experience of the appeal being struck out had not taught him to keep an eye on his representative. Rather than denying that he had known that the appeals had been struck out he argued that he had relied on CTM because the conditional fee agreement meant that they had a vested interest. Clearly he had known about the consequences of the previous Unless Order.

12. Further inconsistency on the part of Mr Rattan is to be found at paragraph 11 of the Second Statement where he stated that he was aggrieved that HMRC stated that he had "maintained absolute minimal engagement with the appeal process. Had I known this earlier I would have sought alternative representation." However, in his own production GR/8 he produced and relied upon a letter from the Tribunal sent to CTM on 15 May 2012 pointing to the failure to co-operate with the Tribunal for a period of approximately 15 months and indicating that an Unless Order would be sought in the event of a failure to reply. The key point noted by this Tribunal was that that letter was copied to HMRC and, crucially, to the Appellant. Since Mr Rattan had previous experience of the impact of an Unless Order in these appeals we find it wholly incredible that he did not act upon a letter that was written in plain English and made the consequences of non co-operation clear. There was no immediate reply and the Unless Order was issued on 1 June 2012 but there was then co-operation with the Tribunal.

13. He also stated in the Second Statement that he had had no idea that the case had been listed for hearing on 11 March until 31 January 2013. However at the First Hearing he confirmed that CTM had told him in November 2012 that the case was listed for 2013 yet he was not told the date of the hearing and nor did he ask. Like Judge Sinfield, we find it incredible that he would neither have asked nor have been told the date. The unequivocal assertion from CTM that they advised Mr Rattan of the Trial date last year is accepted. Even if we took Mr Rattan's statement at face value, which we do not, 2013 starts in January and when CTM resigned agency at the beginning of January, since by his own admission he was aware that it was listed for 2013, it should have been a matter of urgency for him to check the precise date. He did nothing. He did not reply to the letters sent to him in January 2013 by HMRC. In particular, although HMRC wrote to him on 15 January 2013 and that letter was confirmed to be delivered by couriers at 12:07 on 17 January 2013, he only responded by email on 30 January 2013 at 22:09 alleging that he had "just received your letter". However, in the interim HMRC had also emailed him on 24 January 2013 stating "Given that you are not currently represented and the proximity to the final hearing

please advise within 24 hours if you are intending on continuing with your appeal." There was no response and that email was not overtly referred to in his subsequent email. HMRC again emailed him on 1 February 2013 with details of the outstanding costs and also intimating that if payment was not made then they would be making an urgent application to have the appeal struck out. It was only in the face of the possibility of another application to strike out the appeals that he responded in any meaningful way on 5 February 2013 indicating that he would be applying for postponement of the hearing, that he would attend the final hearing to give evidence, that he would pay the costs and that he had no witnesses.

14. It was a matter of agreement between the parties that CTM were very experienced in cases of this type and that they had been retained by Mr Rattan on a conditional fee agreement. The email from CTM, obtained by HMRC who had contacted them in the course of this hearing, confirmed that CTM had resigned agency only after a final review of the evidence and authorities. We find it unsurprising that they state that their files have been archived and could not be instantly retrieved. They are clear that the original client file was returned to Mr Rattan. Mr Rattan said in the Second Statement that he had left matters to CTM entirely and that is consistent with the statement from CTM in the email that they had been given free rein to run the case as they saw fit. The Tribunal finds that on the balance of probability that that would have been within the constraints of their instructions, or lack of same. However, indubitably, it would have been in their interests to have ascertained whether there were any witnesses who could assist. HMRC confirmed that CTM had co-operated with them.

15. Clearly, at least until Mr Rattan's lengthy witness statement ("First Statement") was lodged on 18 December 2009, CTM had relatively precise instructions. That statement expressly identified in the first paragraph that it addressed the evidence lodged by HMRC in September 2009. That extended to seven witness statements. On 1 September 2009 CTM had agreed to an application by HMRC for an extension of time for HMRC to lodge witness statements and that on the basis that "this is a complex appeal involving an allegation of MTIC fraud by the Commissioners, and involving a greater volume of evidence than the majority of cases before the Tribunal. It is of medium to high end volume and complexity when compared with the other MTIC appeals".

16. It is clear from the First Statement that not only had Mr Rattan, and CTM, considered the witness statement of Officer Julia Danson at some length but also the copious exhibits produced in support thereof since they are referred to and commented upon in the statement on a number of occasions. This is wholly inconsistent with the assertion by Mr Rattan at paragraph 12 of the Second Statement that when he received the case papers from CTM he noted that it consisted of the statements and exhibits of the witnesses on behalf of the Respondent and that "this was the first time I had seen these documents". (Mr Rattan had told Judge Sinfield that he had received the case papers from CTM on 7 or 8 February 2013.)

17. The Respondents case has not materially altered since September 2009. In the Second Statement Mr Rattan confirms that when he signed the First Statement on

18 December 2009 it was after he had reviewed the statement with Mr Ahmed of CTM. That is in stark contradiction of the averment in the Skeleton Argument for this application that he had had no input into the drafting of that statement. It also contradicts the assertion referred to in the previous paragraph that the first time he saw the HMRC's witness statements and exhibits was in February 2013.

18. The said Skeleton Argument states clearly that it is Mr Rattan who has identified the preparatory work for which the adjournment is sought such as obtaining witness statements. Mr Rattan proffered no explanation as to why, if he had bank statements and witnesses, which could support him, he had neither furnished HMRC with them in the course of the lengthy enquiry nor produced any detail at all in regard thereto to the Tribunal even as at the date of the Hearing of this application. HMRC, in their written Response to this application, argued that "it is noted that no particulars have been provided for these witnesses" and that point was not addressed either orally or in writing for, or by, Mr Rattan. In the Second Statement Mr Rattan states that a witness would be a solicitors firm (unnamed) who was responsible for doing due diligence for him. Due diligence was one issue that was addressed at more length than many others in the First Statement. Had he used a firm of solicitors then it would have been in Mr Rattan's interests at each and every stage to produce details of the work that they had done. Instead, not only was there no mention of their existence in the First Statement or in the recorded interviews with Officer Julia Danson but when talking about due diligence in the First Statement he stated that he had produced "all my due diligence files" to HMRC. The only firm of solicitors mentioned in the First Statement or the exhibits is CTM themselves and that only in relation to a due diligence report which was not instructed by Mr Rattan. The Tribunal finds that if Mr Rattan had employed solicitors he would reasonably be expected to have recalled their existence, and importance, at some point before 7 March 2013. The very fact that CTM produced a report of their own for Mr Rattan to refer to indicating what due diligence would have shown, had it been done, points to there having been no other available evidence. In the Second Statement, the only other indication as to who would be called as a witness was Mr Anthony Elliot-Square to challenge the evidence of HMRC's witness Mr Roderick Stone. The Tribunal is conversant with, agrees with and adopts the decision in Narain Bros v HMRC [2012] UKFTT 188 (Narain) in so far as it relates to Mr Stone's evidence and that is to the effect that it is largely generic in nature and a substantial part is inadmissible. To adjourn in order to obtain a witness statement to challenge Mr Stone's evidence, which in all likelihood would be excluded for the reasons set out in Narain, would not be dealing with these appeals in terms of Rule 2 of the Rules.

19. The only other information in relation to possible witnesses, which is available to the Tribunal, are bland statements that such evidence "is relevant (indeed critical) to the issues on appeal" and that "there are witnesses who could and should be called in support of his case." As noted in paragraph 13 above, as late as 5 February 2013, Mr Rattan had intimated to HMRC that he had no witnesses whom he wished to call in this case. Although it was argued for him that one of the bases for the adjournment application was to seek witness statements, it was also argued for him that HMRC's assertion, that there should be no further delay because of the possibility of erosion of the individual and institutional memory, was not a good argument because the

evidence in this evidence was a documentary exercise and it was not a question of memory testing. Both arguments cannot obtain.

20. In the Tribunal's experience, when drafting and reviewing a statement such as the First Statement any experienced advisor, retained on a contingency basis would have endeavoured to ascertain if there was any shred of evidence which could bolster a client's case and therefore enhance the chances, however faint, of success and therefore of remuneration. The Tribunal has very serious doubts about Mr Rattan's credibility because of the inconsistencies set out above and therefore does not accept his averments about alleged failures by CTM. The Tribunal finds that, as indicated in both the First and Second Statements, Mr Rattan met with CTM on 18 December 2009, reviewed the First Statement and was well aware of the nature and extent of HMRC's case, the witnesses who would be called and the exhibits which would be lodged. Little has changed since then.

21. Mr Rattan should have been very aware of the importance of keeping records since he was convicted on 4 October 1993 for failure to keep proper records. If bank statements which could assist him did exist then he would be expected either to have kept proper records or to have attempted to obtain copies. No information whatsoever has been provided in relation to the bank statements other than that he sought an adjournment to enable him to obtain "bank statements showing transactions". We find that if there had been witnesses and/or bank statements available who could assist Mr Rattan it is inherently unlikely that their existence would suddenly have come to his attention after he was unsuccessful in his attempt to have the Hearing adjourned at the First Hearing.

22. From no later than 31 January 2013, Mr Rattan knew that there was an outstanding Direction to pay costs. At the first hearing he could offer no explanation as to why he had not done so in the three weeks prior to that Hearing. He only paid the said costs "at the eleventh hour" on the afternoon of the last day for compliance in the face of the Unless Order issued by Judge Sinfield thereby delaying matters for the Tribunal and HMRC by a further seven days. Judge Sinfield had warned him orally that if he wished to renew his application to adjourn then he would have to demonstrate more urgency in his conduct of the appeal. These two delays alone indicate a lack of co-operation with the Tribunal even at this very late stage.

23. At the First Hearing, Mr Rattan declined to offer any explanation as to why CTM had resigned agency stating that he "did not know the reason" and in his Second Statement intimated that no explanation had been given. That seems to be inherently unlikely. CTM are clear that it was after a final review. In the experience of the Tribunal, it would be normal practice for an experienced practitioner specialising in this field, regularly appearing in the Tribunals and retained on a contingency basis to explain precisely why they were not continuing to act for an appellant.

24. There was no evidence offered as to why Mr Rattan did not seek representation immediately after CTM resigned. There was only a bland assertion that he had emailed and telephoned a whole host of solicitors and barristers before he lodged the first application to adjourn on 4 February. He told Judge Sinfield that 15 to 18 firms

had declined to take the case on. There is no information as to the detail or timing. However, it is noted that Judge Sinfield made it abundantly clear at the First Hearing that it was doubtful that any firm would take on such a case at such a late stage on a contingency basis. Mr Rattan had then stated that he would pay private fees, if necessary, but did not explain why he had not done so with CTM. In those circumstances Judge Sinfield explained that even if an adjournment was granted it was unlikely that it would change anything since Mr Rattan would be unlikely to find and/or would be unwilling to pay for representation. Mr Khan confirmed that his firm had not been retained for a substantive hearing. The only explanation proffered was that they were not experienced in MTIC cases. However, the Tribunal accepted the point made by HMRC that the firm hold themselves out to have such expertise. Their website states clearly that they "have experience in dealing with such cases and provide highly skilled representation at First-tier Tax Tribunals". The Tribunal was not persuaded by Mr Khan's response that the website should be changed. This Tribunal also finds that given the long and chequered history of these appeals, it seems inherently unlikely that, even if this Hearing were adjourned to enable Mr Rattan to find representation, he would either do so or be prepared, or able to pay for same. On the balance of probability, nothing would be achieved by adjournment other than further delay. As Mr Justice Neuberger states in *RJ Fox v Graham Group plc* "…to adjourn it would simply be putting off the evil day".

25. Mr Rattan has repeatedly failed to cooperate with the Tribunal even since CTM withdrew agency. It is neither fair nor just to adjourn on the basis that because Mr Rattan is now a party litigant something may turn up by way of funding. As indicated above, at the First Hearing Judge Sinfield very carefully explained the consequences of failing to obtain an adjournment for the purposes of obtaining representation to him. Even in the face of that, his co-operation with the Tribunal has been dilatory at best. The whole history of these appeals causes the Tribunal to have grave reservations about the genuineness of any of the reasons advanced by Mr Rattan for an adjournment. The Tribunal does not accept that this application is one made in good faith. On the contrary it appears that almost any tactic will be deployed in order to obtain an adjournment in these long running appeals, which in itself is curious, since the sums at stake amount in total to £2,105,160.50.

26. *Terluk v Berezovsky* correctly identified that a late adjournment involves a significant loss of time and money. If this hearing were to be adjourned there would undoubtedly be a waste of scarce Tribunal time, little or no possibility of recovery of costs for this Hearing from Mr Rattan and a further delay in access to justice for the parties. The Tribunal accepts HMRC's contention that an adjournment would result in significant prejudice to HMRC, the administration of justice and the public purse.

27. As is made clear in *Transport for London v O'Cathall* at paragraph 42 the overarching fairness factor must be taken into account is assessing the effect of the decision as to whether or not to adjourn on *both* sides. *Dhillon v Asiedu* confirms that the decision as to whether or not to adjourn is a balancing exercise. Both parties are entitled to have the cases dealt with fairly and justly. Mr Rattan does not have a monopoly of the fairness factors. He has failed to advance credible or indeed consistent arguments in support of the application. He has repeatedly failed to co-

operate with the Tribunal even after the resignation of his previous agents. In light of the factors set out above, and having due regard to the provisions of Rule 2, and Article 6 the Tribunal directs that in order to deal with these two cases fairly and justly the application to adjourn the hearing is refused.

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

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 30 July 2013

APPENDIX 2

Witness statements

1	Witness statement of Gurminder Rattan	18/12/09
2	First witness statement of Julia Danson	09/09/09
3	Second witness statement of Julia Danson	10/02/10
4	Third witness statement of Julia Danson	21/10/10
5	Fourth witness statement of Julia Danson	01/06/11
6	Witness statement of Peter Cameron-Watson - Famecraft	15/09/09
7	Witness statement of Susan Okolo -Famecraft	15/09/09
8	Witness statement of Paul Staniforth – I P Ltd	10/08/09
9	Witness statement of Timothy Reardon – Compufix	14/09/09
10	Witness statement of Michael Penry – Powerlink	10/09/09
11	Witness statement of Mark Hughes – Barato	23/09/09
12	Witness statement of Peter Moorehead – 1st Freight	01/09/10
13	Witness statement of Gary Taylor – Grey Market	10/09/10
14	Witness statement of Rod Stone – MTIC Generic	11/09/09

APPENDIX 3

The Law

The legislation

1. Articles 167 and 168 of Council Directive 2006/112/EC provide:

> "167. A right of deduction shall arise at the time the deductible tax becomes charged.
>
> 168. Insofar as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay: The VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person".

2. That has been implemented in UK domestic law by Sections 24 to 26 of the VAT Act 1994 and Regulation 29 of the VAT Regulations 1995 under which, in principle, a trader is entitled to the payment of the input tax it claims.

The case law

3. Mr Baker referred to the following authorities in the course of the written and oral submissions and all but the last were included in the bundle lodged prior to the hearing so Mr Rattan had had fair notice thereof. In the course of the hearing for the adjournment application, Mr Baker had made the point that the legal background to this case was well known to any legal firm experienced in MTIC fraud. It was a matter of agreement that CTM were experienced therein. The Tribunal accepted Mr Baker's contention that Mr Khan's firm were experienced in this field (paragraph 24 of the adjournment decision) and, of course, in acting for him in the adjournment. They had advised him on what he would require for a substantive hearing. Such advice should, and no doubt would, have been in the context of the legal principles which apply.

4. HMRC cited the following cases:-

(1) *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL* 2008 STC 1357 (Kittel)

(2) *Mobilx Ltd (in liquidation) v HMRC* 2010 EWCA Civ 517

(3) *Mobilx (First Instance)* 2009 EWHC 1081 (CH)

(4) *Blue Sphere Global Ltd v Commissioners for Revenue & Customs* 2008 UK VAT 20901 (Blue Sphere)

(5) *Red 12 Trading Ltd v The Commissioners for HM Revenue & Customs* 2009 EWHC 2563 (CH) (Red)

(6) *D I & G I Electronics Ltd v HMRC* 2011 UKFTT 825 (TC) (DI & GI)

(7) *Maximum Networks v HMRC* 2011 UKFTT 93 (TC) (Maximum)

(8) *Active Infotech v HMRC* 2011 UKFTT 328 (TC) (Active)

(9) *Davis & Dann Ltd v HMRC* 2012 UKFTT 55 (TC) (Davis) – appeal dismissed

(10) *Radarbeam v HMRC* 2010 UKFTT 431 (TC) (Radarbeam)

(11) *J J Wholesale Ltd v HMRC* TC/2010/00383 (JJ Wholesale) – leave to appeal refused

5. In addition the Tribunal was conversant with the case of *Brayful Ltd v HMRC* [2011] UKUT 99 (TCC) (*Brayful*) which the Tribunal in *Davis* quoted with approval. We agree with, and have applied these principles in our deliberations.

(i) 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 fails to meet the objective criteria which determine the scope of the right to deduct. (s 43)

(ii) If a taxpayer has the means at his disposal of knowing that by his purchase he is participating in a transaction connected with fraudulent evasion of VAT he loses his right to deduct, not as a penalty for negligence, but because the objective criteria for the scope of that right are not met. (§ 52)

(iii) The principle 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. (s 60)

(iv) The test 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 then he should have known of that fact. (s 59)

(v) 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. (s 81)

(vi) In answering the factual question, 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 focusing 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(s 82)

6. At paragraph 45 of our decision we refer to the findings in *JJ Wholesale* and those paragraphs read:-

"67. The facts found demonstrated that *Famecraft* was not involved in legitimate trade. The only reasonable explanation for the facts found was that *Famecraft* was knowingly involved in fraudulent trading with the intention of cheating the Revenue. This conclusion was amply supported by the manner in which *Famecraft* conducted its business (no due diligence despite its knowledge of the high risk of MTIC fraud), the sudden ease in which it traded in huge quantities of new commodities and in finding customers and suppliers despite having no prior experience of the market sector, and the rapid growth in sales resulting in a turnover which if allowed to continue would have ranked *Famecraft* as one of the biggest companies in the UK with an estimated turnover of £1.2 to £1.3 billion.

68. The facts found showed that *Famecraft's* mobile phone and razor blade transactions in period 08/06 were contrived with no commercial rationale whatsoever, and connected with each other. Both sets of transactions ultimately involved Portuguese suppliers and Spanish customers which questioned why the Spanish customers did not go straight to the suppliers, saving themselves significant sums of money. *Famecraft* had no trading pedigree in mobile phones but was able at the beginning of period 08/06 to find a UK market for mobile phones to the value of £154 million. Equally at the end of period *Famecraft* discovered a new Spanish customer for razor blades to a value in excess of £150 million. The effect of these two sets of transactions enabled *Famecraft* to offset the output liability of £27,296,134.67 incurred on the mobile phones within £4,145.74 by the inptu tax claim on the sales of razor blades. All of *Famecraft's* 149 deals in razor blades were traced back to a tax loss by the same defaulting trader. The artificiality of the mobile phones transactions was demonstrated by the layers of UK companies acting either as buffers or brokers in the respective deal chains, and *Famecraft's* disregard of measures ensuring the *bona fides* of the goods sold and of its trading partners. Finally the timing of the opening and use of an obscure off-shore bank accounting facilities by the participants in both sets of transactions and the existence of a common controlling mind for the Spanish customers were indicative of the orchestrated and connected nature of the respective sets of transactions."

7. At paragraph 51 of our decision we refer to the findings in *JJ Wholesale* and those paragraphs read:-

> "73. The Tribunal makes the following findings of fact in respect of Barato:
>
> 42. the purported trade in razor blades had no connection with *Barato's* trade classification of *wholesale of soft drinks and foodstuff*sunder its VAT registration dated February 2005.
>
> 43. A massive increase in turnover in a short period of time. In the period 05/06 *Barato's* declared sales were £76 million from nil sales in period 05/05.
>
> 44. *Barato* has not produced to HMRC its business records for the purported deals. Apparently the records were kept on a memory stick.
>
> *45. Barato* failed to deliver VAT returns for period 08/06 and for the final period to de-registration on 25 October 2006.
>
> *46.* Barato has not paid or appealed the assessment to the value of £22,967,287.
>
> *47.* A winding up order was made against *Barato* on 13 June 2007.
>
> 74. The Tribunal is satisfied on the facts found that the VAT losses incurred by *Barato* in the August 2006 razor blades transactions were occasioned by fraud."

8. HMRC argue that Mr Rattan knew or ought to have known that these transactions were connected with the fraudulent evasion of Value Added Tax and found on the decision of the ECJ in *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL* (C-439/04 and C-440/04). The Court of Justice in these joint cases established an exception to the right to deduct when the trader knew its transactions were connected to fraud. The Court stated:

> "51. In the light of the foregoing, it is apparent that traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud, be it the fraudulent evasion of VAT or other fraud, must be able to rely on the legality of those transactions without the risk of losing their right to deduct the input VAT (see, to that effect, Case C-384/04 *Federation of Technological Industries and Others* [2006] ECR I-0000, paragraph 33).
>
> 52. It follows that, where a recipient of a supply of goods is a taxable person who did not and could not know that the transaction concerned was connected with a fraud committed by the seller, Article 17 of the Sixth Directive must be interpreted as meaning that it precludes a rule of national law under which the fact that the contract of sale is void, by reason of a civil law provision which renders that contract incurably void as contrary to public policy for unlawful basis of the contract attributable to the seller, causes that taxable person to lose the right to deduct the VAT he has paid. It is irrelevant in this respect whether the fact that the contract is void is due to fraudulent evasion of VAT or to other fraud.

53. By contrast, 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' are not met where tax is evaded by the taxable person himself (see Case C-255/02 *Halifax and Others* [2006] ECR I-0000, paragraph 59).

54. As the Court has already observed, preventing tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive (see Joined Cases C-487/01 and C-7/02 *Gemeente Leusden and Holin Groep* [2004] ECR I-5337, paragraph 76). Community law cannot be relied on for abusive or fraudulent ends (see, inter alia, Case C-367/96 *Kefalas and Others* [1998] ECR I-2843, paragraph 20; Case C-373/97 *Diamantis* [2000] ECR I-1705, paragraph 33; and Case C-32/03 *Fini H* [2005] ECR I-1599, paragraph 32).

55. Where the tax authorities find that the right to deduct has been exercised fraudulently, they are permitted to claim repayment of the deducted sums retroactively (see, inter alia, Case 268/83 *Rompelman* [1985] ECR 655, paragraph 24; Case C-110/94 *INZO* [1996] ECR I-857, paragraph 24; and *Gabalfrisa*, paragraph 46). It is a matter for the national court to refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent ends (see *Fini H*, paragraph 34).

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.

58. In addition, such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them.

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'.

60. It follows from the foregoing that the answer to the questions must be that where a recipient of a supply of goods is a taxable person who did not and could not know that the transaction concerned was connected with a fraud committed by the seller, Article 17 of the Sixth Directive must be interpreted as meaning that it precludes a rule of national law under which the fact that the contract of sale is void – by reason of a civil law provision which renders that contract incurably void as contrary to public policy for

unlawful basis of the contract attributable to the seller – causes that taxable person to lose the right to deduct the VAT he has paid. It is irrelevant in this respect whether the fact that the contract is void is due to fraudulent evasion of VAT or to other fraud.

61. By contrast, where it is ascertained, having regard to objective factors, that the supply is to a taxable person who knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, it is for the national court to refuse that taxable person entitlement to the right to deduct".

9. The Court of Appeal in *Mobilx Limited & Others v The Commissioners for Her Majesty's Revenue & Customs* [2010] EWCA Civ 517 clarified the test in *Kittel, inter alia*, at paragraphs 59-61 and 82-84, as follows:-

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

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.

61. Such an approach does not infringe the principle of legal certainty. It is difficult to see how an argument to the contrary can be mounted in the light of the decision of the court in *Kittel*. The route it adopted was designed to avoid any such infringement. A trader who decides to participate in a transaction connected to fraudulent evasion, despite knowledge of that connection is making an informed choice; he knows where he stands and knows before he enters into the transaction that if found out, he will not be entitled to deduct input tax. The extension of that principle to a taxable person who has the means of knowledge but chooses not to deploy it, similarly, does not infringe that principle. If he has the means of knowledge available and chooses not to deploy it he knows that, if found out, he will not be entitled to deduct. If he chooses to ignore obvious inferences from the facts and circumstances in which he has been trading, he will not be entitled to deduct.

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 appeal, 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 p72) 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 eg 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.
>
> 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.'

84. Such circumstantial evidence, of a type which compels me to reach a more definite conclusion than that which was reached by the Tribunal in *Mobilx*, will often indicate that a trader has chosen to ignore the obvious explanation as to why he was presented with the opportunity to reap a large and predictable reward over a short space of time. In *Mobilx*, Floyd J concluded that it was not open to the Tribunal to rely upon such large rewards because the issue had not been properly put to the witnesses. It is to be hoped that no such failure on the part of HMRC will occur in the future."

APPENDIX 4

HMRC's *de minimis* advice on due diligence

If known, when verifying the VAT status on new or potential customers/suppliers the information provided should include the following:

- The name of the new or potential Customer/Supplier.
- Their VAT Registration Number.
- Their contact numbers (including telephone number, fax number, e-mail address and mobile numbers if known).
- Copies of any supporting documentation (ie VAT certificate, letter of introduction, certificate of incorporation etc).
- The Directors and/or responsible members.
- Whether they are buying or selling goods.
- The nature of the goods.
- The quantities of the goods.
- The value of the goods.
- Their bank sort code and account number.
- We would also ask that you forward, on a monthly basis, a purchase and sales listing with the identifying VAT Registration Numbers against the suppliers/customers to your local office.