

DECISION

1. This is an appeal against three decisions of HMRC to (i) Westminster Trading Limited (“WTL”) of 19 March 2008 denying a claim of input tax for the 06/06 period (ii) SGL International Limited (“SGL”) of 23 June 2008 denying a claim for input tax for the 05/06 period and (iii) Westminster Import and Export Limited (“WIE”) of 26 June 2008 denying claim for input tax in the 05/06 period. The reason for refusing the claims was the same in each case; that the underlying transactions were connected via a contra-trading scheme, with MTIC fraud and that the Appellants knew or should have known of that fact.

2. The disputed transactions relate to mobile phones and number 52 in total; WTL carried out 16 transactions from 20 – 27 June 2006; SGL carried out 20 transactions from 11 – 31 May 2006 and WIE carried out 16 transactions from 25 – 31 May 2006.

3. The grounds of appeal for each of the three Appellants are very similar and set out in their appeal notices of 31 March 2008 (WTL), 14 July 2008 (SGL and WIE). These appeals were directed to be heard together by the Tribunal on 20 January 2009.

4. A number of preliminary issues were heard by the Tribunal starting on 16 September 2014 including three adjournment applications, this decision relates to those applications and not the substantive appeal:

Witness Evidence

(1) HMRC made a request to adduce a further witness statement of Mr Nigel Humphries. The Appellants confirmed before the Tribunal that they had no objection to this.

(2) HMRC made an application on 8 August 2014 to replace the evidence of Mr Patterson relating to the contra-trader Worldwide with evidence of Mr Bycroft, Mr Patterson having died. Mr Bycroft’s evidence was more extensive and detailed than Mr Patterson’s but on the basis that the Appellants were given additional time to consider this and that HMRC highlighted the areas of new evidence, including new exhibits, the Tribunal agreed that this evidence should be admitted.

(3) HMRC made an application on 2 September 2014 to replace the evidence of their expert witness Mr Fletcher with expert evidence from Mr Corkery because Mr Fletcher had ceased to act through KMPG as an expert witness. On the basis that this evidence did not differ materially from the evidence of Mr Fletcher and that HMRC highlighted the differences between Mr Fletcher’s statement and Mr Corkery’s and that the Appellants were given additional time to consider this new expert witness evidence, the Tribunal agreed that this evidence should be admitted.

(4) Mr Hewitt on behalf of the Appellants made an application for disclosure of Mr Corkery’s relationship with HMRC and HMRC’s relationship with his firm, Ernst and Young. HMRC objected to this request on the basis that it was so wide as to be impossible to comply with. The Tribunal concluded that any issues with Mr Corkery’s independence were best dealt with as part of the witness cross examination rather than as a preliminary matter but agreed with

HMRC that the Appellants' disclosure request was too wide. The Appellants' application was therefore rejected.

The First Adjournment Application

5 Mr Hewitt, on behalf of the Appellants made an application for the hearing to be adjourned on 26 August 2014 because the Appellants' solicitors had ceased to act for them on 8 August 2014 and the Appellants had not been able to instruct replacement advisers in time for the commencement of the hearing. That application was rejected on 29 August 2014 by Judge Berner because the Appellants had not provided sufficient reasons why their solicitors had ceased to act or why it was not possible for 10 Mr Kohli, as a director of each of the Appellant companies, to represent them at the Tribunal.

The Second Adjournment Application

6 Before the Tribunal on 16 September Mr Hewitt made a renewed adjournment application and provided additional reasons for making that request. The renewed 15 adjournment application was on the basis that:

(1) The Appellants' solicitors had ceased to act for them on 8 August 2014 and the Appellants currently had no legal representation. The solicitors' decision was because the original fee agreement with the Appellants from 2008 was no longer effective.

20 (2) The nature and complexity of the Appellants' case and the very large amount of material (114 trial bundles) was too difficult for the unrepresented Appellants to deal with. Mr Hewitt said that he had not seen any evidence to suggest that the solicitors' decision to come off the record had been anything other than a unilateral decision by them. The Appellants should not be 25 prejudiced as a result of a decision of their advisers which they could do nothing to avoid.

(3) HMRC had served two new witness statements shortly before the commencement of the hearing; Mr Bycroft's on 8 August 2014 and Mr Corkery's on 29 August 2014. It was not reasonable to expect the Appellants to deal with this significant new evidence in the time available. 30

(4) The decision in *Fonecomp*, due to be heard by the Court of Appeal in late October was relevant to the Tribunal's decision in this case and it did not make sense for the Tribunal to proceed without knowing the outcome of the *Fonecomp* appeal. 35

7. HMRC objected to the adjournment request, pointing out that both they and the Tribunal had an obligation to the courts to ensure that the case was heard fairly and that there was no reason why Mr Kohli could not represent the Appellants with suitable adjustments being made to take account of the fact that he was not legally 40 qualified. Mr Kohli had been involved with the appeals since 2008 and must have had numerous conversations with his advisers while they were still instructed. As at 8 August 2014 when the Appellants' advisers came off the record it was fair to assume that preparations for the hearing were complete. It was possible within the five week timetable for which the case had been listed to give the Appellants time to familiarise 45 themselves with the new evidence which had been provided. As far as the *Fonecomp* decision was concerned, the Tribunal could request later submissions on any relevant points if necessary.

8. The Tribunal concluded bearing in mind their overriding objective to deal with cases justly and fairly that none of the objections raised by the Appellants were sufficient to persuade the Tribunal to adjourn a five week hearing for a case which had already been significantly delayed. The Tribunal concluded that it would use its wide and flexible powers which were intended to enable it to deal with cases such as this to ensure that each of the Appellants' concerns could be dealt with satisfactorily and that it was in the interests of justice that the case should not be further delayed.

(1) The First Tier Tribunal Rules were essentially designed to ensure that it was possible to deal with unrepresented parties including in a complex case such as this. In these circumstances the Tribunal would undertake to use those powers to ensure that the unrepresented Appellants were not prejudiced, including giving the Appellants additional time to deal with complex and detailed evidence, providing technical support on questions of law and ensuring that the evidence was produced to the Tribunal in a manner which was straightforward for the Appellants to deal with.

(2) Mr Kohli was a director of each of the Appellant companies, he was therefore well placed to understand and comment on their businesses and how the disputed transactions were undertaken. He had been involved in these appeals from inception and therefore should be aware of all the relevant facts in issue. The Tribunal concluded that for those reasons, and with support from the Tribunal, there was no reason why he should not be able to effectively present the Appellants' case.

(3) In coming to this decision the Tribunal did not consider the culpability or otherwise of the Appellants in their solicitors' decision to cease to act. The Tribunal accepted as a fact that the solicitors were no longer willing to act and made its decision considering only whether the case could be heard fairly and justly without the Appellants having legal representation.

(4) It was accepted that HMRC had served two witness statements only a number of weeks before the hearing was due to commence, but the Tribunal was prepared to give the Appellants additional time to consider this evidence prior to the start of the hearing and to ensure that those witnesses were not called until the Appellants had had sufficient time to familiarise themselves with that material.

(5) The Court of Appeal's decision in Fonecomp, while it might well be relevant to the Appellants' case, was likely to be known before the Tribunal provided its final decision in this case. If required, the Tribunal would be prepared to invite the parties to make further submissions on the implications of the Fonecomp decision after the end of the hearing.

9. For all of these reasons the Tribunal concluded that none of the Appellants' grounds for requesting an appeal either on their own or in combination were sufficient grounds for adjourning this hearing and concluded that the appeal should be heard commencing on Wednesday 17 September 2014.

10. On a further request of the Appellants, the hearing was adjourned for a five day period until Wednesday 24 September to allow Mr Kohli as the representative of the Appellants ample time to prepare to make submissions and respond to HMRC's arguments and if possible, find alternative legal representation.

11. The Tribunal also issued directions as to the way in which the hearing should proceed to make it as easy as possible for Mr Kohli to represent the Appellants' case, including (i) allowing Mr Kohli to rely on his written opening submissions (ii) re

ordering the proceedings so that Mr Kohli could respond immediately to HMRC's opening submissions (iii) giving Mr Kohli 24 hours notice of which witnesses would be called by the Respondents and of the matters which each witness would address (iv) allowing Mr Kohli to respond to and cross examine specified elements of each witnesses' evidence rather than hearing lengthy witness evidence and cross examining at the end and (v) limiting the material to be covered to one sample deal per Appellant.

12. The hearing commenced on Wednesday 24 September and the Tribunal heard Ms Malcolm's opening submissions on behalf of HMRC, including detailed comments on various aspects of a single transaction, Deal 1 for the Appellant SGL. On Wednesday 24 September and the morning of Thursday 25 September Mr Kohli responded to Ms Malcolm's opening submissions setting out his main arguments and provided factual evidence on behalf of the Appellant SGL relating to Deal 1. Mr Kohli concluded his opening submissions before the short adjournment on Thursday 25 September.

The Third Adjournment Application

13. After the short adjournment on Thursday 25 September the Tribunal was informed that Mr Kohli had fallen ill, had called an ambulance for himself and had been taken to hospital. The Tribunal therefore adjourned the hearing for the day pending further information about Mr Kohli's state of health.

14. The Tribunal was informed on Friday morning that Mr Kohli would not be attending the Tribunal on that day on his doctor's advice and that he was having further tests. No information was provided at that stage about the nature of Mr Kohli's illness. Have discussed the matter with the Respondents' representatives it was agreed that the Tribunal would request further information about Mr Kohli's state of health, including a medical certificate from the hospital which treated him on Thursday 25 September and would re-convene on Monday 29 September at 2pm at which time a decision would be taken about how to proceed.

15. At the end of the day on Friday 26 September the Tribunal was provided with a copy MED 3 "Fitness for Work" certificate from Dr Sapuay, a GP at Knightsbridge Medical Centre stating that Mr Kohli had been assessed with "*severe anxiety, chest pain under investigation, awaiting cardiology assessment, patient advised to rest and is not fit to attend court in current condition*". The medical certificate was stated to have a duration of 14 days.

16. The Tribunal re-convened on Monday 29 September with representatives from HMRC but no representatives from the Appellants. The Tribunal noted that Mr Kohli had not complied with the specific request of the Tribunal to provide evidence from the hospital where he had been treated but that nevertheless Dr Sapuay had stated that he was not fit to attend the Tribunal.

17. Having heard representations from the Respondents the Tribunal ordered that the Appellants be formally notified of Mr Kohli's state of health and consequent inability to represent them at the Tribunal and that Mr Kohli be ordered to provide the

specific medical evidence which had been requested by the Tribunal on Friday 26 September before 2pm on Tuesday 30 September.

18. The Tribunal re convened on Tuesday 30 September at 2pm and at 2.05pm
5 received from Mr Kohli on behalf of the Appellants a request for a further
adjournment on the basis that only Mr Kohli was able to represent the Appellants and
the he was not able to do this because of his health issues. The Tribunal was provided
with a cardiologist's report of 30 September 2014 from Dr Martin Been, consultant
10 cardiologist at University Hospital Coventry, confirmation from University College
London Hospital that Mr Kohli had attended the accident and emergency unit on 25
September and a more detailed letter from Dr Sapuay explaining Mr Kohli's current
state of health. Dr Been's report stated that "*it seems most likely that [Mr Kohli's]
15 syncopal episode was of neurocardiogenic origin.... This episode seems to have been
provoked by stress. In my opinion it would not be advisable [for Mr Kohli] to be
placed in the same situation again..... I conclude that it could be harmful for Mr Kohli
[sic] health to be placed in the same stressful environment of the Court; and therefore
am of the opinion he is currently not in a fit state to attend Court for at least 14
days*".

19. HMRC's counsel directed the Tribunal to the decision of the Court of Appeal in
20 *Forresters Ketley v Brent & Another* [2012] EWCA Civ 324 which stated that "*In
cases where the applicant complains of stress-related illness, an adjournment is
unlikely to serve any useful purpose because the stress will simply recur on an
25 adjourned hearing*" and requested that the Appellants' request for a further
adjournment be refused. HMRC also suggested that the Appellants could seek
alternative representation, including in respect of WTL and WIE Mr Kohli's co
director, Mr Maini, who was in any event due to provide witness evidence to the
Tribunal.

20. The Tribunal concluded from the medical evidence that Mr Kohli was suffering
30 from stress-related ill health and that the earliest date on which Mr Kohli could be
expected to attend the Tribunal was 14 October 2014. The Tribunal was of the view
that there was a real risk, on the basis of that evidence that Mr Kohli might never be
35 in a position to represent the Appellants since his stress-related illness had been
triggered by appearing before the Tribunal.

21. Bearing in mind the overriding objective that cases should be heard fairly and
40 justly, the Tribunal nevertheless concluded that it was in the interests of justice to
continue with the hearing if at all possible given the amount of time and resource
which all of the parties and the Tribunal had committed to having the case heard in
the five weeks for which it was listed.

22. The Tribunal was aware of its obligations to ensure that all parties participated
45 fully in proceedings as far as practicable and so directed on Wednesday 1 October that
the hearing be adjourned for a further seven days, until Friday 10 October to allow the
Appellants to make arrangements to either be represented by Mr Kohli, if his health
permitted, or to find alternative representation. The directions included details of how
the hearing should proceed should Mr Kohli not be available to attend to ensure that

the Appellants were able to participate in the hearing as far as practicable, including the provision of transcripts to the Appellants, taking account of any requests from the Appellants for the order in which witnesses should be heard and providing an extended time for written closing submissions and directed that the parties should
5 make specific requests for any other reasonable special arrangements which they required in order to ensure that the hearing could proceed on Friday 10 October 2014, before 2pm on Thursday 9 October.

The Fourth Adjournment Application

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23. In response to its directions of 1 October HMRC made a number of specific submissions to the Tribunal for arrangements which they considered would allow the hearing to proceed even if Mr Kohli was not able to attend some or all of the remainder of the hearing days;

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(1) That on request the Appellants should be provided with transcripts of the hearing free of charge.

(2) That Mr Kohli would not be required to provide witness evidence until 15 October at the earliest (after the two weeks for which his cardiologist had suggested he would not be fit to attend the Tribunal).

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(3) That assistance would be provided by HMRC to any representative appointed by the Appellants before the hearing re-commenced on 10 October to assist them in marshalling the documentation.

(4) That any representative of the Appellants could be accompanied by others at the Tribunal to provide secretarial and administrative assistance.

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(5) That HMRC would provide an index of a “core bundle” which would be used by the parties for the remainder of the hearing.

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(6) That the parties be given an extended period to make written closing submissions and that HMRC would provide their submissions first allowing the Appellants further time to make a response and that a further oral hearing of half a day could be provided for oral closing submissions if requested by the parties.

(7) That if Mr Kohli was not able to attend the Tribunal after 14 October that his witness statement, his written opening submissions and his oral opening submissions stand as his evidence.

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24. On Thursday 9 October the Tribunal received from Mr Hewitt, representing the Appellants, a further adjournment request due to Mr Kohli’s ill health, stating that the Tribunal had been incorrect to conclude on the medical evidence provided that Mr Kohli’s illness meant that he might never be fit to attend the Tribunal. The medical evidence only stated that Mr Kohli was not currently able to attend the Tribunal and that further tests were required to be carried out.
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25. The directions issued by the Tribunal were unfair and contrary to the overriding objective that all cases should be heard fairly and justly, since only Mr Kohli was able to represent the Appellants. The arrangements suggested by the Tribunal and HMRC would not be adequate to ensure that the Appellants could participate fully in the proceedings. Mr Hewitt also referred to Article 6 of the Human Rights Act as being in point.

26. HMRC objected to the Appellants' request for a further adjournment in writing to the Tribunal on 9 October.

27. At the hearing on 10 October the Appellants were represented by Mr Hewitt who made a number of points in addition to his written adjournment application saying that it was not possible, as suggested by the Tribunal, for anyone other than Mr Kohli to represent the Appellants since only Mr Kohli was involved in the day to day running of the Appellants' businesses. In particular Mr Maini, who was a director of two of the three Appellant companies, was not aware of the day to day running of the businesses. The Tribunal could not conduct a fair hearing without considering the evidence of Mr Kohli's mens rea for entering into the disputed transactions which only he could provide. The hearing should be adjourned indefinitely until Mr Kohli's health permitted his attendance or at least until 14 October for further medical reports on Mr Kohli.

28. On behalf of HMRC Ms Malcolm referred to the history of postponement requests from the Appellants, both prior to and during the course of the hearing and the "foot dragging" of the Appellants throughout the preparation for the hearing. Ms Malcolm pointed out that there was no evidence that the Appellants had made any attempt to find alternative representation in the time since Mr Kohli had become unwell. Ms Malcolm stated that Mr Kohli's fellow director, Mr Maini, had resigned from the two Appellant companies of which he was director on 19 September 2014 but nevertheless there was no reason why he could not represent the two Appellant companies with which he had been involved at the relevant period in 2006.

29. In HMRC's view the medical evidence from Mr Kohli's cardiologist did clearly suggest that Mr Kohli's health issues were stress related and that he would not be fit to attend court with no specified end date to that condition.

30. Having considered the arguments of both parties the Tribunal decided that it was not in the interests of justice to grant a further adjournment in this case. The Tribunal recognised the significance of a decision to continue with the hearing without being certain that the Appellants' representative and main witness would be available to attend and that this was to the disadvantage not just of the Appellants but also the Respondents who would lose the ability to cross examine Mr Kohli. In coming to its decision the Tribunal has taken account of these factors;

(1) The medical evidence available to it at the time, particularly the evidence from Dr Been, Mr Kohli's cardiologist which suggested that Mr Kohli had suffered from stress-related illness triggered by attending the Tribunal which could re-occur, but that Mr Kohli might be fit to attend the Tribunal after 14 October. The Tribunal has concluded from this that there was a risk that Mr Kohli would not be available to attend the Tribunal either on or after 14 October or on any other occasion to represent the Appellants and that an adjournment would therefore serve no purpose.

(2) Having heard from Mr Hewitt on this and previous occasions concerning the possibility of other legal representation or other representatives of the Appellant companies being found to represent the Appellants, the Tribunal concluded that there was no certainty than any other representation would be found for the Appellants in the short to medium term if at all. Even if new legal representatives were appointed that would entail considerable further delay.

(3) The Tribunal had already heard relatively lengthy opening submissions from Mr Kohli on behalf of the Appellants who had also provided written witness evidence.

(4) The Appellants had been provided with the opportunity to request any further measures to ensure that they could participate in the hearing as far as practicable, but they had chosen not to make any such requests.

5 (5) The Tribunal had stressed at the start of the hearing and in relation to the second adjournment request that all parties, including the Appellants had a duty to the Tribunal to ensure that there was a fair and just hearing and to co-operate with the Tribunal. Taking account of the number of adjournment applications, the failure by the Appellants to comply with earlier directions prior to the commencement of the hearing, their lack of response to evidence served by the Respondents and their failure to specify what evidence submitted by the Respondents was contested, it was hard to avoid the conclusion that the Appellants were not committed to working with the Tribunal to ensure that that the hearing could proceed. This was demonstrated by the fact that a fourth adjournment application was being heard at the end of the fourth week of a hearing which had been listed for five weeks and had heard, at that stage, only one and a half days of submissions, the rest of its time having been taken up with adjournment applications and other case management issues.

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20 (6) Mr Hewitt's reference to Article 6 of the Human Rights Act was not relevant to these proceedings which were against companies which were accused not of fraud or any criminal activities, but of being knowingly involved in a chain of transactions which included fraudulent deals.

25 31. The Tribunal has been left in the unenviable position of deciding whether it is fairer to adjourn a hearing which has already been subject to extensive delay and which has taken significant resources to get to this point, with no certainty as to when it might be continued, and deciding to continue in the absence of any representation for the Appellants and without their main witness. The Tribunal has concluded that adjourning a case in which there is a risk that the Appellants may never be in a position to represent themselves or obtain representation before the Tribunal is tantamount to accepting that the case will never be heard and that this cannot be in the interests of justice.

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35 32. Contrary to Mr Hewitt's arguments, the obligation of the Tribunal is not simply to provide that the parties participate in the proceedings, but rather that this is done as "far as is practicable". In these circumstances, where the Tribunal is faced with Appellants who have no legal representation and whose main representative is unavailable potentially for the foreseeable future, the Tribunal has no alternative but to consider what is "practicable" in order for hearing to proceed at all, even if that is less than ideal.

40 33. The Tribunal has therefore decided that on the basis of the Directions set out below, which are intended to ensure that the Appellants can participate in the hearing as far as practicable in the given circumstances, the hearing should proceed as of 10 October 2014.

34. The Tribunal DIRECTS that;

45 (1) Transcripts of each day's hearing for which the Appellants are not able to provide a representative to attend the Tribunal on their behalf be provided free of charge to the Appellants as soon as they are available.

(2) The order of witness evidence will be as requested by HMRC in their submissions of 3 October 2014 and in any event Mr Kohli will not be required to attend the Tribunal to provide witness evidence before 15 October 2014 at the earliest.

(3) If Mr Kohli is not fit to attend the Tribunal on 15 October 2014 the Appellants provide medical evidence from Mr Kohli's consultant, Mr Been to explain why he is not available to attend, before 5pm on 14 October 2014.

5 (4) The Appellants provide to the Tribunal before 2pm on 16 October 2014 details of the Respondents' evidence which is contested in respect of (i) the identity of the deal chains; (ii) the fact of the tax loss (iii) that the tax loss was fraudulent (iv) that the transactions subject to this appeal were connected with that fraudulent tax loss. If the Appellants do not accept HMRC's evidence in respect of each of these issues the Appellants must state which specific details are disputed and why. If this is not provided the Tribunal will proceed on the basis that witnesses whose evidence relates to those issues will not be called for cross-examination and their written witness evidence will be accepted by the Tribunal.

15 (5) Closing submissions be made by the parties in writing, that HMRC serve their closing submissions first and no later than three weeks after the end of the hearing, and that the Appellants' closing submissions be served no more than five weeks after receipt of the Respondents' submissions. Both parties may apply for a further hearing to make oral closing submissions, of no more than one day.

20 (6) That the Appellants should inform the Tribunal before 2pm on Thursday 16 October 2014 whether Mr Maini and Mr Ibrahim will be available to give oral evidence on behalf of the Appellants to the Tribunal on Friday 17 October 2014 and of any other witnesses who they intend to call.

25 (7) If the decision of the Court of Appeal in *Fonecomp* has not been released before the 8 week period in (5), the parties have leave to make further written submissions in respect of that decision within two weeks of the date of the release of that decision.

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.

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**RACHEL SHORT
TRIBUNAL JUDGE**

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RELEASE DATE: 22 October 201