TC00936

Appeal number: EDN/07/143

VALUE ADDED TAX – repayment of input tax refused – MTIC fraud – actual and imputed knowledge of Appellant – Appeal Dismissed.

FIRST-TIER TRIBUNAL

TAX

CELL TRADING (UK) LTD	**Appellant**

- and -

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

TRIBUNAL JUDGE:	**Mr Kenneth Mure, QC**
(Members):	**Mr I R Welch, CA,**
	Mr K Pritchard, OBE., BL., WS

Sitting in public at 126 George Street, Edinburgh on 12-26 July and 23 September 2010

Rajesh Rai, Barrister, for the Appellant

Peter Gray QC, and Paul O'Brien, Advocate, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Preliminary

1. The issue in this Appeal is whether a repayment of "input" tax of £6,630,969.77 should be made to the Appellant company in respect of 81 transactions entered into in April, May, June and July 2006. Helpfully, Parties negotiated an extensive Statement of Agreed Facts leaving as the main contentious aspect the actual and imputed knowledge of the Appellant company and in particular its director Mohammed Rasool of a scheme to defraud the Respondents of VAT.

2. It was agreed that the Respondents should lead albeit under reservation of all considerations affecting the *onus* of proof. With Parties' consent it was agreed too that the members of the Tribunal should read the Witness Statements in advance but subject to correction and elaboration in questioning by Counsel in due course.

The Law

3. Section 26 Value Added Tax Act 1994 provides:-

"(1) the amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for that period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within sub-section (2) below.

(2) the supplies within this sub-section are the following supplies made or to be made by the taxable person in the course or furtherance of his business –

(a) taxable supplies;

(b) supplies outside the United Kingdom which would be taxable supplies if made in the United Kingdom;

(c) such other supplies outside the United Kingdom and such exempt supplies as the Treasury may by order specify for the purposes of this sub-section."

However, the right of a VAT registered trader to deduct input tax may be withheld if there is an "abuse of right", such as facilitating or being complicit in a fraud on the system of indirect taxation. This arose for consideration by the ECJ in *Axel Kittel v Belgian State [2008] STC1537.* That decision directs that repayment of input tax should be withheld where the trader *knew or ought to have known* that the related transaction was tainted by VAT fraud. In the MTIC (Missing Trader *intra* Community Fraud) scenario described *infra* the fraud will have been perpetrated at the initial stage of a series of transactions involving the same goods.

The decision in *Kittel* has been applied by the UK Courts and Tax Tribunal and most recently reviewed in the Court of Appeal in England in the conjoined decisions in *Mobilx Ltd (in Administration) and Others v HMRC [2010] EWCA Civ 517.* We refer extensively in our reasoning to the opinion of Moses LJ in that decision and we note therein his approval of *dicta* of Christopher Clarke J in *Red 12 v HMRC [2009] EWHC 2563*.

4. Essentially the legal issue for the Tribunal to resolve was the interpretation and correct application of the principles set out in *Kittel*.

The Evidence

5. The Respondents' first witness was Roderick Stone, a senior VAT official, with responsibilities for the investigation and combating of MTIC fraud for the past 9 years or so. He confirmed the terms of his

Witness Statement, which moreover was agreed by Counsel as representing his evidence subject to further elaboration by their questioning and cross-examination.

6. Mr Stone noted firstly the VAT application for registration in July 2001 by the Appellant company (Vol A-4) completed by Sarfaraz Ahmed, its then principal director, and brother-in-law of Mohammed Rasool, its present principal director. In particular a maximum annual turnover of £75,000 was anticipated and ordinarily claims for repayment of VAT were not expected. In the event turnover soon after substantially exceeded £75,000 per annum. Indeed in May 2002 it exceeded £30m.

7. Mr Stone noted the Audit Report of Officer Haswell (Vol F13-45) arising out of his visit on 7 June 2002. In addition to the substantially increased turnover Mr Haswell observed that 80% of its stock came from one supplier, Select One, that it had only 12 customers, and used only one freight forwarder, Hawk Logistics.

8. Mr Stone then explained the structure of MTIC carousel fraud. Goods are imported zero-rated into the UK. The importer then re-sells to a UK purchaser subject to output VAT. The importer fails to account for the output tax to HMRC: he thus becomes the "defaulting trader". A series of purchases and sales by intermediaries or "buffers" is then concluded. The final purchaser in the UK, the "broker", then re-exports the goods zero-rated. He seeks from HMRC repayment of input tax. Such a repayment, given the failure to account for output tax following the import, represents a loss to HMRC. In the present case HMRC is refusing to make such a repayment, which, of course, is the matter at issue.

9. The sequence of transactions, the invoice chain, and the circular payment trail in the opposite direction, were explained in relation to several chains. It appeared, according to Mr Stone, that the chain of transactions was initiated by an initial payment being made by a "controlling mind" to (ultimately) a foreign purchaser who buys from the *broker*. This finances the sequence of payments. The *broker* contributes a further sum sufficient to meet the cost of VAT charged to him on the sale by the final *buffer*. These sequences are shown in the diagrams and relative spreadsheets prepared by Mr Birchfield and Mr Flavelle and setting out the flow of cash and invoice trails. The *buffers* serve to distance the defaulter from the broker seeking repayment.

10. In these examples, arguably suspiciously, all transactions and the sequence of payments were each completed in the great majority of cases within a day, and the financial transactions were all made by using the facilities of the First Curacao International Bank. A repayment of input tax to the *broker* would enable him to assist to finance further *chains* of transactions. Mr Stone emphasised that such chains in his opinion were not coincidental but contrived and by design. (Note too Mr Flavelle's view: para 26). Many UK banks had (for whatever reason) closed the accounts of mobile phone brokers. Conversely the FCIB offered a 24 hour internet service. In October 2006 its banking licence was revoked by the Netherlands Antilles authorities following investigations into VAT fraud and money-laundering.

11. Mr Stone noted certain features commonly found in MTIC Fraud. These are itemised in his Witness Statement. In particular Third Party Payments are made frequently. Instead of payment being made by the first *buffer* to the *defaulter*, it is made to another party, often outwith the UK, and thus the defaulter is less likely to be in funds which could be recouped by HMRC.

12. Freight Forwarders were used commonly. The goods would not exchange hands physically but would be held throughout on the premises of a freight forwarder. After import the goods might be stored at the freight forwarder's premises only briefly but title could pass via the *buffers* to the *broker* who then exports. No apparent purpose may be served by the import into the UK and later re-export: indeed the series of transactions subsequently only bears to increase price rather than add value, which creates suspicion that these are not arms-length commercial transactions and have no economic logic.

13. Mr Stone explained the scale of tax losses from MTIC Fraud and steps taken by the UK Authorities to combat it. To assist traders HMRC's MTIC Validation Team at Redhill, Surrey, would on enquiry confirm

a trader's registration for VAT and would also notify the subsequent de-registration of such traders to parties who had enquired about them or with whom they had traded. The Appellant had received a number of these notifications.

14. In cross-examination Mr Stone acknowledged the existence of "grey market" dealings in mobile phones, where the manufacturer or authorised distributor will sell or "dump" on the market stock which they cannot otherwise dispose of. The grey market is not illegal and in certain circumstances may have the tacit approval of the manufacturer. This, Mr Stone accepted, creates legitimate *arbitrage* opportunities for smaller traders.

15. It was then put to Mr Stone that his suggested features of MTIC fraud could be consistent with innocent trading. As we understand, he accepted that viewed individually and depending on the particular circumstances, they could. Mr Stone acknowledged that there had not as yet been any criminal prosecutions brought in the UK against MTIC traders using offshore banking arrangements such as those afforded by the FCIB. However, steps had been taken to recover unpaid output tax from defaulters and one trader had been reported for further criminal investigation.

16. Mr Stone agreed that while the Appellant had been advised that certain repayments were being withheld pending investigation, an actual refusal had not been intimated until 2007. He accepted that culpability depended on *mens rea* on the part of the trader, an inference which depended on all the evidence, direct and circumstantial.

17. We considered Mr Stone a formidable witness with a detailed familiarity with MTIC fraud. He was credible and reliable throughout and consistent in his account.

18. The next witness for the Respondents was Alan Flavelle, an officer of HMRC, who together with a senior colleague, a Mr Vaughan (now retired and in poor health), was responsible for investigating the Appellant company's VAT affairs. (In cross-examination he confirmed that his personal involvement dated from about April 2006). He in turn confirmed his Witness Statement, the terms of which were again amplified by Counsel's questioning and cross-examination.

19. Mr Flavelle spoke to the Appellant's being allowed to complete monthly Returns since March 2002 (A11/13). He referred to the terms of its application for registration (A/4) in July 2001. The principal director then was Mr Rasool's brother-in-law. He spoke to the applications for repayment of input tax in April, May, June and July 2006 (C/9), their being subjected to the process of extended verification, and later their being ultimately refused. Earlier, repayments had been withheld pending verification although ultimately allowed albeit on a "without prejudice" basis. In these circumstances the Appellant and Mr Rasool were well aware of the prevalence and risks of becoming involved in MTIC fraud. Additionally from June 2004 the Appellant had received "Redhill" letters (intimating withdrawal of registration for VAT purposes) affecting various traders in this sector.

20. Mr Flavelle spoke to the Appellant company's transactions entered into in the 4 months in question, April-July 2006. There were 78 deals concluded in April and the details of these are set out in schedules produced which record the names of the parties in the chains, relevant date(s), types of phone and quantities, mark-ups and profit. Mr Flavelle referred also to diagrams prepared by a colleague, Mr Birchfield (a later witness for the Respondents), showing the invoice chain and a corresponding payment trail.

21. Of the 78 deals concluded in April the Appellant acted as *broker* in 33. These are deal numbers 7, 8, 10a, 10b, 12a, 12b, 13, 14, 15, 16, 20, 26, 27, 28a, 28b, 33, 34, 35, 36, 38, 43a, 43b, 44, 45, 50, 55, 56, 57, 63, 64, 65, 67 and 68. and reflected in Vol 12-20. There is, Mr Flavelle noted, a remarkable pattern of the same persons including the Appellant transacting, often in the same order, with a consistency in mark-ups (20p then 50p according to the order of the *buffers*) and a larger profit to the *broker*. Invoice dates are the same or are on consecutive days. All 33 can be traced back to 3 defaulting importers. The input tax on these 33 deals is included in the disputed repayment claim in this Appeal.

22. In another 37 deals the Appellant acted as a *buffer*. These deals are not the subject of repayment claims. However, their circumstances are relevant to the merits of the present appeal in Mr Flavelle's view. All these chains started with one of the same 3 defaulting traders. There are similar patterns in the identity of the *buffer* traders involved, dates of invoices, and mark-ups. In the remaining 8 deals the Appellant acted as importer. There was no default. However, the circumstances of the deals and the prices agreed suggested according to Mr Flavelle a contrived pattern of trading. (See Vol 12-21).

23. In May the Appellant was party to 95 deals. In 33 it acted as *broker* and has made repayment claims, presently refused. These also are included in the present Appeal. Relative spreadsheets were spoken to by Mr Flavelle and these disclose the same pattern of features as in the April deals. 25 can be traced back to 2 defaulters, both being defaulters in April also. In the other 8 cases the acquirer was not a defaulter but a *contra* trader. (*Contra* trading is a more sophisticated form of MTIC fraud, where a second "clean" chain is used to create a liability to account for output tax which is offset against the fraudulent claim for repayment of input tax in the "dirty" chain). In another 56 deals the Appellant acted as *buffer*. These deals are not contested in the present appeal. (See Vol 12-22 and 23).

24. In June the Appellant acted as *broker* in 14 out of 15 deals. The relative chains can be traced back to 2 defaulters. Repayment has been refused and is included in the present appeal. The pattern of the deals is repeated essentially. Spreadsheets are produced and their terms confirmed. (See Vol 12-24 and 25).

25. In July only 1 deal was the subject of refusal, in which the Appellant acted as *broker*. It can be traced back to a defaulting trader and is included in the present appeal. (See Vol 12-26).

26. Given their complicated structure and the level of inter-dependence between the deals and money-flows Mr Flavelle agreed with Mr Stone's view that these could not have been achieved accidentally but were by design, and that their completion depended on central orchestration. (The Tribunal noted this shared view as being of particular significance. See paras 9 and 10 supra). It appeared to Mr Flavelle that the goods never seemed to reach the ultimate consumer or even a retailer. Further they remained physically in or moved between freight forwarders' premises. There they could be used in a subsequent deal chain. So far as the cash sequence was concerned it bore to be circular in his opinion. The diagrams produced by Mr Birchfield showed a complete circular movement of funds, starting with the party injecting the capital to facilitate the sequence of purchases. The broker adds to this sum an amount to cover input VAT on his purchase. The purchases and payments each take place on one day usually. Payment is not always made to the defaulter but rather to a third party, so making recovery by HMRC less likely. Ultimately an enhanced figure is returned to the financier and the broker has potentially a claim for repayment of input tax. Of course, HMRC loses since the importer, the missing trader, has defaulted in accounting for output tax on re-sale by him.

27. Mr Flavelle emphasised the state of awareness of the Appellant company. From May 2004 when the April 2004 Return was challenged, the Appellant had been sent monthly letters by the Respondents indicating that repayments were being withheld pending enquiry. While repayments were made until the refusal in respect of the April 2006 Return, these had been made strictly on a "without prejudice" basis. Also, Redhill letters intimating de-registrations had been sent regularly. Turnover had increased prodigiously, well beyond the initial expectation, and without any apparent injection of capital funds.

28. Other factors suggestive of an absence of commercial reality in Mr Flavelle's view were the "back to back" nature of the transactions. Models of phone (relatively expensive ones) and their numbers (considerable) in purchases and re-sale matched. No stock levels were maintained and no stock was left over unsold. There was no need for storage facilities: the freight forwarder's short-term provision was sufficient. Terms of sale were not set out on invoices. There was no evidence of any negotiation. There were never any faults apparently or returned items. The Nokia 8801 model could not be used in the UK. Yet substantial quantities of it had been imported into the UK, such transactions having served no apparent commercial purpose. No adequate International Mobile Equipment Identity ("IMEI") checks (of individual

phones' registration numbers) were carried out – indeed in the time available no adequate checks of the phones could be made.

29. Mr Flavelle was referred to the "due diligence" records of the Appellant. (See Folders A, 8 and 11). This covers VAT, Companies House and other documentation (see para 109 of the Witness Statement). These, he considered, were not satisfactory for commercial purposes. In particular the credit worthiness of these parties was generally unsatisfactory. Often there was no credit rating or an unsatisfactory one. Accounts and trading records were not available often because the concern had not been trading for a significant period. Considering that the Appellant's pattern of trading involved substantial sums, this was not satisfactory. Trading had taken place often before the process of due diligence had been completed. These other businesses often traded from a serviced office. In certain instances the Appellant and its prospective trading partner had put forward the same trade references, undermining the independence of the process in Mr Flavelle's view. Some of the information recovered had even been conflicting (re Opal 53 – noted at para 112 of the Witness Statement) and generally was limited in extent.

30. The thrust of Mr Rai's cross-examination was directed at the extent of the Appellant company's knowledge of any fraudulent activity on the part of the concerns with which it traded at the material dates ie April-July 2006. Mr Flavelle agreed at the outset that he had not been involved in monitoring the Appellant company prior to April 2006. Insofar as he spoke to that period he was relying on other officers' notes and records. His responsibility extended only to verifying claims for the 4 months in question. He accepted too that none of the Appellant's immediate suppliers in the chains in April, May, June and July 2006 were (certainly then) missing or defaulting traders. Mr Rai referred Mr Flavelle to the various letters notifying de-registration of traders sent to the Appellant. He agreed that the Appellant had not traded with any of them although it may well have inquired about their registrations. Mr Rai referred also to HMRC's having repaid all earlier claims for repayment of input tax as tending to support the sufficiency of the Appellant's "due diligence" procedures. Although pressed, Mr Flavelle was not prepared to concede this. Much of the correspondence from HMRC was on a "without prejudice" basis. Mr Flavelle considered that these letters should have warned Mr Rasool of the prevalence of MTIC fraud and consequent risks. Individual letters had to be viewed in an overall context. (It was noted in re-examination that HMRC would have a liability to pay interest on any repayments withheld after a certain period). When invited to comment on the terms of HMRC's reports of various assurance visits to the Appellant (Folder A – 55, 63, 64, 68, 69, 84 and 91) as suggesting that its VAT affairs were in order, Mr Flavelle was again not prepared to agree. In fairness he was not involved personally with the Company's VAT affairs before April 2006 but unhelpfully he could not explain the scoring system on particular matters noted in the body of the Reports. He did accept under reference to paras 46 and 60 of his Witness Statement that there was nothing irregular in the Appellant's having sold certain phones at a loss in June 2006 and having re-exported to Spain on the same day another batch of phones. Equally Mr Rasool's having his private dwelling house and the business office of the company in the same building could not be the subject of adverse comment.

31. Briefly evidence was taken from James McGee, an officer of HMRC who retired in 2009. Again he adopted and confirmed the terms of his Witness Statement. In particular the Tribunal observed the favourable comments (paras 8-12) about Mr and Mrs Rasool's "due diligence" paperwork and their apparent eagerness to follow advice and seek professional guidance there anent. In cross-examination Mr McGee could not recollect how often he was in contact with Andy Lynch of KPMG who advised the Appellant company. He recollected accompanying Mr Vaughan when sales invoices and related documents were uplifted from the Company's office.

32. We considered that both "field" officers, Mr Flavelle and Mr McGee, gave their evidence in a fair and straightforward way. Mr Flavelle's evidence was wide-ranging yet he was able albeit with reference to his Written Statement and other documentation to deal satisfactorily with many detailed queries raised. We considered the testimony of both officers to be credible and reliable.

33. Gary Taylor MBA was the fourth witness led by the Respondents. He acted as their expert witness dealing with "grey market" opportunities in the telecoms industry, of which he has extensive experience over about 15 years. He is presently a director with PWC in London in a strategy group.

34. Mr Taylor noted in Mr Rasool's Witness Statement that the business of the Appellant company was essentially in *arbitrage* and in his Report he considered this as a trading opportunity; whether the nature of the activities of the Appellant were consistent with this; and that in the context of the grey market which operated in the distribution system of the telecoms industry. Mr Taylor had concluded that it was very unlikely that the Appellant had been conducting legitimate *arbitrage*. Further, although the Appellant had not claimed this, Mr Taylor considered it very unlikely that it had been exploiting other legitimate grey market opportunities such as "box breaking", "forecast failures" or "dumping".

35. Mr Taylor referred to and adopted both his Witness Statements, the second of which dealt with the response of the Appellant's expert, Mark Gregory.

36. Mr Taylor explained that apart from the "white market" in telecoms, whereby manufacturers could attempt to control sales and distribution, there was also a grey market, tolerated if not approved by manufacturers and certainly not illegal. Essentially the grey market emerged where the white market distribution system as directed by manufacturers via authorised distributors, failed. In the UK authorised distributors numbered only about 12, with about 24 others acting as unauthorised distributors. In particular small retailers requiring only a few models of a particular phone could not readily deal with an authorised distributor. In 2006 this market was shrinking as larger retailers were prevailing over smaller outlets. Grey market suppliers, to succeed against larger outlets, had to be able to compete on price and speed of delivery.

37. *Arbitrage* exploited price differentials between markets. The *arbitrageur* "bought where cheap and sold where dear". To enable this process, Mr Taylor explained, he would expect to find a volume of paperwork setting out negotiations (eg model, colour, accessories, chargers etc being specified). Also unnecessary steps in the sale/purchase chain were unlikely as they reduced profit. Special consideration applied to Nokia phones, which featured substantially in the Appellant's transactions. That company did not vary its pricing between territories. All these factors militated against the profitable and successful conduct of *arbitrage* by the Appellant.

38. Other grey market opportunities (possible but not asserted by the Appellant) were excluded too by Mr Taylor. For instance "box breaking" ie re-configuring for use in the UK phones bought at a subsidy, required staff, storage and technical facilities, all of which were absent here. "Forecast failures", where a particular model becomes unexpectedly popular, can create opportunities where stock can be traced in the supply chain before the manufacturer can make good a shortfall. Factors indicative of grey market trading or otherwise are helpfully summarised at page 39 of Mr Taylor's first Witness Statement.

39. Mr Taylor had paid especial regard to Mr Rasool's statement of 30 June 2008 in his deliberations. He did not find his account convincing. Any one of several *contra* indicators (all of which were present) undermined its credibility. Admittedly the profit margin of about 6% was consistent with *arbitrage.* However, a substantial percentage of the handsets were mature, with less scope for the profit margin (para 9-15). Significantly the Appellant's market share was surprisingly large in relation to the Motorola C113. (It did not sell in significant numbers). Also the company seemed to have traded in very large volumes of relatively expensive phones (eg Sony Ericsson W900), which to be successful would require a mass market. Such a market share was not plausible for any trader let alone a small business such as that of the Appellant. Further the Nokia 8801, suitable for use only in North America, had been dealt in by the Appellant in substantial quantities. In figure 31 (para 9-32) a market share comparison is set out attributing to the Appellant a share averaging 10-13%, which would have made it the fourth largest trader in mobile phones in the UK. Mr Taylor stressed that in his view such a share by volume and value was not consistent with profitable legitimate grey market *arbitrage* trading (para 9-35).

40, In his second Witness Statement Mr Taylor responds to the Report of the Appellant's expert, Mark Gregory. Mr Taylor indicated to us in evidence that he adhered to his conclusions and arguments as set out in his first Statement. Mr Gray referred him to certain characteristics of the trading founded on by him as *contra* indicators of *arbitrage*:-

5 (i) he remained of the view that an excessive market share was inconsistent with legitimate grey market trading. In particular even if emerging markets were added to the equation, the threshold for an excessive market share would fall proportionately (para 2-37). Also, as his calculations had been made by reference to new mobile phones, additions for refurbished phones and "box-breaking" were not appropriate.

10 (ii) He repeated his suspicions about the length of the deal chains. In an archetypical deal chain each party adds value and profits are maximised by each link. In Cell Trading's case there were several parties not adding value. There was no commercial logic in the links. There was no logic in importing then exporting phones out of the UK. Curiously many chains were concluded within one day.

15 (iii) The lack of detail in invoices exposed Cell Trading to serious risk. Even colour should be specified. Such omissions could upset a deal and prejudice payment.

(iv) Further the solvency and financial status of intermediaries was important. The *bona fides* and solvency of parties in the chain were vital in avoiding risk.

(v) Nokia stock represented 83% of the Appellants' sales (WSI, para 9-21). While prices
20 varied within territories, they did not vary between territories, so restricting *arbitrage* opportunities by purchasing in low priced territories.

41. Mr Taylor confirmed that the Nokia 8801 model was marketed as suitable for North America while the somewhat similar 8800 was appropriate for Europe. The distinction related to compatibility with certain networks. Only 299 Nokia 8801's were sold in 2006 in Europe and the UAE.

25 42. It was agreed that Mark Gregory, the Appellant's expert, should be the next witness, being interposed before the end of the Respondents' Proof. He too is a professional economist (BA, MSc) and is presently a partner with Ernst & Young at their London office.

43. He confirmed the terms of his report in which essentially he responds to Mr Taylor's analysis of the "grey market" in telecoms. To the Tribunal's surprise Mr Gregory admitted candidly that he had not
30 considered the deal chains, the sequence of controversial transactions, which form the essence of this Appeal (para 1.1.2). (This was confirmed in response to the Tribunal's direct questions).

44. Mr Gregory considers that the "grey market" is dynamic, changing and unpredictable, and international. He suggested that this had not been appreciated by Mr Taylor. The "grey market" arose from mismatch of supply and demand. Mr Taylor, he argued, had failed to acknowledge the size and significance of demand
35 in India and Africa in this context. Cell Trading should not be viewed as a "distributor" but rather as an intermediary or trader.

45. He had noted the four suggested *contra* indicators suggested by Mr Taylor as being inconsistent with *arbitrage* and made these criticisms –

(i) the pricing policy for Nokia phones allowed for a 12% discount depending on volume.
40 There were additionally some local subsidies. International pricing policy was subject to competition rules.

(ii) In relation to market shares it was misleading to calculate this on a monthly basis. Sales in mobile phones peaked at about Christmas. Further, Mr Taylor had understated the size of the market.

45 (iii) The length of the deal chains were not necessarily contra indicators of grey market trade. Many factors could affect this such as the location of the final destination, storage, and knowledge of local market conditions.

(iv) So far as the need for detail in documentation was concerned Mr Gregory considered that identification of the broad handset type was sufficient. Colour was relatively unimportant. It was the size of demand which mattered.

46. In cross-examination Mr Gregory admitted that he had not looked at the deal chains and that he had "very much glanced" at the deal sheets. He explained that his remit was to consider the "grey market". While he considered that the Appellant company could have been engaged in legitimate trading, he did not say that there was clear evidence to support such a finding. That question, Mr Gregory explained was not within his remit. While he had responded to Mr Taylor's Report, he had not broadened his own Report to consider the merits of the Appeal under reference to para 1.1.2. While he had considered the nature of *arbitrage* trading he had not considered whether the trading was legitimate or fraudulent.

47. In his Report Mr Gregory had considered the role of authorised distributors. He had distinguished small independent dealers. He was uncertain, however, whether Cell Trading fell within the latter category. He did accept that it would probably have had some contact with authorised distributors in its later stages in view of its increasing sales volume. He acknowledged that authorised distributors dealt in the "grey market". While Mr Gregory was aware of MTIC fraud as a concept, he did not seem to have immediate familiarity with it. He accepted that importing mobile phones into the UK and re-exporting them to Europe within 24 hours had no commercial rationale unless, say, the ultimate destination for the goods was outside Europe.

48. Mr Gregory accepted that the maximisation of profit would be the expected objective of any trader. In the mobile phone market, he agreed, the cheapest source may well be the authorised distributor. There was no reason why an independent trader should not contact an authorised distributor. Thus in a typical chain, he accepted, there would be an authorised distributor, or a mobile network operator, or large retailer. Mr Gregory agreed that it was odd that there were only independent dealers in the chains in this Appeal.

49. Mr Gray then invited Mr Gregory to consider the categories of phones sold in the chains. In his report he notes (para 4.5.1d) that independent traders tended to deal in older phones. Yet, he accepted that about half of the models of phones sold, and over one-third by volume, were less than or about 6 months old. He freely acknowledged that these were not mature grey market phones.

50. In para 6.3.18 Mr Gregory explains that lengthier chains would be formed where distribution extends across the globe. However, in cross-examination he acknowledged that where, say, a dealer in the UK was to supply to a customer in France, as few as three participants in the chain would be feasible ie an authorised distributor, the UK dealer, and the customer in France. He agreed that there was no commercial logic in a lengthier chain then.

51. Mr Gregory agreed with Mr Gray that in a business such as Cell Trading's some documentary records of negotiations would be likely, such as phone-records, e-mails, notes of conversations. He agreed that some form of database, depending on the sophistication of the business, was likely.

52. In scrutinising a chain from a commercial viewpoint Mr Gregory accepted that it was appropriate to consider the number of participants, whether they added value, the route of the goods, and whether money flowed correspondingly. He was then asked to consider certain of the chains by these criteria. He appeared to accept that in various respects these did not reflect commercial sense. There was no economic justification for the sequence of transactions. Finally, Mr Gregory agreed (perhaps obviously) that the honesty, reliability and solvency of a trading partner were important and were matters to be verified before engaging in trade.

53. Mr Gregory was not re-examined.

54. The Tribunal paid great care to both experts' evidence. Ultimately we preferred the Report of Mr Taylor. It is comprehensive in relation to all matters arising in the present case whereas Mr Gregory's Report relates essentially to the grey market. There is no dispute that the grey market exists. The issue is

whether Cell Trading was trading there legitimately or the deals which it concluded were contrived. Mr Gregory accepts that his report does not focus on this. Indeed Mr Gregory candidly admitted its limited scope both to the Tribunal and in cross-examination in particular to the initial questions then. We noted Mr Gregory's criticisms of the *contra* indicators of *arbitrage* trading relied on by Mr Taylor, but we think that these criticisms were adequately dealt with in Mr Taylor's second Report. Both experts agreed that the import of phones into the UK and their re-export served no obvious commercial purpose.

55. The scope of Mr Gregory's Report occasioned some surprise in the course of the evidence. The Tribunal noted (see para 43) that he had not considered the deal chains. He had not reviewed the full circumstances of the Appellant's trading. His Report was a response in the abstract to Mr Taylor's view of the "grey" market. The Tribunal was conscious of changes in representation and problems of funding at earlier stages of the Appeal and accordingly (via the Chairman) offered the Appellant the opportunity of seeking a further Report on the matter of the deal chains and an adjournment. This, however, was not taken up.

56. The final witness for the Respondents was Peter Birchfield. He has served for about 35 years with HMRC. He presently leads the MTIC technical team at Redhill. He adopted his 3 witness statements and amplified these in the course of his evidence.

57. He explained that his role in this enquiry was examining bank records recovered from FCIB which showed or might tend to show the passage of money in settlement of the invoices set out on the spreadsheets prepared and spoken to by Mr Flavelle. All the traders traced in the invoice chain had accounts with FCIB and these became accessible to the UK revenue authorities following on the Bank's licence being revoked by the Netherlands Antilles banking authorities. From this information Mr Birchfield prepared flowcharts, showing the passage of money, which, he submitted, corresponded with the payments due in terms of the invoices.

58. It was not challenged that the information recorded on the flowcharts showing these money transfers accurately records the evidence of these bank records. (See para 20 of the Statement of Agreement Facts).

59. Mr Birchfield prepared a large number of flowcharts from a series of transaction enquiry reports. These are produced as relative to his Witness Statement and were identified by him. From re-examination the point of controversy was what proper inferences could be made. Some of the flowcharts are complete: others are not. What they show, in Mr Birchfield's view, is a flow of money passing in the opposite direction to the passage of title to the phones in terms of the invoices. Where the cash flow circle is complete, it starts with a party injecting capital which passes (not necessarily directly) to the foreign customer purchasing the goods free of VAT on export by the *broker*. Each party in the circle withholds a small amount. The *broker* to fund his purchase from the last *buffer* adds an amount for VAT and the enhanced sum passes between *buffers* and then to the missing trader or more frequently to a *Third Party*, who then returns it to the initial financier. He receives an enhanced sum. The *broker* has a claim for repayment of input tax. HMRC has lost the output tax following import by the default of the importer/missing trader. For ease of reference two flowcharts relating to Deals nos 10a and 12a concluded in April 2006 are produced as appendices ("A") hereto. (Vol 19/2 p.13 and 38). These illustrate a circular flow of funds, diminishing slightly at each stage, except for the purchases by Cell Trading from the last *buffer* when it adds the VAT due. The cashflow passes in the opposite direction to the invoice chain. In the flowchart for Deal 12a there is one interruption of the circle when the funds leave the FCIB and thus cannot be traced. Also in Deal 12a there is a *third party payment* by Stylez to Alagu Muthusamy instead of to Worldwide Enterprises which invoiced Stylez.

60. In many cases Mr Birchfield was able to trace cash transfers corresponding exactly in amount and date to the series of payments due in terms of the invoices in the chain. In others the sums were a little different, but a circular movement of cash between the parties in the invoice chain at about the date(s) of the invoices and passing in the "reverse" direction, was detected. Mr Birchfield acknowledged frankly that attribution of a cash flow was more difficult in these cases. It was a matter of judgement, he explained.

61. We were impressed by Mr Birchfield. His researches seemed thorough and well documented. His conclusions were reasonable in our view and not strained. He acknowledged candidly that in certain cases his conclusions as to attribution of particular money flows to invoice chains were less than certain. We considered that in those instances where he had exercised his judgement, that had been done wisely.

5 62. Finally, Mr Rasool gave evidence on behalf of the Appellant company as its principal director. Originally the directors were his wife's brother and sister and he succeeded them in February 2005. He confirmed the terms of his Witness Statement which was elaborated in questioning by Counsel.

63. He explained that the company acted as a wholesaler, not selling to retail outlets but to similar traders. There had been concern about the implications of joint and several liability in the trade and in April/May
10 2005 the company engaged KPMG to advise on what precautions and checks were appropriate in their business and to ensure that the wording of their documentation was satisfactory. HMRC visited the company monthly, advising simply, according to Mr Rasool, to "do as much as you can". After KPMG's involvement the company's checks and procedures became more stringent. Mr Rasool explained how he would compile a "deal sheet" in respect of each concluded transaction. He explained the individual items
15 included in the deal sheet. (See para 65 *infra*). These were regularly inspected by HMRC and apparently verified.

64. Mr Rasool then explained his manner of conducting business. He would phone around his regular suppliers and customers on a daily basis making 20 to 30 calls a day and check websites such as IPT, Ali Baba and GSM, which promote mobile phones. He would receive in turn about the same number of
20 incoming calls. A deal would take typically 2-3 days to conclude. Once stock was sourced, a price had to be negotiated, the specification of stock checked, and the status of the other trader verified.

65. Price was the main aspect of the negotiation. Mr Rasool referred to Table A in the Appellant's productions, a spreadsheet setting out the deals negotiated between April and July 2006. He highlighted their price differences on particular models of phone, between £3 and £25. Mr Rasool explained that he
25 used HMRC's office at Redhill to verify VAT details of suppliers and customers. The company used freight forwarders, taking advantage of their storage and transport facilities. Thus Cell Trading did not have to arrange for warehousing or maintain a transport fleet. It used AI Inspections, instructing a 10% sampling and IMEI number check of the phones. (Mr Rasool estimated that a 10% check of 1000 phones would take about 1 hour). The deal summary sheets maintained for individual transactions spoken to by Mr Rasool
30 included orders, invoices, offers, freight forwarders' and shipping documentation, "Redhill" enquiry records, and certain due diligence documentation. In relation to "due diligence" checks on its business contacts KPMG had advised the Appellant to visit premises and take photographs. This was done regularly by Mr Rasool. In relation to credit reports he explained that where a trader had not been in business for an extended period – and many of their contacts had traded for under 18 months – there would not be accounts
35 filed at Companies House, and inevitably no positive credit rating. In certain instances, when a business had been set up by a former employee of another trade contact, Mr Rasool felt able to rely on the previous business relationship with the employee.

66. Where Cell Trading and a new contact offered each other the same trade reference Mr Rasool felt more comfortable as the reference was known to him. He did not consider it sinister that trade contacts banked
40 with FCIB. Cell Trading had maintained an account with Barclays Bank in Glasgow, which had been closed on the instructions of its head office. It was well known in the trade that other UK banks had adopted such a policy. He did not think it suspicious that he had trading opportunities for such large numbers of phones. The market in 2006 was strengthening.

67. Mr Rasool remains indignant at the refusal by HMRC to make repayments. He had had a good
45 relationship with Mr Vaughan and Mr McGee, the two officers of HMRC who had visited the company before Mr Flavelle took over in about April 2006. All repayment claims had been met prior to that date. While certain repayments were delayed, verification ultimately had been completed satisfactorily. While Mr Rasool believed that there was some risk of innocent involvement in MTIC trading chains before April

2006, he did not consider that they were of the magnitude later discovered. He did not consider that he should have known of the extent of the actual risk earlier.

68. In cross-examination Mr Rasool was questioned in detail about his knowledge and understanding of how carousel fraud operates, suggested inconsistencies between the terms of his Witness Statement and his oral evidence, and his company's pattern of trading as being inconsistent with "arms-length" commercial transactions.

69. Mr Rasool accepted that he was aware of fraudulent activity in the telecoms trade and the risks for him as a trader. He agreed that the first delayed repayment of VAT in early 2004 emphasised this. While repayments had been delayed in 2004/5, they had been paid eventually (albeit subject to further enquiry) and that had reassured him. He undertook "due diligence" enquiries, which were important given the substantially increasing turnover of the company. He accepted that the only real issue in the appeal was whether he knew or ought to have known that the transactions in respect of which repayment of input tax had been withheld were likely to have been tainted by fraud.

70. Mr Gray posed certain questions, considering carousel fraud from the fraudster's viewpoint. In particular Mr Rasool accepted that if an innocent trader became involved in a chain, then control over the circulation of monies and goods would be lost. He accepted further that for the chain to work, every participant should be party to the fraud; that the chain was as strong as its weakest link; and that the chain would end if broken by an innocent party. (We would acknowledge that these are somewhat technical questions and we view Mr Rasool's answers, which were given candidly, in that context).

71. Mr Rasool was then asked about 2 "deals" in May 2006, numbers 34 and 35, and invited to comment on the apparent circularity of funds explained by Mr Birchfield. He was referred to spreadsheets setting out the sequence of invoices and flowcharts showing the passage of cash. In Deal no 34 a *third party payment* was again made to Alagu Muthusamy. (See para 59).

72. He was then asked about credit facilities extended by Cell Trading. In his Witness Statement Mr Rasool had explained that credit standing of parties with whom he dealt was not unduly important as the company did not grant credit. (Para 110 explains its pattern of "back-to-back" trading). In particular it was put to him that credit had been granted by Cell Trading in deal 7 to Opal 53. The invoice date was 7 April 2006 yet payment was not made until 22 May. Mr Rasool explained that there might have been a further 2 days delay before the goods were released ie. 9 April. However, he did accept that Cell Trading had granted credit and explained that para 105 of his Witness Statement was in error. Market considerations, he claimed, had compelled Cell Trading to grant credit. We did not find this explanation satisfactory.

73. Mr Gray pursued then the matter of credit checks and due diligence generally as one aspect of the company's manner of trading. He invited Mr Rasool to explain paras 12, 20-22. Was there not, Mr Gray asked, a greater commercial risk where there was only a 6 month rather than a 12 month pattern of trading? Mr Rasool replied that you had to take account of the market. It was natural for individuals to want to set up their own businesses and make profit. While in para 25 Mr Rasool spoke of having diligence checks carried out professionally, he accepted in his oral evidence that this had not been done. He had approached KPMG but they, he claimed, had been discouraged by HMRC from undertaking such work. He had had some discussions with Chiltern, another professional advisor, but checks had not actually been carried out by them. Again we did not find this explanation satisfactory.

74. Mr Gray then asked Mr Rasool to comment on diligence files compiled for 3 business contacts *viz* CIPD, Symbolix, and A-Z Mobiles. In general terms an explanation was sought from Mr Rasool about their compilation. On occasions it appeared that trading had started before or during the process of investigation. Also, in instances the prospective contact had put forward as a trade reference the same persons as Cell Trading had proposed in respect of itself. In one case trade references were in conflict about the duration of the trading relationship. These points were not explained away satisfactorily. Further, the premises of certain businesses were merely serviced offices, of a short-term or temporary nature, yet this did not

apparently cause Mr Rasool any concern in a trading relationship in which substantial transactions were concluded.

75. Other aspects about the pattern of Cell's trading were noted. Why, Mr Gray asked, were there no documentary records, emails, notepads recording preliminary negotiations? There had only been produced deal sheets in respect of concluded deals, recording a concluded agreement and subsequent steps in procedure. Mr Rasool explained that no records were kept of deals which did not materialise. Further Mr Rasool considered it unnecessary to keep phone bill records and lists of trade contacts.

76. Mr Gray suggested that it was odd that in view of Mr Rasool's evidence of receiving 20-30 sales offers daily by phone, there were only 4 suppliers of mobile phones to Cell Trading in the relevant period. Mr Rasool replied that he preferred to deal with those other businesses which gave credit. Equally, Mr Gray added, it seemed odd that the same three freight forwarders were used throughout. Again the Tribunal considered that these matters were not explained away satisfactorily by Mr Rasool.

77. Mr Rasool disputed that the transactions were contrived and without an economic rationale. He disputed that there were unnecessary parties and that the process of import and export of the same goods served no purpose. He disputed too that there was a curious lack of documentation.

78. The Tribunal paid great care in assessing Mr Rasool's evidence given its importance in relation to the principles in the *Kittel* decision. The matter of imputed knowledge was critical. There were in the Tribunal's view serious and unexplained divergences between Mr Rasool's oral evidence and the terms of his Witness Statement. Documentation which must have been necessary on a purely practical level was not available. We had in mind simple records of phone-calls, notes of goods which were available, at what price and in what quantities, and records of which prospective purchasers had been approached. We did not find Mr Rasool a credible or reliable witness. So far as explanations were proffered by him, we found these implausible. His recollection of the names of persons with whom he contracted – even regularly – was poor.

79. On the basis of that evidence and the Statement of Agreed Facts we make the following **Findings-in-Fact**:-

(a) The Appellant is a limited company incorporated in February 2001. It was registered for VAT from 8 August 2001. In its Application for Registration dated 23 July 2001 it was stated by Sarafaraz Ahmad, one of its directors, that an annual turnover of about £75,000 was likely and that repayments of tax were unlikely to become due.

(b) The present principal director of the Appellant is Mohammed Rasool, appointed in February 2005. His wife, Fehmeed Rasool, is also a director, appointed in March 2003. Its original directors were Sarafaraz and Razia Ahmad who have both retired. They are the brother and sister of Mrs Rasool.

(c) The business of the Appellant company at the material time was trading in mobile phones. This was the Appellant's exclusive business since soon after its Registration. It was noted following on a visit on 7 June 2002 by Officer Haswell of HMRC that the Appellant company's turnover had increased prodigiously (see Audit Report, vol F/13-45). It had only 12 customers and one freight forwarder. While in the 3 months to end January 2002 the turnover was just over £70,000, in March 2002 the monthly turnover was £1,195,110.00. In April it had increased to over £17m. In May it increased to over £30m. There had been no injection of any significant capital into the business and the Appellant company remained in modest premises at Luma Towers, 510 Shieldhall Road, Glasgow, and it did not employ significant staff numbers.

(d) The Appellant was permitted to submit monthly Returns since March 2002. All Returns thereafter sought repayments of input VAT on purchases.

(e) From January 2004 repayments were initially withheld and the relative Returns subjected to extended verification. While repayments were made later, it was on a "without prejudice" basis.

(f) Each of the repayments sought in the Returns for April, May, June and July 2006 has been refused and continues to be withheld. These repayment claims total £6,630,969.70. The Appellant has appealed against the refusal, which is the subject of the present appeal.

(g) The Respondents have indicated that the basis for their refusal to make repayment is that the Appellant company through its officers knew or ought to have known that the purchases of mobile phones in respect of which repayments are sought occurred in deal-chains which were connected with the fraudulent evasion of VAT.

(h) It is admitted that in respect of each of these deal-chains there was a loss of revenue to the Respondents because of the failure to account by a taxpayer preceding the Appellant company in the deal-chain; and that such loss resulted from fraud. (Paras 16 and 17 of Statement of Agreed Facts).

(i) The structure of a *carousel* MTIC fraud involves typically the following stages –

(i) the purchase and importation of the goods into the UK;

(ii) the resale of the goods to a UK customer, subject to the imposition of VAT;

(iii) the failure by the party importing to account to HMRC for the VAT output tax on re-sale;

(iv) a sequence of sales and purchases of the goods within the UK and subject to VAT regulation by parties known as *buffers*; and

(v) the sale and export of the goods by the final UK purchaser, the *broker*, zero-rated.

These stages are completed within a short period, usually on the same day.

Typically also funding is provided by another party and passes in a circular fashion via each purchaser (with the possible exception of the importer/defaulter) until it is returned to him. This sum is enhanced by the *broker* who adds an amount to include VAT on his purchase from the final *buffer*. Thus the party financing receives an increased sum on its return to him, albeit subject to relatively small deductions withheld by each intermediary. These financial transactions take place within a short period also, usually one day.

(j) Commonly in *carousel* MTIC fraud payment will not be made to the party importing (and defaulting) but to a Third Party not involved in the sequence of purchases and sales.

(k) Also the use of "freight forwarders" is common, the goods remaining on their premises from import until re-export while title passes between the successive owners in the UK.

(l) To ensure that the *carousel* MTIC fraud succeeds, with the funding returning to its source, each participant must sell the goods to the next intended member of the invoice chain. The *carousel* requires overall controlling direction.

(m) Manufacturers of mobile phones will normally sell their products directly and in bulk quantities to authorised distributors, mobile network operators, and major retailers. In addition to this authorised (or "white") market there is a "grey" market, not susceptible to control by the manufacturers, but which is legitimate and enables distribution of mobile phones to for example smaller retail outlets.

(n) According to the Respondents' published records there was a prodigious increase in the numbers of mobile phones exported from the UK in the period between January and June 2006, which was not readily attributable to commercial factors, but most likely to changes in the law and procedure affecting the recovery of VAT due.

(o) From about April 2004 officers of HMRC visited the Appellant company's premises regularly at about monthly intervals when their officers met the company's officers, including Mr Rasool, and checked its records and documentation relating to its VAT liability.

(p) The Appellant company was well aware of the prevalence of *carousel* MTIC fraud in the merchandising of mobile phones from early in 2004, when it was advised that its Returns seeking

repayment of input VAT were being subjected to extended verification because of the possibility of being tainted by such fraud (Vol I-43). Also this risk was emphasised at HMRC's monthly (or so) visits to the company's premises. Further from about June 2004 the Appellant company received many letters from HMRC's Redhill office advising of the de-registration for VAT purposes of businesses with which the Appellant had traded or about which it had enquired, because of their involvement with MTIC fraud (eg Vol I-48).

(q) In April 2006 the Appellant company acted as *broker* in 33 contested deal chains selling mobile phones to customers in the EU, which all can be traced back to 3 defaulting traders who imported the goods. Its claim for repayment of input tax on these deals has been refused and this is included in the present appeal. These are deal numbers 7, 8, 10a, 10b, 12a, 12b, 13, 14, 15, 16, 20, 26, 27, 28a, 28b, 33, 34, 35, 36, 38, 43a, 43b, 44, 45, 50, 55, 56, 57, 63, 64, 65, 67 and 68 (see Mr Flavelle's Witness Statement para 33) and the relative invoice chains are set out on spreadsheets which are contained in Folder C (tab 1) and Vol 12/20.

In each spreadsheet a common pattern of trading is shown:-

- the same quantity of phones is sold successively from import by the defaulter to export by the broker, forming a sequence of *back to back* transactions;
- the importer defaults in accounting for VAT on re-sale;
- each *buffer* receives a mark-up of about 20p to 50p per phone, the last *buffer* receiving the larger amount, without apparently adding value to the product;
- the *broker* (here Cell Trading, the Appellant) receives a larger mark-up of between 5-6% approximately;
- the levels of these mark-ups form a consistent pattern or template, indicative of a contrived and orchestrated plan; and
- the successive purchases and sales are all concluded (usually) within one day.

(r) In April 2006 the Appellant company acted as a *buffer* in 37 other deal-chains. These are not contested in the present appeal. (Relative spreadsheets are produced: see Folder C/tab 3 and Vol 12-21).

(s) In May 2006 the Appellant company acted as *broker* in 33 contested deal-chains exporting mobile phones. 25 can be traced back to defaulting importing traders and 8 to *contra* trades. Its claim for repayment of input tax on these deals has been refused and is included in the present appeal. These are deal nos 1, 5, 6, 7, 8a, 8b, 16, 17, 21, 22, 23, 24, 25, 29, 30, 34, 35, 50, 51, 60, 61a, 61b, 61c, 61d, 61e and [*contra* trades] deal nos 40, 41, 42, 52, 53, 54, 58, 59 (see Mr Flavelle's Witness Statement paras 38-40) and the relative invoice chains are set out on spreadsheets which are contained in Folder C (tab 3) Vol 12/22.

In May 2006 the Appellant company acted as *buffer* in 56 other deals, which are not contested in this appeal. (Relative spreadsheets are produced: see Folder C/tab 4 and Vol 12-23).

(t) In June 2006 the Appellant company acted as *broker* in 14 contested deal-chains exporting mobile phones which can be traced back to defaulting importing traders. Its claim for repayment of input tax on these deals has been refused and is included in the present appeal also. These are deal nos 1a, 1b, 2a, 2b, 3, 4, 5a, 5b, 5c, 5d, 6, 8, 9a, 9b, (see Mr Flavelle's Witness Statement para 44) and the relative invoice chains are set out on spreadsheets: see Folder C/tab 5 and Vol 12-24.

In June 2006 the Appellant company acquired and exported phones in one other deal which is not contested in this appeal. (The relative deal sheet is produced: Vol 12-25).

(u) In July 2006 the Appellant company acted as *broker* in one deal exporting mobile phones. This can be traced back to a defaulting importing trader. The claim for repayment of input tax on this deal has been refused and is also included in the present appeal. It is deal no 1 and the relative invoice chain is set out on the spreadsheet in Folder C/tab 7 and Vol 12-26.

(v) In each of the May, June and July deal-chains the relative spreadsheets show the same pattern of trading as observed in the April deal-chains, as noted *supra*.

(w) Flowcharts showing the circulation of the payments made via accounts with the First Curacao International Bank (see further sub-para z, *infra*) in respect of the purchases and sales of the mobile phones in certain of the deal-chains are produced in Vols 19/2 and 23 relative to Mr Birchfield's Witness Statements.

(x) The share of the market for mobile phones, whether by volume or value, apparently enjoyed by the Appellant at about the material dates was implausibly large.

(y) Typically the invoices contain only limited specification of the goods.

(z) Each of the participants in the deal-chains, including the Appellant company, held at the material time accounts with the First Curacao International Bank via which the sequence of sales and purchases was financed. The FCIB provided an internet banking service operating on a 24 hour basis daily. It was used extensively by traders in the mobile phone industry. Its operations ceased in about October 2006 when its banking licence was revoked by the Netherlands Antilles Regulatory Authorities.

(aa) Such credit checks as the Appellant company made on its prospective trading contacts were inadequate considering the value of the transactions concluded and the credit facilities afforded. In particular the credit ratings were generally inadequate or even non-existent. The enquiries in instances were not completed before trading started. Common trade references were offered, indicative of a lack of independence.

(bb) When checks were made of the IMEI numbers of the phones traded in, only a 10% sample was taken. Such a limited volume was wholly inadequate.

(cc) While the Appellant company was advised by KPMG to carry out "due diligence" checks on the parties with which it traded, such checks as were undertaken fell short of in-depth verification of the matters obviously necessary for a satisfactory "due diligence" exercise.

(dd) In relation to these proceedings Parties negotiated a Statement of Agreed Facts, set out in Appendix B hereto to which reference is made. Moreover, the summaries in the spreadsheets referred to in paras 15 and 19 thereof and described as being believed to be true and accurate, are found in fact to be true and accurate. Also, all data recovered from, records thereof, applications (and copies thereof) for banking services submitted to FCIB and described in para 20 in relation to the evidence of Peter Birchfield as being believed to be true and accurate, are found in fact to be true and accurate.

We deal with the degree of knowledge which, we consider, should be imputed to the Appellant company in the concluding section of our Decision.

Submissions

80. Counsel helpfully provided us with detailed written submissions in support of their arguments, to which we refer, and thereafter addressed us on these.

81. Mr Gray for the Respondents argued that all the ingredients of MTIC fraud were present, such as Third Party payments, the use of Freight Forwarders, the lack of commercial *rationale*, a tax loss resulting, and having small, valuable goods as the subject of the transactions. There was a sequential pattern in the *chains* of transactions.

82. He referred us to Community Law and the *Kittel* decision. This has been applied in the UK courts and he noted especially as guidance the opinion of Moses L J in the combined decisions in *Mobilx Ltd and Others v HMRC*. The suggested test bears to be whether the "*only reasonable explanation*" for the

transaction and its terms was that it was tainted by tax fraud (para 59). Mr Gray conceded that the *onus* of proof rests on HMRC and while the standard of proof is the balance of probabilities, it must be supported by cogent evidence (all this did not prove to be controversial).

83. The appropriate inference from the facts proved in the present case, Mr Gray argued, was that the disputed chains were contrived and by design and did not arise by chance or coincidence. He founded on Mr Birchfield's and Mr Flavelle's evidence and their conclusions thereanent. He invited us to reject the possibility of Mr Rasool's and the Appellant company's innocent involvement. The evidence of Mr Gregory, the Appellant's expert, did not assist greatly in as much as his report was academic rather than an adequate consideration of the controversial transactions in the present case.

84. Mr Gray developed his argument by reference to the Spreadsheets produced by Mr Flavelle and the relative Flowcharts produced by Mr Birchfield in relation to particularly Deals nos 7, 26 and 35. These contradicted Mr Rasool's evidence that his company did not grant credit. They illustrate Third Party payments diverting a consideration due apparently to the Missing Trader in the chain.

85. At para 25 of his Written Submissions Mr Gray identified factors suggestive or indicative of MTIC fraud in a general context. All of these, he submitted, were present in this case. At para 41 he identifies what he considers to be the critical factors. These include the circularity of payments, the lengthy deal chains with consistent mark-ups in price, the "back to back" nature of the individual transactions resulting in no leftover stock and avoiding the need for storage facilities, the very limited contractual documentation, the use of banking facilities by the FCIB, and the substantial increase in turnover in the period in dispute. Moreover, Mr Gray submitted, there was a dearth of evidence from the Appellant to support the manner of its conducting its business. In his view one might reasonably expect copies of e-mails, correspondence, checklists, and other notes of goods available and goods sought. Mr Rasool spoke of making and receiving many phone calls each day and of searching on internet sites. There was no apparent explanation for the import into the UK and re-export of phones which were not suitable for the UK market. This, he suggested, was purposeless. Also, Mr Gray added, the Appellant's process of due diligence was wholly inadequate.

86. Crucially, Mr Gray submitted, a profit of about 5% on a substantial turnover, repeated in a large number of transactions, all without adding value to the product, and without apparent risk, called for a convincing explanation.

87. In reply Mr Rai argued that the *Kittel* test was not satisfied and that the Appeal should be allowed. Helpfully, he confirmed that he and Mr Gray were essentially in agreement about the legal framework and he too noted Moses L J's opinion in *Mobilx*.

88. The main thrust of Mr Rai's argument was that Mr Rasool had reasonable cause to believe that his company was not involved in transactions affected by VAT fraud. He emphasised that the Appellant (and Mr Rasool) could reasonably have knowledge of only the immediate parties with which it traded. The nature of this business activity was such that the identities of remoter parties in any chain could not be ascertained, at least reasonably readily. (If these remoter parties were known, the interests of other intermediate businesses in the chain in deriving a profit would be prejudiced). None of the parties with which the Appellant had traded directly were *Missing Traders*. This confirmed the rigour and sufficiency of the Appellant's due diligence procedures.

89. In addition to the Appellant's internal procedures, it could reasonably be further reassured in as much as HMRC's inspections had not discovered anything untoward about its pattern of business before April 2006. All repayment claims previously made had been paid.

90. The Respondents in their approach had not appreciated the nature of the Appellant company's business model. Profits were derived from low margins on high volume transactions. Mr Rasool would not buy goods speculatively: the company's business was to "match" purchaser and seller in both quantities and specifications of goods. All this and the increasing volume of goods traded were consistent with successful

trading on the "grey" market, with developing sales opportunities in India and Africa. Mr Gregory's Report supported such a legitimate pattern of trading, Mr Rai argued. Also, there were significant opportunities for *arbitrage* in Nokia phones, contrary to Mr Taylor's opinion.

91. The *Kittel* test as interpreted by the Court of Appeal in *Mobilx* was, according to Mr Rai (see paras 50.1, 2 & 3) – ought the taxpayer to have known that he was participating in a transaction connected with the fraudulent evasion of VAT? That test, he submitted, was not satisfied on the evidence. Accordingly he moved that the appeal be allowed.

Decision

92. There is no dispute about the principles of law applicable in the present case, and indeed there is only one major issue of fact for us to determine. It is not in dispute that in the transaction chains there has been a loss of tax revenue in that the importer has failed to account for output tax (becoming the *missing trader*) and, further, that this loss was fraudulent. The remaining element is the state of knowledge of the Appellant company and Mr Rasool, its director, as measured against the criteria set out in *Kittel*. It is not contended by HMRC that there is evidence of direct knowledge of a tax fraud on the part of the Appellant. Rather it is argued that in terms of the *Kittel* test Mr Rasool (as controlling the Appellant company) should have known that this was the only reasonable conclusion to be drawn in the circumstances of the considerable number and value of the transactions entered into in a relatively short period. Mr Gray invited us to infer this from the circumstantial evidence which in his view pointed inexorably to that conclusion.

93. We have found the decision by the Court of Appeal in the *Mobilx* and conjoined cases helpful as guidance. We note in particular the following sections of Moses L J's opinion. Firstly he confirms – as the Respondents' Counsel accepted – that the burden of proof rests on HMRC –

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

Next, he explains the level of actual or imputed knowledge to be demonstrated. It is a high standard *viz* that there must be no other reasonable conclusion.

> "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….
>
> 75. The ultimate question is not whether the trader exercised due diligence but rather whether he should have known that the only reasonable explanation for the circumstances in which his transaction took place was that it was connected to fraudulent evasion of VAT….
>
> 80. In my judgment, on the basis of those findings the true and only reasonable conclusion is that *Mobilx* ought to have known that the only realistic possibility, as it continued to trade in that manner, was that its purchases would be connected with fraudulent evasion of VAT and not merely that all its transactions were more likely than not to be connected with fraud….

> 82. … 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 know 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".

Further, he stresses that the consequence for the offending taxpayer is that he is deprived of any repayment benefits under the VAT system. In effect he takes his transactions outwith the VAT system.

> "52. If a taxpayer has the means at his disposal of knowing that by his purchase he is participating in a transaction connected with fraudulent evasion of VAT he loses his right to deduct, not as a penalty for negligence, but because the objective criteria for the scope of that right are not met. It profits nothing to contend that, in domestic law, complicity in fraud denotes a more culpable state of mind than carelessness, in the light of the principle in *Kittel.* A trader who fails to deploy means of knowledge available to him does not satisfy the objective criteria which must be met before his right to deduct arises….
>
> 64. On my interpretation of the principle in *Kittel*, there is no question of penalising the traders. If it is established that a trader should have known that by his purchase there was no reasonable explanation for the circumstances in which the transaction was undertaken other than that it was connected with fraud then such a trader was directly and knowingly involved in fraudulent evasion of VAT. The principle in *Kittel*, properly understood, is, as one would expect, compliant with the rights of traders to freedom from interference with their property enshrined in Art. I of the First Protocol of the European Convention of Human Rights. The principle in *Kittel* does no more than to remove from the scope of the right to deduct, a person who, by reason of his degree of knowledge, is properly regarded as one who has aided fraudulent evasion of VAT….
>
> 65. The *Kittel* principle is not concerned with penalty. It is true that there may well be no correlation between the amount of output tax of which the fraudulent trader has defrauded HMRC and the amount of input tax which another trader has been denied. But the principle is concerned with identifying the objective criteria which must be met before the right to deduct input tax arises. Those criteria are not met, as I have emphasised, where the trader is regarded as a participant in the fraud. No penalty is imposed; his transaction falls outwith the scope of VAT and, accordingly, he is denied the right to deduct input tax by reason of his participation".

Finally (para 83) he refers with approval to the reasoning of Christopher Clarke J. in *Red 12 v HMRC* –

> "109 Examining individual transactions on their merits does not, however, require them to be regarded in isolation without regard to their attendant circumstances and context. Nor does it require the tribunal to ignore compelling similarities between one transaction and another or preclude the drawing of inferences, where appropriate, from a pattern of transactions of which the individual transaction in question forms part, as to its true nature e.g. that it is part of a fraudulent scheme. The character of an individual transaction may be discerned from material other than the bare facts of the transaction itself, including circumstantial and "similar fact" evidence. That is not to alter its character by reference to earlier or later transactions but to discern it….
>
> 110 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, 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".

94. We too consider that the deal chains in question did not arise by chance: rather they were contrived and formed by design. Each bears to follow the same pattern. The mark-ups enjoyed by the *buffers* virtually correspond, with a larger sum being paid to the one who sells to the *broker*. The *broker* derives about 5-6% on turnover consistently. The same parties tend to appear in each chain, often in the same order. The deals throughout are for the same number of phones with identical specification. There would appear to be no faulty models or returns. Purchases and sales "match" in number. The sequence of transactions is concluded on the same day or within a very brief period. In the chains there are no major or authorised distributors at the start and no final consumers or retailers at the end. All of this bears to follow a common template. A corresponding money flow (in the opposite direction) is shown on Mr Birchfield's flowcharts in relation to certain of the deals, with funds passing through accounts in the one bank *viz* FCIB. The money flow bears to be circular, funded apparently by a controlling financier, with only the *broker* adding a further element to fund the VAT on his purchase from the last *buffer*.

95. The Respondents argue that if any one party in an invoice chain and corresponding financial circle does not deal with his neighbour in such a contrived *scenario*, then the scheme is broken and frustrated. The funding would not return to its original source.

96. In response to Mr Gray in cross-examination Mr Rasool seemed to accept that the inclusion of an "innocent" party in the scheme would jeopardise it (Notes of Evidence of 23 July 2010, pages 137-139). However, in response to the Tribunal's questions Mr Gray accepted that it did not follow that it could be presumed *ipso facto* that a party involved in such a scheme had the necessary knowledge to satisfy *Kittel*. The relevant case-law does not seem to support such a proposition.

97. Accordingly the assessment of Mr Rasool's evidence is critical to our decision. He insisted throughout that although he was aware of the prevalence of MTIC fraud in his type of business, he was justified in believing that his company was not seriously at risk of becoming involved in transactions tainted by this.

98. In assessing Mr Rasool's evidence we considered it in several contexts. (We refer also to our remarks in paras 76-77 *supra*).

99. Firstly, there is on any view a dearth of support for Mr Rasool's account. While it is accepted that the *onus* of proof rests on the Respondents, what we have in mind are the basic business records which should be readily available, and which as a practical necessity must surely have been kept by the business. Having heard Mr Rasool's evidence of making and receiving many phone-calls daily about stock availability and requirements, it would be reasonable to expect <u>some</u> record on paper (notebooks, aides-memoire and such like). Such information would be too voluminous to recollect satisfactorily without such aids. "Deal sheets" containing paperwork <u>after</u> the invoice stage were produced, but nothing comparable was produced relating to the <u>pre</u>-bargain stage. There must, surely, have been prior communings, even haggling, likely to require some written record. Notes of phone calls, phone bills, (possibly with details of calls made and phone numbers) copy e-mails and so on would have been relevant and potentially helpful. Further, no evidence was taken from trade contacts of the business.

100.Next, the nature and frequency of the "deals" must surely have aroused Mr Rasool's suspicions, particularly as he had been alerted to the prevalence of fraud in the mobile phone trade. In early 2006, in the period in question, there was a very marked increase in turnover. The 81 disputed deals, each substantial, fell within a fairly short period. The profit was 5-6% with no (or no significant) outlays. No loss on any of these deals was sustained. Nor was there any customer dissatisfaction to resolve. No goods were returned. Purchases of a significant volume of expensive phones could be matched quickly with a sale for the same

quantity. There was never any excess stock and there was no need for storage facilities. On any view such trading opportunities must surely have seemed "too good to be true". The Appellant company was a relatively modest business with apparently only modest resources. Without rehearsing them further we find the factors narrated in para 41 of Mr Gray's written submissions (summarised herein in para 85 *supra*) persuasive and supportive of his stance.

101.Finally, we considered certain discrepancies between Mr Rasool's Witness Statement and his oral evidence. We are conscious that his Witness Statement is dated 30 June 2008 but there are in our view divergences on fundamental aspects which should not have become confused over the period to date. There is some support too for the Appellant in the evidence of James McGee, a retired official of HMRC, who had been involved with the company's tax affairs in late 2005, shortly before the period relevant to this appeal. However, whatever view he may have formed of the company's "due diligence" procedures, these on closer examination were not adequate. As we have found, the nature of the checks was superficial. Many of the traders inspected had poor or non-existing trading records; the completion of some enquiries post-dated the start of trading; in instances a common trade reference had been proposed. Critically, and contradicting Mr Rasool's apparent stance in his Witness Statement (para 105) credit was in fact afforded by Cell Trading to certain of its customers, for example in Deals 7 and 26. This tends to suggest that the business of the Appellant was not (always) conducted on an arms-length basis.

102.We find also that the evidence about IMEI checks was unsatisfactory. The 10% sample taken was an inadequate check in our view.

103.In conclusion we consider that the *Kittel* test has been satisfied in this appeal. In relation to each and all of the disputed deals Mr Rasool should have known that they were connected with fraud. They were not arms-length commercial transactions and had no economic *rationale*. The return to his company and the terms generally were in our view obviously "too good to be true". That is the inevitable inference from all the factual findings taken *in cumulo*. For these reasons we dismiss this appeal.

104.While on the principles set out in *Kittel* the present appeal must fail, we observe that the loss to HMRC arose in an immediate sense from the failure of the defaulting/missing trader. Arguably that party is the principal offender. We appreciate that further investigations are on-going, but given the size of the estimated loss of revenue to the UK resulting from MTIC fraud, we would respectfully urge that vigorous efforts be taken to pursue, for example, the directors of defaulting companies and their personal estates.

Expenses

105.Both Parties sought an award of expenses in the event of success. In view of our decision it follows that expenses are awarded to the Respondents.

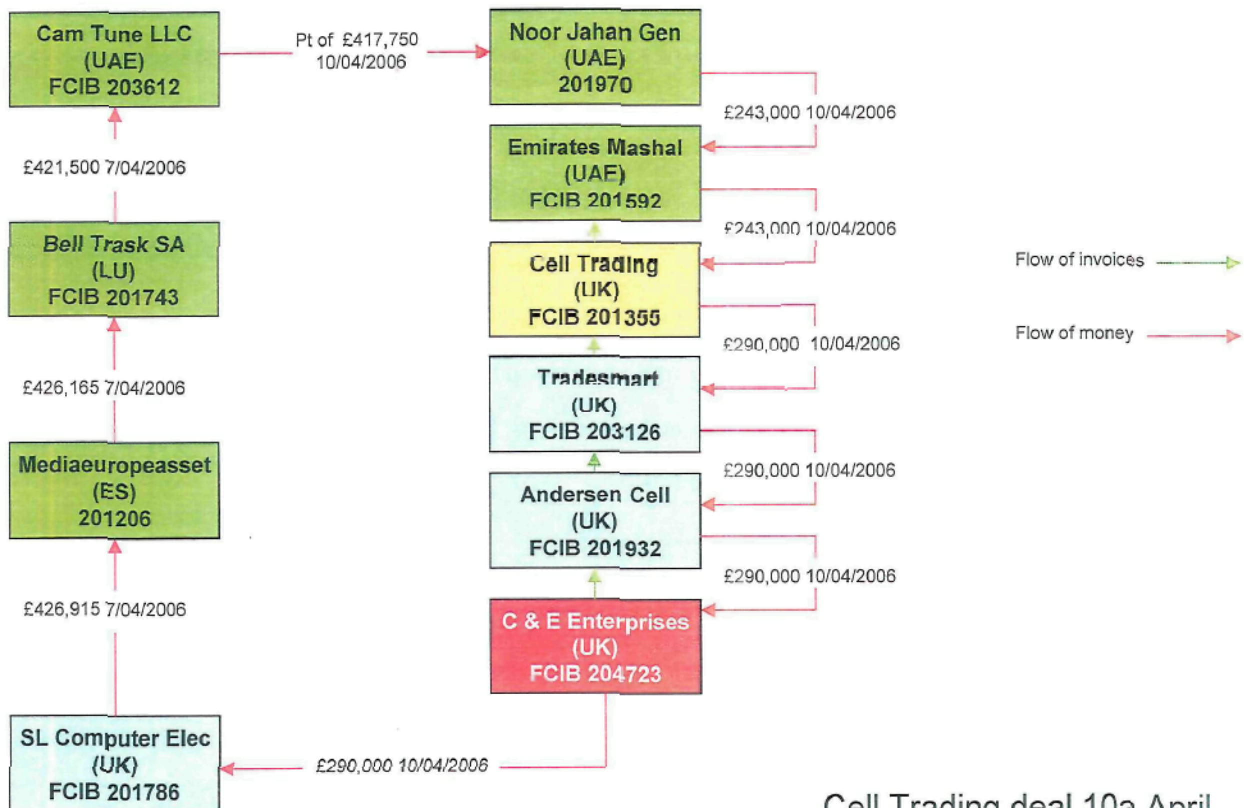
106.This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received 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.

MR KENNETH MURE, QC
TRIBUNAL JUDGE

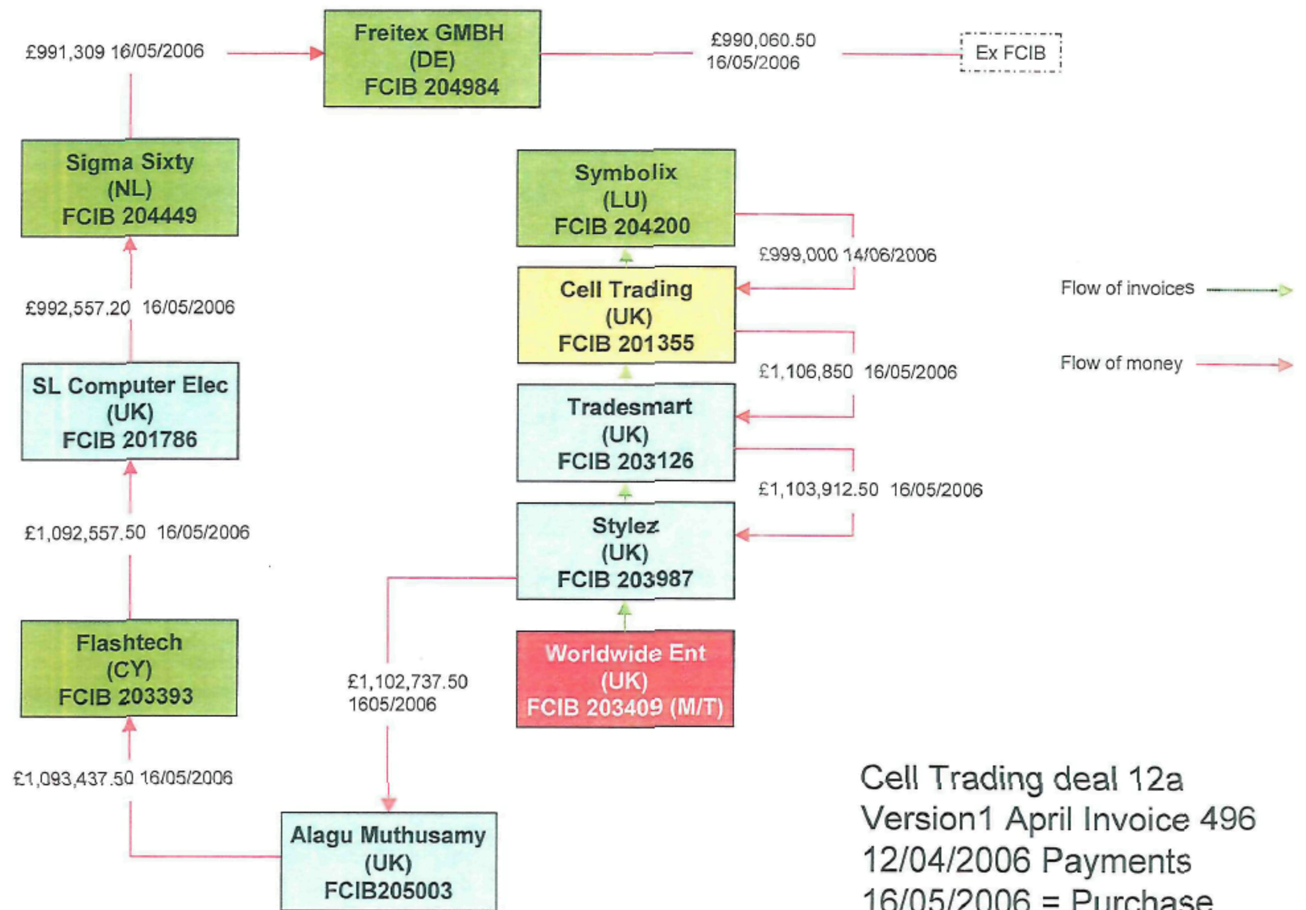
RELEASE DATE: 17 JANUARY 2011

5

APPENDIX A



13.



Cell Trading deal 12a
Version1 April Invoice 496
12/04/2006 Payments
16/05/2006 = Purchase
Invoice Value inc VAT

38.

APPENDIX B

Cell Trading (UK) Ltd

And

The Commissioners for Her Majesty's Revenue and Customs

STATEMENT OF
AGREED FACTS

Rasool for the Appellant and Carty for the Respondents concur in stating to the Tribunal that for the purposes of this Appeal the parties are agreed as follows:

1. The Appellant was incorporated in Scotland on 7th February 2001 with number 215521.

2. On 23rd July 2001 the Appellant applied to be registered for VAT giving its estimated value of taxable supplies in the 12 months from 8th August 2001 as £75,000. The Appellant was and remains registered for VAT under number 774 7997 50 with effect from 8th August 2001.

3. The Appellant's directors at the time of registration were Sarfaraz Ahmad and Razia Ahmad, who resigned on 31st March 2003 and 1st February 2005 respectively. The present directors are Fehmeeda Rasool, who was appointed on 13th March 2003 and Mohammed Rasool who was appointed on 1st February 2005. Razia Ahmad was re-employed in administration by the Appellant from mid-2005. Sarfaraz Ahmad, Razia Ahmad and Fehmeeda Rasool are siblings. Mohammed Rasool and Fehmeeda Rasool are spouses.

4. At registration the Appellant's place of business was at 10 Ayton Road, Glasgow. On 22nd October 2001 it notified a change of address to Suite 205A, Abbey Mill Business Centre, Paisley. On 28th May 2002 it notified a change of address to Suite 419, Pentagon Business Centre, Washington Street, Glasgow. On 5th September 2002 it notified a change of suite at the Pentagon Business Centre to number 322. On 11th October 2003 the Appellant notified a change of address to Luma Towers, 510 Shieldhall Road, Glasgow.

5. At registration the Appellant's bank account was number 20059897, sort code 20-33-70. On 28th April 2003 the Appellant notified a change of bank account to number 06090741 at sort code 80-22-60 with the Bank of Scotland, 600 Gorgie Road, Edinburgh. On 30 March 2005 the Appellant gave formal intimation by letter dated 30 March 2005 to the Respondent that it had opened a new account, to be run in conjunction with the Bank of Scotland account. The reason given was so that it could make international payments swiftly and improve trading. The new account was number 04-801-201355-01 with the First Curacao International Bank, Curacao, Netherlands Antilles ("the FCIB"). On 23rd November 2005 the Appellant notified a change of bank details to account number 19788045 with the Bank of Ireland, 26 West Nile Street, Glasgow sort code 83-91-12.

6. On 27th February 2002 the Appellant applied to make returns on a monthly basis instead of quarterly. On 29th February 2002 the request was refused. On 4th March 2002 the Appellant reapplied, giving the explanation that if monthly returns were granted it would be exporting computer processors and that it had agents in Europe it would like to supply but could not trade with them until it had monthly returns. This requested was granted on 4th March 2002.

7. Since commencing trading the Appellant has dealt wholesale in computer chips and mobile telephone handsets ("mobile phones"). The Appellant does not carry stock in any products, parts or accessories.

8. Since at least 2005, the Appellant has been aware that missing trader intra-community ("MTIC") fraud is prevalent in the trade in computer chips and mobile phones.

9. The Respondents authorised repayment in full of the following repayment claims by the Appellant but expressly subject to being without prejudice to any other action that may result from continuing inquiries into the supply chains of which the transactions that were the subject matter of the repayment claims formed part:

Claim for period	Date of Respondents' letter	Respondents Production
01/04	17 May 2004	45
02/04	17 May 2004	46
06/04	21 September 2004	56
01/05	11 April 2005	77
07/05	7 September 2005	95
08/05	27 October 2005	104
09/05	1 December 2005	107

10. On 30th October 2007 the Respondents denied the Appellant's claim to deduct the following as input tax, amounting in total to £6,630,969.70:

    a. Input tax claimed in its return, submitted 23rd May 2006, for the period 04/06 (1st to 30th April 2006), amounting to £2,751,323.76;

    b. Input tax claimed in its return, submitted 14th June 2006, for the period 05/06 (1st to 31st May 2006), amounting to £3,140,501.00;

    c. Input tax claimed in its return, submitted 10th August 2006, for the period 06/06 (1st to 30th June 2006), amounting to £691,895.01;

    d. Input tax claimed in its return, submitted 17th August 2006, for the period 07/06 (1st to 31st July 2006), amounting to £47,250.00.

11. Production number 129 in the Respondents' volume 1 is an accurate and complete listing of the Appellant's purchases and sales of mobile phones ("deals") in period 04/06, comprising 67 deals.

12. Production number 144 in the Respondents' volume 1 is an accurate and complete listing of the Appellant's deals in mobile phones in period 05/06, comprising 96 deals.

13. Production number 257 in the Respondents' volume 1 is an accurate and complete listing of the Appellant's deals in mobile phones in periods 06/06 and 07/06, comprising 15 deals in period 06/06 and 1 deal in period 07/06.

14. All of the claims for deduction as input tax which the Respondents have denied relate to the purchase of mobile phones and computer chips which the Appellant then sold and exported from the UK.

15. Productions number 20, 22, 24 and 26 in the Respondents' volume 12 each comprise a series of spreadsheets relating to the deals during the periods 04/06, 05/06, 06/06 and 07/06 respectively, for which the appellant's claims to deduct input tax were refused ("the Contested Deals"). Each spreadsheet relates to a different Contested Deal, and is believed to be a true and accurate summary of the chain of transactions of which that deal formed part ("the Deal Chains"), including the identities of the other traders in the chain, their VAT number, the date of the relevant invoices, the quantity and description of mobile phones, the price charged at each stage in the chain of transactions, and the profit margin and percentage mark-up at each such stage.

16. In each of the Deal Chains, there was a loss of VAT caused by the failure of a trader earlier in the chain of transactions than the appellant to account for output tax charged on his sale of the mobile phones. The identity of the defaulting trader for each Deal Chain is shown on the relative spreadsheet in the said productions numbers 20, 22, 24 and 26 in the Respondent's volume 12.

17. In each of the Deal Chains, based on evidence provided by the Respondents in the course of this Appeal, it is not disputed that the purpose of the failure to account for VAT by the defaulting trader was the fraudulent evasion of VAT.

18. In each of the Deal Chains the Appellant sold the mobile phones to a purchaser in another EU member state or the Middle East.

19. Productions numbers 21, 23 and 25 in the Respondents' volume 12 each comprise a series of spreadsheets relating to other deals in which the appellants participated during the periods 04/06, 05/06 and 06/06. Each spreadsheet relates to a different deal and is believed to be a true and accurate summary of the chain of transactions of which that deal formed part, including the identities of other traders in the chain, their VAT number, the dates of the relevant invoices, the quantity and description of mobile phones, the price charged at each stage in the chain of transactions, the profit margin and percentage mark-up at each such stage, and the identities of defaulting traders who fraudulently failed to account for VAT.

20. The data analysed by Peter Birchfield and referred to in his witness statement is data which was recovered from the server of the FCIB, and which includes a record of the data held in the FCIB's Bankmaster system. All documents produced as exhibits to that witness statement which bear to be printouts of that data are believed to be true and accurate records of such data. All documents produced as exhibits to that witness statement which bear to be applications to the FCIB for banking services are believed to be true and accurate copies of applications which were made by the persons by whom they bear to have been made, on or about the dates they bear. Where that statement or the exhibits thereto refer to data obtained from the FCIB records, they are believed to be a true and accurate record of the data so obtained.

21. All copy documents produced to the Tribunal are true and accurate copies and are to be held as equivalent to principals.

22. All letters and other correspondence between the Appellant and the Respondents which have been produced to the Tribunal are what they bear to be, and were sent by the persons by whom they bear to have been sent, to the persons to whom they are addressed, on or about the date they bear.