TC02761

Appeal number: LON/2008/0970

VAT – INPUT TAX – MTIC fraud – appellant admitting transactions connected with fraud but denying having knowledge or means of knowledge of fraud – held appellant had actual knowledge of connection with fraud – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SILICON 8 LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE DAVID DEMACK
NICHOLAS DEE

Sitting in public at London from 25 February 2013 to 1 March 2013 and on 4 and 5 March 2013

Mr Liban Ahmed of CTM Litigation and Tax Services represented the Appellant

Miss Karen Robinson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Silicon 8 Ltd ("Silicon") a trader in semi-conductors, or CPUs, against two decisions of the Commissioners notified on 14 April 2008 and 19 May 2008 denying its entitlement to the repayment of input tax in the sums of:

(1) £362,932.50 claimed in respect of 8 transactions in the monthly accounting period 05/06;

(2) £450,398.83 claimed in respect of 9 transactions in period 06/06;

(3) £221,120.16 in respect of 5 transactions in period 07/06; and

(4) £37,209.38 claimed in respect of a single transaction in period 08/06.

Those claims were based on Silicon, a repayment trader making monthly returns, having made zero-rated supplies of CPUs to foreign traders. It is unnecessary for the purposes of our decision to deal with the arithmetical detail of the claims.

2. We should add that the letter of 14 April 2008 also operated as a recovery assessment, the Commissioners having earlier repaid the input tax claimed by Silicon for period 05/06.

3. In the letter of 14 April 2008, the Commissioners expressed themselves satisfied that the transactions set out in the schedule thereto formed part of an overall scheme to defraud the revenue, and that the directors of Silicon knew, or should have known, that that was the case. That letter related to all the transactions entered into by Silicon in the four accounting periods referred to above, except one – a single transaction in period 06/06. In relation to that transaction, in their letter of 19 May 2008, the Commissioners disclosed that they had been unable to trace the deal in question back to a fraudulent source, but expressed themselves satisfied on the balance of probabilities that had missing records been available to them, they would have demonstrated that the deal did emanate from a fraudulent source. The Commissioners further stated that in making their decision they relied upon the principles expounded by the Court of Justice of the European Communities ("the ECJ") in *Kittel v Belgium* and *Belgium v Recolta Recycling SPRL* (Joined Cases C-439/04 and C-440/0) [2008] STC 1537. Shortly stated, those principles are that a trader who has participated in a fraudulent scheme involving the purchase and sale of goods, knowing or having the means of knowing that he is so participating, forfeits the right to deduct the input tax incurred in his purchase of the goods used as the vehicle of the fraud.

4. In the transactions with which we are concerned, Silicon bought consignments of CPUs from other UK traders and immediately sold them intact to foreign customers. The Commissioners have traced the chains of transactions leading to Silicon's purchases back through a number of steps, and maintain that they can demonstrate that a series of purchases and sales, running on occasions to eight, occurred on the same day. They further contend that they can show, or we can infer, that each chain of transactions began with a missing trader, or a trader whose VAT registration had been hijacked, the true purpose of each chain being to defraud the revenue.

5. Silicon gave notice of appeal against the two decisions on 18 April 2008 and 13 June 2008. Its grounds of appeal may be summarised as follows:

i. the purchases of the goods from its suppliers could not be said to be connected with the fraudulent evasion of VAT;

ii. it was for the Commissioners to prove the accuracy of the objective factors on which they relied and, additionally, it was for them to prove that Silicon actually or constructively knew about the fraudulent evasion of VAT complained of, and the causal connection;

iii. Silicon denied trading in the manner described by the Commissioners and contended that, even if it had traded in that manner, it should not have lead the Commissioners to contend that, as a consequence, it should have known that by its purchases it was implicating itself in a fraudulent transaction;

iv. the test of knowledge was on what the relevant taxable person knew about the transactions to which he was a contracting party;

v. it was for the Commissioners to prove, to the heightened civil standard, actual participation in the alleged fraud;

vi. the Commissioners' actions were irrational, breached the Sixth VAT Directive and offended against the principle of neutrality.

6. In the statement of case, the Commissioners claimed that various factors went to prove that Silicon knew its transactions were part of a contrived series forming part of an overall scheme to defraud the revenue. They therefore said that there was a connection between Silicon's transactions and the defaulters' or missing traders' dishonest failure to account for VAT in chains beginning with tax losses.

7. Despite the Commissioners' allegation that Silicon was involved in an overall scheme to defraud the revenue, both in the decision letters and the statement of case, they did not identify the supposed participants in any such scheme or schemes. In the absence of any clear indication as to what the Commissioners might have meant by the allegations, we are unwilling to accept that any findings we might make as to contrivance can amount to evidence either of one overall scheme, or of a series of schemes. We propose to confine ourselves to dealing with the appeal on the basis of the remaining allegations in the statement of case.

8. It is well established that the VAT system, whereby goods sold by a registered trader in one Member State of the EU to a registered trader in another such State, has been exploited for fraudulent purposes on a huge scale. Losses to the UK Exchequer alone are said to run into billions of pounds. The question for us is not so much whether there has been fraud, but whether the Commissioners' view of Silicon's knowledge of and the precautions taken against it is justified.

9. The type of fraud with which we are concerned is referred to as MTIC (Missing Trader Intra-Community) fraud. A common feature is that it involves trade in small but valuable, items such as CPUs or mobile phones. What happens in the type of deals with which the present appeal is concerned is that a UK registered trader purchases goods from a trader in another EU Member State. The goods then usually change hands a number of times within the UK before being sold to an overseas trader which, if located in a Member State of the EU, is registered for VAT in that State. Commonly all the transactions occur, if not on the same day, then within one or two days of the goods entering the UK; indeed, it is not uncommon for goods to enter the UK in the morning, and for them to be exported later the same day. We might add that in the present case, MTIC is something of a misnomer since all of Silicon's customers were based outside the EU.

10. The UK trader acquiring the goods from abroad is required to, and does, charge VAT on the consideration paid by his purchaser but, instead of accounting for it to the Commissioners, he disappears with it. The documentation relating to his purchase is never produced to the Commissioners. For the scheme to work he must be a VAT-registered trader who provides the purchaser with a genuine VAT invoice, on the strength of which the purchaser claims input tax credit. The original purchaser's own sale, and those of the other UK traders in the sequence, with the exception of the very last one, usually generate a small profit, which results in a small VAT liability for which those traders properly account. The last trader in the sequence exports the goods in a zero-rated supply, and thus has no liability to output tax. He is, however, entitled to reclaim the input tax he has paid, and it is that claim which the Commissioners deny, and which results in an appeal to these tribunals.

11. The Commissioners have developed a jargon peculiar to MTIC fraud. The UK importer who fails to account for the output tax charged to his customer is known as a "defaulter" or "missing trader". The trader who exports the goods is called a "broker", and those traders between the defaulter and the broker are called "buffers". In the instant case, Silicon's input tax claim is based on its acting as a broker, but it is part of the Commissioners' case that it also acted as a buffer. It is also the Commissioners' case that the transactions were artificially generated, or orchestrated, and the goods were not bought or sold to meet any genuine demand, but rather simply to generate the input tax repayment sought by the broker, i.e. as a means of defrauding the Exchequer.

12. Between the extremes of traders who knowingly participate in frauds of this kind, who will be guilty of criminal offences, and those innocent caught up in frauds, are traders who know or have the means of knowing that their transactions are connected with fraud even though they are not themselves participants and who, for whatever reasons, carry on with those transactions. Such traders aid the perpetrators of the fraud and become their accomplices (see para 57 of the judgment in *Kittel*), and they too lose the right of deduction. As Moses LJ explained at para 41 of his judgment in *Mobilx Ltd (in administration) v HMRC* [2010] EWCA Civ 517, "*Kittel* did represent a development of the law because it enlarged the category of participants to those who themselves had no intention of committing fraud but who by virtue of the fact that they knew or should have known that the transaction [in which they were involved]

was connected with fraud, were to be treated as participants. Once such traders were treated as participants their transactions did not meet the objective criteria determining the scope of the right to deduct".

13. It is common ground that in appeals of this sort, the tribunal must answer four questions:

(1) Was there a tax loss?

(2) If so, did the loss result from fraudulent evasion of VAT?

(3) If there was fraudulent evasion, were Silicon's transactions the subject of the appeal connected with that evasion?

(4) If such a connection was established, did Silicon know, or have the means of knowing, that the transactions were connected with the fraudulent evasion of VAT?

14. In the present case, Silicon, as the broker in the transactions concerned, accepts that there were tax losses resulting from the fraudulent evasion of VAT, and that its transactions were connected with that evasion. Thus, the only question that remains to be answered is whether it knew or should have known that the transactions were connected with the fraudulent evasion of VAT.

15. Before us, Miss Karen Robinson of counsel appeared for the Commissioners, and Mr Liban Ahmed of CTM Litigation and Tax Services represented Silicon. Each most helpfully put in an opening written statement and provided closing written submissions. They produced some 45 bundles of copy documents, and called the following witnesses to give oral evidence:

Mark Thompson, a higher officer for the Commissioners who was the assurance officer for Silicon from late July or early August 2006 and who made the decision to reject Silicon's input tax claims.

Jane Elizabeth Humphrey, another officer of the Commissioners who was the assurance officer for Silicon in 2005

David Fisher, a director of Silicon and its principal shareholder. (We shall refer to David Fisher throughout our decision as "Mr Fisher")

Eran Milner, an employee of Intel, a major manufacturer of CPUs, and the manufacturer of all those concerned in the present appeal.

(Mr Milner's evidence was taken by videolink from Israel)

16. The statements of those witnesses who gave oral evidence were treated as their evidence in chief, but were supplemented orally both for completeness and to bring them up to date.

17. In addition we were provided with the agreed statements of a number of other witnesses. They were: Matthew Bycroft, John Hawkins, Roderick Guy Stone,

Andrew Siddle, Charlotte Rebecca Jackson, Robert McNaughton, Andrew Charles, Laura Hartell, Dean Foster, Peter Cameron-Watson, Erika Denise Carroll, Alistair Strachan and Stephen Doyle.

18. It is from the whole of that evidence that we make our findings of fact.

19. However, before proceeding to do so, there are two matters we should mention. Whilst Mr Fisher was responsible for conduct of the deals, his brother and co-director, Michael Fisher, was responsible for maintaining Silicon's records and for dealing with the financial aspects of the transactions with which we are concerned. We had no statement from Michael Fisher, nor did he give oral evidence. The least we can say of the lack of such evidence is that it was unhelpful. But, since Mr Fisher claimed Michael Fisher to have been absent from his post for a period of some 5 weeks in the claim period – a claim we accept as fact - the lack of evidence from him is perhaps not critical.

20. The second matter is a claim by Miss Robinson that, as the result of Silicon having accepted that only the last of the four questions which arise in cases such as the present one need be answered (see [13] above), Silicon concedes that:

A) all deal chains were traced accurately, as per the deal sheets and deal packs produced by the Commissioners;

B) in respect of all deal chains, there existed tax losses in those chains;

C) those tax losses were attributable to fraud; and

D) the deal chains formed part of an orchestrated scheme to defraud the Revenue.

We accept the correctness of that claim.

The law

21. The principal EU legislative provision in force at the relevant time was the Sixth VAT Directive (since replaced by Council Directive 2006/112/EC). Article 17 (1) of the Sixth Directive provided that "The right to deduct [input tax set against the output tax for which a trader must account] shall arise when the deductible tax becomes chargeable". That provision was transposed into domestic legislation in sections 24 to 26 of the Value Added Tax Act 1994. They read as follows:

"**24. Input tax and output tax**

(1) Subject to the following provisions of this section, 'input tax', in relation to a taxable persons, means the following tax, that is to say-

(a) VAT on the supply to him of any goods or services;

(b) VAT on the acquisition by him from another member State of any goods;

(c) VAT paid or payable by him on the importation of any goods from a place outside the member States,

being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.

(2) Subject to the following provisions of this section, 'output tax', in relation to a taxable person, means VAT on supplies which he makes or on the acquisition by him from another member State of goods (including VAT which is also to be counted as input tax by virtue of subsection (1)(b) above)…"

"**25. Payment by reference to accounting periods and credit for input tax against output tax**

(1) A taxable person shall

(a) in respect of supplies made by him, and

(b) in respect of the acquisition by him from other member States of any goods,

account for and pay VAT by reference to such periods (in this Act referred to as 'prescribed periods') at such time and in such manner as may be determined …

(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

(3) If either no output tax is due at the end of the period, or the amount of the credit exceeds that of the output tax then … the amount of the credit or, as the case may be, the amount of the excess shall be paid to the taxable person by the Commissioners; and an amount which is due under this subsection is referred to in this Act as a 'VAT credit' …"

"26. Input tax allowable under section 25

(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 the period (that is input tax on supplies, acquisitions and importations or the period) as is … attributable to supplies within subsection (2) below.

(2) The supplies within this subsection 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 …"

22. Subject to a trader holding evidence to support his claim, the right to deduct or to a repayment is absolute; no element of discretion is conferred on the Commissioners, except that they may accept lesser evidence than that prescribed for the purpose.

23. In the present case, although in some invoices the CPUs traded were wrongly described as being 1Mb, whereas they were 2Mb (see page 1 of the Schedule to our decision), essentially the Commissioners accept that the transactions in question were exactly as stated, i.e. the goods bought and sold were those Silicon claimed to have bought and sold, that the goods and payment for them changed hands, and that the goods were transported out of the United Kingdom, the company holding the necessary evidence to support its claims. The Commissioners also accept that Silicon's suppliers properly accounted for the output tax corresponding to Silicon's input tax claims.

24. However, the Commissioners contend that the statutory requirements as to repayment of input tax cannot be relied on by Silicon in the present case as they were used for abusive or fraudulent ends. For that purpose the Commissioners essentially rely on the judgment of the ECJ in the *Kittel* case, and of that of the Court of Appeal in *Mobilx*.

25. The Court of Appeal considered the basis for, and application of, the test for the Commissioners' right to refuse a claimed repayment of input tax if the Appellant knew or should have known that its transaction(s) were connected with fraud for the first time.

26. We accept that if a taxable person has incurred input tax that is properly allowable, he is entitled to set it against his output tax liability and, if the input tax credit due to him exceeds the output tax liability, to receive a repayment. We further accept that *Kittel* provides a legal basis for denying a taxable person the right to deduct in certain defined circumstances.

27. In *Kittel*, the ECJ took the view that:

> (a) where the tax authorities find that the right to deduct has been exercised fraudulently, they are permitted to claim repayment of the deducted sums retroactively [55];
>
> (b) in the same way, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with the fraudulent evasion of VAT, must be regarded as a participant in that fraud [56];
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> (c) this is the case, irrespective of whether or not he profited by the resale of the goods;
>
> (d) this is because in such a situation the taxable person aids the perpetrators of the fraud [57].

28. At [61] the ECJ concluded

> "… where it is ascertained, having regard to objective factors, that the supply is to a taxable person who knew or should have known that, by his purchase, he

was participating in a transaction connected with fraudulent evasion of VAT, it is for the national court to refuse that taxable person entitlement to the right to deduct."

29. In the light of the above, the Commissioners have the right to refuse a claimed repayment of input tax if the taxable person has knowledge or the means of knowledge of a connection with fraud.

30. At [51] of *Kittel* the ECJ referred to "traders who take every precaution which could reasonably be required of then to ensure that their transactions are not connected with fraud". Such traders can rely upon the legality of their transactions without risk of losing their right to deduct the input tax.

31. As we earlier mentioned, the only question for the tribunal in the present case is whether Silicon knew or had the means of knowing that its transactions were connected with fraud. What is clear is that the relevant "knowledge" is not necessarily knowledge of the actual fraud, or even the identity of a particular defaulter. Rather, it is a question of knowledge of the connection with fraud and what the trader can infer from matters he either knows or reasonably could know.

32. In her skeleton argument, Miss Robinson made reference to a number of cases other than those of *Kittel* and *Mobilx* dealing with MTIC fraud and, being satisfied that read with those two cases the cases on which she relied correctly represent the current state of the law on which our decision must be based, we include them in our consideration.

33. In *Megtian Ltd (In Administration) v HMRC* [2010] EWHC 18 (Ch), Briggs J considered a submission on behalf of the appellant in that case arising from Lewison J's identification of two potential frauds in a contra-trading case:

> "37. In my judgment, there are likely to be many cases in which a participant in a sophisticated fraud is shown to have actual or blind-eye knowledge that the transaction in which he is participating is connected with that fraud, without knowing, for example, whether his chain is a clean or dirty chain, whether contra trading is necessarily involved at all, or whether the fraud has at its heart merely a dishonest intention to abscond without paying tax, or that intention plus one or more multifarious means of achieving a cover up while the absconding takes place.
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> 38. Similarly, I consider that there are likely to be many cases in which facts about the transaction known to the broker are sufficient to enable it to be said that the broker ought to have known that his transaction was connected with a tax fraud, without it having to be, or even being possible for it to be, demonstrated precisely which aspects of a sophisticated multifaceted fraud he would have discovered, had he made reasonable enquiries. In my judgment, sophisticated frauds in the real world are not invariably susceptible, as a matter of law, to being carved up into self-contained boxes even though, on the facts of particular cases ... that may be an appropriate basis for analysis."

34. In *POWA (Jersey) Ltd v HMRC* [2012] UKUT 50 TCC, Mr Justice Roth stated as follows:

> "52… HMRC must establish that fraudulent evasion of VAT took place, and if the form of fraud involved was contra-trading then that is what they have to prove. But it is a misconception to consider that they must also establish that the party seeking to deduct input tax … should reasonably have known that its own transaction was connected to (or involved in) this particular form of missing trader fraud as opposed to another form…"

35. In *Mobilx*, the Court of Appeal (Moses LJ giving judgment) dismissed a submission that the principles enunciated by the ECJ in *Kittel* cannot be applied as part of UK domestic law without specific legislation. It then went on to consider what it described as two essential questions:

> "4... firstly, what the ECJ meant by 'should have known' and secondly, as to the extent of the knowledge which it must be established that the taxpayer had or ought to have had: is it sufficient that the taxpayer knew or should have known that it was more likely than not that his purchase was connected to fraud or must it be established that he knew or should have known that the transactions in which he was involved *were* connected to fraud?"

36. On the first question, the Court concluded:

> "52. If a taxpayer has the means at his disposal of knowing that by his purchase he is participating in a transaction connected with the 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."

37. In relation to the second question, the Court said:

> "53. Perhaps greater weight is the challenge based, in *Mobilx* and *BSG [Blue Sphere Global Ltd v HMRC* [2009] EWHC 1150 (Ch)*]*, on HMRC's denial of the right to deduct on the grounds that the trader knew or should have known that it was more likely than not that transactions were connected to fraud ... In short, does a trader lose his entitlement to deduct if he knew or should have known of a risk that his transaction was connected to fraudulent evasion of VAT? HMRC contends that the right to deduct may be denied if the trader merely knew or should have known that it was more likely than not that by his purchase he was participating in such a transaction.
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> . . .
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> 56. It must be remembered that the approach of the court in *Kittel* was to enlarge the category of participants. A trader who should have known that he

was running the risk that by his purchase he might be taking part in a transaction connected with fraudulent evasion of VAT, cannot be regarded as a participant in that fraud. The highest it could be put is that he was running the risk that he might be a participant."

38. The Court held that the alternative view would infringe the principle of legal certainty.

39. The Court concluded:

"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 he 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 purchases 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."

40. The Court also addressed the issue raised by traders in a number of previous cases that the test cannot be satisfied when the fraudulent default may take place after an appellant's connected transaction:

"61. …The extension of that principle to a taxable person who has the means of knowledge but chooses not to deploy it, similarly, does not infringe that principle. If he has the means of knowledge available and chooses not to deploy it he knows that, if found out, he will not be entitled to deduct. If he chooses to ignore obvious inferences from the facts and circumstances in which he has been trading, he will not be entitled to deduct.

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

41. Later in its judgment, the Court provided further guidance on the application of the *Kittel* test:

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

42. Moses LJ quoted with approval the dictum of Christopher Clarke J in *Red12 v HMRC* [2009] EWHC 2563, to the effect that the tribunal should examine all the circumstances, and consider a given transaction in the context of the other transactions conducted, and patterns that may exist, the quoted passage ending:

> "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."

43. Moses LJ continued:

> "84. Such circumstantial evidence, of a type which compels me to reach a more definitive conclusion than that which was reached by the Tribunal in *Mobilx*, will often indicate that a trader has chosen to ignore the obvious explanation as to why he was presented with the opportunity to reap a large and predictable reward over a short space of time. In *Mobilx*, Floyd J concluded that it was not open to the Tribunal to rely upon such large rewards because the issue had not been properly put to the witnesses. It is to be hoped that no such failure on the part of HMRC will occur in the future.
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> 85. In so saying, I am doing no more than echoing the warning given in HMRC's Public Notice 726 in relation to the introduction of joint and several liability … A trader who chooses to ignore circumstances which can only reasonably be explained by virtue of the connection between his transactions and fraudulent evasion of VAT, participates in that fraud and, by his own choice, deprives himself of the right to deduct input tax."

44. In *HMRC v Brayfal Ltd* [2011] UKUT 99 (TCC), Lewison J recognised that in determining what it was that the taxpayer knew or ought to have known, all the evidence presented before a tribunal must be considered and that the accumulation of a whole series of individual factors may be sufficient to prove a case. The totality of the deals must be regarded.

45. When considering the application of the *Kittel* test to a given transaction, a court or tribunal is not only entitled to, but must, look at all the available and relevant evidence: it should not only look at the particular transaction. It will inevitably look at the circumstances in which the transaction took place. It is this that Christopher Clarke J was considering when he made the observations at paragraphs 107 – 111 of his judgment in *Red 12*. Having considered the relevant passages from *Optigen Ltd v HMRC* [2006] Ch 218, he continued:

> "107. *Red 12* submits that the tribunal breached these principles by relying on data unknown to *Red 12* such as the fact of third party payments (which the tribunal took as evidence of fraud) and on late evidence adduced by HMRC which was unknown to *Red 12* at the time of the trades, including, for instance, evidence of the fraudulent activity of a company of which, as the tribunal admitted, *Red 12* might not have had knowledge.
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> 108. In *Optigen* the assumed facts were, as Lewison J recorded in *Livewire***,** that the trader was "an innocent buyer of the goods who had no knowledge of a defaulter at an earlier link in the chain". HMRC had sought to argue that the transactions in a chain involving MTIC fraud were not genuine economic activities at all because their purpose was to misappropriate VAT. The ECJ rejected that and held that a taxpayer who supplied goods and accounted for the output tax to HMRC was not to be denied the right to deduct the input tax because someone else in the chain had a fraudulent intent of which it had neither knowledge nor the means of knowledge. It is in that context that the court spoke of the need to examine each transaction on its own merits.
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> 109. Examining individual transactions on their merits does not, however, require them to be regarded in isolation without regard to their attendant circumstances and context. Nor does it require the tribunal to ignore compelling similarities between one transaction and another or preclude the drawing of inferences, where appropriate, from a pattern of transactions of which the individual transaction in question forms part, as to its true nature e.g. that it is part of a fraudulent scheme. The character of an individual transaction may be discerned from material other than the bare facts of the transaction itself, including circumstantial and "similar fact" evidence. That is not to alter its character by reference to earlier or later transactions but to discern it.
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> 110. To look only at the purchase in respect of which input tax was sought to be deducted would be wholly artificial. A sale of 1,000 mobile telephones may be entirely regular, or entirely regular so far as the taxpayer is (or ought to be) aware. If so, the fact that there is fraud somewhere else in the chain cannot disentitle the taxpayer to a return of input tax. The same transaction may be

viewed differently if it is the fourth in line of a chain of transactions all of which have identical percentage mark ups, made by a trader who has practically no capital as part of a huge and unexplained turnover with no left over stock, and mirrored by over 40 other similar chains in all of which the taxpayer has participated and in each of which there has been a defaulting trader. A tribunal could legitimately think it unlikely that the fact that all 46 of the transactions in issue can be traced to tax losses to HMRC is a result of innocent coincidence. Similarly, three suspicious involvements may pale into insignificance if the trader has been obviously honest in thousands.

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

46. Christopher Clarke J in *Red 12* and Moses LJ in *Mobilx* both referred to the importance of looking at all the circumstances. It is clear from the passages set out above that both courts placed considerable emphasis on the significance of circumstantial evidence. Inevitably, direct evidence of the appellant's knowledge is very rarely, if ever, going to be available. Nevertheless the combination of individual factors may together give rise to a clear inference that an appellant had knowledge of a connection of fraud.

47. As Briggs J said in *Megtian:*

"24. In my judgment, the primary facts found by the tribunal relevant to *@tomic's* knowledge were, in the aggregate, sufficient to permit the tribunal, if it thought fit, to make a finding of dishonest knowledge on the part of *@tomic*. It is in this context important for an appeal court to have regard to the need to appraise the overall effect of primary facts, rather than merely their individual effect viewed separately. As Lewison J put it in *Arif v Revenue and Customs Commissioners* [2006] EWHC 1262 (Ch), at paragraph 22:

> 'There is one other general comment that is appropriate at this stage. It relates to the evaluation of circumstantial evidence. Pollock CN famously likened circumstantial evidence to strands in a cord, one of which might be quite insufficient (*R v Exall* (1866) 4 (F&F 922). Thus there can be no valid criticism of a tribunal which considers that one piece of evidence, while raising a suspicion, is not enough on its own to find dishonesty; but that several such pieces of evidence, taken cumulatively, lead to that conclusion.'"

48. Whilst the observations of Briggs J were made in the context of an appeal in a contra-trading case, and whilst it is noted that *@tomic* was an alleged contra trader in that appeal, the Commissioners maintain that the observations must apply equally to a broker trader in the case concerning straight line deal chains only.

49. In *Calltel Telecom Ltd v HMRC* [2009] EWHC 1081 (Ch), Floyd J cited with approval the approach of the Tribunal to the question whether it is appropriate to draw a particular inference in respect of the issue of tracing a deal chain:

> "37. The tribunal then returned to consider a question as to whether a tax loss had been shown, in particular, when it had not been possible to trace a chain all the way back to a defaulter. At [170] the tribunal concluded thus:
>
> > 'The first matter to determine is whether Mrs Bushby [an officer of the Commissioners] correctly drew the conclusion that, where a buffer could be shown to have acquired its supplies from a defaulter in those chains which could be fully traced, it was reasonable to infer that, in those chains which could not be fully traced, it had acquired its supplies from the same source. In our judgment, the inference is not merely reasonable but compelling. It would be remarkable if illicit deals could be traced, while legitimate deals could not. There would be no reason for a buffer to conceal its source in such circumstances; on the contrary, it would be in its interests to be forthcoming about it. The simple facts that Mrs Bushby was able to complete the chain (accepting as we do that her efforts were diligent) speaks for itself.'"

The Facts

Background information

50. We then proceed to make our findings of fact. Silicon was incorporated on 19 June 2002 and registered for VAT with effect from 2 August 2002. In its application for VAT registration it stated that its intended business activity concerned "trading semi-conductors, repping semi-conductors", that the estimated value of its taxable supplies in the following 12 months was £250,000, and that the business did not expect to receive regular repayments of VAT. (We understand the term "repping" to refer to the practice of acting as representative of another trader or manufacturer).

51. The present directors of Silicon are Mr Fisher and Michael Fisher. Mr Fisher was appointed company secretary in 2002 and managing director on 16 March 2004. Michael Fisher was appointed a director on 18 February 2005. One Paul Kuszka was a director of Silicon between 27 June 2002 and 11 May 2004.

52. The authorised share capital of Silicon is 1000 £1 ordinary shares, but its issued share capital is but 100 shares, 80 of which are presently held by Mr Fisher, and the remaining 20 by Michael Fisher. Michael Fisher joined Silicon having been made redundant by his previous employer. He had no knowledge or experience of the CPU industry, and confined himself to dealing with records and accounts.

53. Mr Fisher began his career in the electronic component distribution industry in 1979 when he joined Jermyn Distribution Ltd as a product marketing executive. In 1983 he moved to Abacus-Quest Ltd as its field sales representative; and in 1985 he moved to Barlec Richfield Ltd as a senior sales engineer, being promoted to its Siemens product manager in 1988. In or about 1994 he was made redundant. He then

claimed to have established his own company, Micro and Memory Technology Ltd ("MMT"). However, in cross-examination he said that he was not a director of MMT, but merely a manager. He added that a Mr Paul Kuszka was MMT's managing director. However, a little later Mr Fisher claimed that he had established MMT with one Graham Wright, to whom he sold his interest in the company in 2000. Whatever the truth may be as to Mr Fisher's position with regard to MMT, since it is of no real consequence we need take the matter no further.

54. Paul Kuszka is the owner of a company called XEL Electronics Ltd ("XEL") which to some extent trades in CPUs directly in competition with Silicon. Mr Fisher explained that Mr Kuszka lent Silicon £50,000 on its starting to trade, but said that that sum had since been repaid. However, it emerged that Mr Kuszka lent further monies to Silicon as and when it needed them, and Silicon made repayment of undisclosed sums from time to time. Mr Fisher further claimed that Mr Kuszka purchased shares in Silicon. No evidence was adduced as to the precise sums lent and repaid, the shares purchased, or the dates on which those events took place. Consequently, we are unable to make any findings of fact with regard to them. Nor can we say what capital was available to and used by Silicon in 2006.

55. When Silicon was formed in 2002, Mr Fisher was already a shareholder in, and possibly a director of, two other companies, Algasan Ltd and Silicon Microtechnology Ltd ("SMT"). The business of the latter was registered with the Commissioners as that of a distributor of electronic components. Algasan was set up as a manufacturer of diamond abrasive materials, based solutions, and suspensions. Mr Fisher had no experience of such manufacture, and relied on one John Broad for the purpose. Neither SMT nor Algasan plays any part in the events with which we are concerned.

56. Although Mr Fisher explained that Silicon was intended to be a repping company, it rapidly changed into a trader on the grey wholesale market in CPUs, engaging in what we find to have been both buffer and broker transactions.

57. Silicon rendered quarterly VAT returns until the period ending 09/04 when it converted to making monthly returns. Silicon's turnover between December 2003 and August 2006 was as follows:

VAT period	Net Turnover (£)	VAT Period	Net Turnover (£)
12/03*	127,671	08/05	2,392,812
03/04*	101,878	09/05	1,146,458
06/04*	155,597	10/05	2,727,800
09/04*	250,019	11/05	1,718,248
10/04	627,110	12/05	1,273,274
11/04	926,840	01/06	1,677,315
12/04	208,848	02/06	3,343,508

01/05	488,234	03/06	3,929,699
02/05	149,604	04/06	2,696,961
03/05	1,293,711	05/06	5,389,759
04/05	1,608,976	06/06	4,016,847
05/05	1,283,334	07/06	1,349,907
06/05	1,538,705	08/06	664,585
07/05	1,782563	09/06	1,880

*quarterly returns

58. To put those turnover figures into perspective, we record that Silicon's turnover for the year ending 31 December 2004 was £2,270,292, a substantial increase from £375,227 for the year ending 31 December 2003. For the year ending 31 December 2005, its turnover increased to £17,753,719, an increase of over 700 per cent from the previous year. And in the eight-month period from January to August 2006 inclusive its turnover was £24,068,581 - a figure that represented on an annual basis a 100% increase from the previous year.

59. A substantial part of Silicon's turnover arose from zero-rated sales to foreign customers, and the company's repayment claims grew in line with its turnover.

60. Silicon made its returns for the months of May to August 2006 shortly after each period ended, and expected to receive the repayment sought within a month. As we previously mentioned, the Commissioners did in fact repay the amount sought in the May 2006 return.

61. It was then informed that the four returns had been subjected to extended verification. That exercise involved the Commissioners tracing the transaction supply chains in order to ascertain whether they disclosed a fraudulent loss of VAT.

62. From the verification exercise, the Commissioners identified the zero-rated wholesale sales in the four returns, and went on to trace all of the corresponding standard rated purchases to fraudulent tax losses (either directly, or on the balance of probabilities).

63. From their investigations, the Commissioners concluded that Silicon knew or should have known that the transactions involved in the sales concerned were connected to the fraudulent evasion of VAT, and in the letters of 14 April 2008 and 19 May 2008 informed Silicon of their decision to deny its right to deduct input tax claimed in respect of the 23 sales invoices dealing with broker transactions in May, June, July and August 2006.

The Commissioners' response to MTIC fraud and Silicon's response thereto

64. Amongst the witness statements presented to us was one prepared by Guy Roderick Stone, an officer of the Commissioners responsible for their counter-MTIC

strategy. In the statement, Mr Stone said that he was involved in establishing their verification unit at Redhill which progressively took over responsibility for the whole of the United Kingdom. Its purpose, at least to the general body of traders, was to act as a means whereby they might verify that another trader with whom they intended to deal had a valid VAT registration, and its registered details matched those held by the Commissioners. But it was made plain in their publications that the Commissioners were not prepared to give approval to individual transactions; it was for traders to take reasonable checks on their own transactions, i.e. to police their own trades.

65. A trader making a Redhill check before carrying out a transaction would, if appropriate, have received written confirmation that given particulars matched those held by the Commissioners. But the confirmation would expressly have stipulated that it should not be taken as any kind of authorisation of a contemplated transaction.

66. Mr Fisher complained that in 2005 and 2006 Silicon found the service provided by the Redhill office to be wholly unsatisfactory; it had only two fax lines which were continuously in use so that access to them was effectively denied to traders. The result was that in February 2006 Silicon ceased to make Redhill checks, and instead made checks through the EU Europa website. Mr Fisher was unwilling to accept that that practice afforded Silicon but limited protection since Europa simply confirmed that a VAT registration number searched was a valid one, and offered no protection in the case of e.g. hijacked registration numbers.

Silicon's trading model

67. We then proceed to explain Silicon's trading model when dealing with foreign customers. In part we find it to be as described by Mr Fisher and in remainder we base it on our own findings of fact.

68. Mr Fisher described the CPU wholesale market as very competitive and as involving a large number of traders. Implicitly, he indicated for that trading in it speed was of the essence. He said that Silicon advertised on the website of International Computer Brokers ("ICB") www.icb.cc which he claimed to serve the genuine grey market in CPUs. Wholesalers would post on the site details of stock they wished to buy or sell. Mr Fisher maintained that, as a result of its use of the website, Silicon obtained contracts for both purchases and sales of CPUs from other site users. He said that Silicon's trade in the relevant period was essentially customer generated, and we proceed on the basis that it was. It required the company first to ascertain its customer's stock requirements and then source the stock for it. Assuming a supplier was able to access the necessary stock at a price it believed it would provide it with a reasonable profit, and agreed the price the customer was prepared to pay, Silicon would obtain a purchase order from its customer and itself submit a purchase order to its supplier.

69. Mr Fisher was asked why, since information about goods for sale was freely available to the other ICB website users with which Silicon was dealing, amongst

whom were its customers, they did not by-pass his company, deal direct with traders who held the required stock, and thereby obtain it at a lower price. His reply was effectively to dismiss the question, saying that Silicon was dealing in a market with others who chose to deal with it.

70. The form of trading Silicon undertook was what is commonly referred to as "back-to-back", i.e. it consisted of purchases and corresponding sales of the identical make, number and specification of CPUs. Mr Fisher claimed that that form of dealing protected Silicon in that it agreed no purchase until a sale had been arranged, and arranged no sale until a supply had been secured. Thus there was no possibility of its being left with stock on a deal being completed. (A few other transactions in the chains found by the Commissioners were not back-to-back, but we need not concern ourselves with them).

71. It was apparent from Mr Fisher's evidence that, whilst he accepted responsibility for all the deals entered into by Silicon, its due diligence checks, the preparation and maintenance of records, and payments to its suppliers were the responsibility of Michael Fisher. We do not have his evidence and he was in any event absent for some five weeks (see [19] above). The other person who may have been responsible for administrative matters was a lady named Rebecca, Michael Fisher's assistant. She too was absent from her duties, in her case from 22 May 2006 until at least the end of June due to injuries sustained in a motor accident. We thus have a situation where both Michael Fisher and his assistant were absent for the period when Silicon carried out more transactions than at any other time in its history (see [58] above). No evidence was adduced as to who was responsible for carrying out their duties in their absence or, indeed, whether some of them were carried out at all: Mr Fisher made no claim that he undertook any of them, nor did he indicate that the company's one other employee mentioned in evidence, John Fitzpatrick, did so. We accept that invoicing and the paperwork absolutely necessary for each transaction was prepared, for it was produced to us. In the statement of case, the Commissioners claimed that Silicon had a "minimal number of staff". We suspect, but in the absence of specific evidence consider it unnecessary to find, that its employees consisted of the persons mentioned in this paragraph, and no others. Further, since at the time Silicon was preparing to move its business premises – a matter that Mr Fisher claimed required time devoting to it – it appears to us that the only paperwork dealt with was that absolutely necessary for the conduct of day to day business.

72. At this point, we might conveniently mention that most of the documents produced by the Commissioners for individual transactions by Silicon bore the same date as those for all other transactions in the chains concerned and, where that was not the case, the difference in dates between documents relating to the transaction at the head of a chain and that at its foot varied by one or two days at most.

73. Mr Fisher claimed Silicon's broker deals required it first to ascertain a customer's stock requirements and obtain what he called "a request for a quotation". Quite what he meant by that expression we cannot say, as he indicated that at that stage price would not be under discussion. The method of communication with customers was almost always by means of instant messaging, MSN, or by email. A message would

typically say that the customer was looking for a certain quantity of a particular product. Silicon would commence enquiries "of its suppliers" as to the availability of the stock sought, again communicating electronically.

74. At the time with which we are concerned, Silicon dealt with only two suppliers, Rapid Global Ltd ("Rapid") and Commodity Exports Ltd ("Commodity"), and since at one point in interview by the Commissioners Mr Fisher claimed that it dealt only with Rapid, and in the 23 transactions with which we are concerned Commodity was involved in only two, we are unable to accept that it did make enquiry of a variety of "suppliers".

75. Mr Fisher claimed first to have come across Rapid in 2005. He said that he regularly met the company's representatives at its premises in Windsor, both its directors having been in the CPU industry for some years, and they had extensive knowledge of the CPU grey market. Mr Fisher further claimed daily to have been approached by wholesalers offering CPUs for sale, but said that he turned down their offers in favour of Rapid, having established a strong business relationship with that company. We need not comment on the former claim, and the latter one appears to be borne out by the facts.

76. The Commissioners identified Rapid as customer in no less than 95 of 144 invoices Commodity issued in May, June and July 2006. Every one of the 144 related purchases made by Commodity in those three months was found by officer Bycroft to trace back to a tax loss.

77. The evidence of due diligence on Rapid provided to the Commissioners by Silicon in the period of extended verification consisted of a faxed letter of introduction, a copy certificate of incorporation, its VAT registration certificate, Companies House details (dated 3 October 2006), three BT bills for November 2005, and May and August 2006, confirmation of Rapid's registered address and its accountants' particulars, a copy of a director's passport, copies of a director's utility bills for his residential address, a copy of the lease of Rapid's business premises in Windsor, its FCIB account details, and an on-line credit report dated 9 February 2007. We note that some of those documents were dated after the end of the claim period, and thus have no relevance to that period. Mr Fisher accepted in evidence that Silicon had failed to obtain any trade references for Rapid, and that it undertook no due diligence on that company after February 2006.

78. The evidence of due diligence on Commodity provided consisted of an introductory letter, a copy VAT certificate, bank details for the company, a copy of Commodity's Companies House Certificate of Incorporation, and a copy of the director's passport. Again Silicon obtained no trade references, nor did it carry out any credit checks on the company. No visit report on Commodity was provided. Nor did Silicon carry out any due diligence on Commodity in the claim period.

79. We find that Silicon obtained no accounts or banking references for either Rapid or Commodity; and whilst initially Mr Fisher claimed that the company's due

diligence in dealing with its suppliers was adequate, by the time his cross-examination ended, he acknowledged that it was not.

80. Reverting then to Mr Fisher's evidence, he said that the supplier "would come back and say either we have the stock and it's located at XYZ logistics company or the stock might be due in the next 24 or 48 hours…the stock would be being held by the supplier at the freight forwarder". Assuming the company could meet its customer's requirements as to stock, it would then enter into 'normal commercial negotiations' with the customer, defined by Mr Fisher as "the customer will always want the lowest price and we as the supplier would always want to attain the best price. It would just form part of a normal commercial negotiation". From the evidence adduced, we find that price was the only matter that might have been the subject of true negotiation.

81. Despite the high value of the goods in which Silicon was dealing, it did not enter into written contracts with its suppliers, customers or freight forwarders. From Mr Fisher's evidence it was apparent that the terms and conditions it agreed with its counterparties were basic in the extreme. In the absence of any evidence as to the precise terms on which Silicon traded, we accept a claim by the Commissioners that they did not include a returns and exchange policy for faulty or damaged goods, or provision for the transfer of title, payment and delivery. Silicon's own terms of trade were said to be available on the company's website. We were told that the Commissioners requested copies of them on a number of occasions, but that their requests had been ignored. Nor were we provided with a copy of the terms. Even if they did exist, we doubt that Silicon in fact traded in accordance with them.

82. The true ownership of the CPUs being traded by Silicon whilst passing through its chains of transactions was unclear from the documentary evidence. It appeared that once a trader such as Silicon had taken possession of them, notwithstanding that it had not paid for them and no credit agreement was in place with its supplier, it claimed to have obtained title of some sort to them – a title that enabled it to deal with the CPUs as it wished, and to transfer them abroad. However, the invoices of some traders in the various chains stated categorically that title in the goods they sold would not pass to a customer until the trader had been paid in full for them. It would appear, and we find, that customers receiving the invoices in question totally ignored such statements.

83. On being asked how much time would ordinarily have elapsed when a customer had been quoted a price, Mr Fisher replied, "Well, the normal transaction might take to put together from early morning until late afternoon. But the ideal situation would always be to be able to conclude the transaction as quickly as possible and preferably within the same day". Mr Fisher continued, "We would then put together a quotation and offer the product to the customer. If the customer then accepted our offer we would then go to the next stage, which would be to receive a purchase order from the customer… . Once the customer had processed a purchase order to us, we would then start communications with the supplier and, in line with that, we would start …to have communications with the freight-forwarding company. That would generally be driven by them [the freight forwarder]…the next part would be to offer inspection – to

receive inspection reports and to offer inspection reports. And that's when the freight forwarder communication would start".

84. In none of the transactions with which we are concerned did a supplier hold the stock involved, rather it was held by a freight forwarder. Except in two cases in point, the goods were held by the same freight forwarder throughout a chain of transactions. We ignore the two exceptional cases for no evidence was adduced to indicate why goods in them moved from one forwarder to another whilst a chain was progressing. In the remaining 21 cases, the forwarder originally holding the stock for the trader at the head of a chain successively held it for one trader, released it to the next, held it for that trader until it was released again, and so on until the stock was transferred abroad. The stock did not move, and it was the freight forwarder who was asked to carry out any inspection required. It follows that Silicon itself, always appearing towards the end of a chain of transactions, never chose the freight forwarder. Whilst the stock was in the UK, it remained in the freight forwarder's warehouse, and was simply released by its supplier to it, and then further released to its customer.

85. Mr Fisher did not make clear when Silicon would agree a price for CPUs with its own supplier and submit a purchase order; its own order may or may not have preceded its customer's purchase order, but the likelihood is that it succeeded it.

86. Having initially admitted that Silicon carried out no due diligence on its foreign customers beyond obtaining their bank details, due to what Mr Fisher described as the obvious difficulties in doing so, he nevertheless claimed that the company had attempted to check their creditworthiness with the credit-rating agency Creditsafe. But Silicon had no account with Creditsafe. Mr Fisher maintained that it had no need for an account since it had permission to use XEL's Creditsafe account. Quite why XEL, as a business competitor of Silicon, would have permitted it to do so, and seemingly without charge, was not explained to us, nor was any corroborative evidence adduced to prove the claim. In the absence of any Creditsafe reports on Silicon's customers, we do not accept Mr Fisher's evidence as to checks on them.

87. Whilst dealing with Creditsafe, we might add that Silicon produced a credit report on Forward Logistics (Heathrow) Ltd ("Forward"), one of the freight forwarders used by the company. It was dated 9 February 2007, i.e. some time after the deals with which we are concerned. Consequently, we regard it as of no assistance in relation to Silicon's deals in the denied period. The Creditsafe report it obtained on another freight forwarder, Quest Freight Ltd, was dated 17 August 2006 – again outside the claim period. It would appear, and we find, that in the claim period Silicon carried out no due diligence checks on any of the freight forwarders with which it dealt.

88. We should add that in 2005 a third freight forwarder with which Silicon dealt, All-Ways Logistics Ltd ("All-Ways") was sent 6 hijack letters by the Commissioners, and 115 de-registration veto letters; and in the first 6 months of 2006, Forward was sent 9 hijack letters, and 244 de-registration letters. As we understand it, the former give details of companies whose identities have been hijacked by fraudulent traders, and the latter of companies which have been de-registered for VAT purposes. Had

Silicon made due diligence checks on the two freight forwarders, it ought to have been told of the letters; but as it did not, it would not have been aware of them.

89. Although Mr Fisher claimed periodically to visit freight forwarders holding stock for Silicon, assuming he did so, no evidence was adduced to satisfy us that Silicon, by a director or other person appointed to act on its behalf, inspected any of the goods held by a freight forwarder in relation to the transactions in the claim period.

90. Mr Fisher was asked how much time was likely to elapse between Silicon providing an inspection report to a customer and a sale transaction being completed. He replied, "In an ideal situation we would think that we would like to start as early as possible in the morning to get the process flow started and conclude the business by the end of play that same day. A lot of that would depend on how busy the freight forwarding company were and where we were in terms of the queue".

91. He was then asked, "At what stage did you instruct the freight forwarders to export the goods?" Mr Fisher explained that "that would have been done at the last point of the process. Had we received all the paperwork? If that had all been exchanged and everything else was up to date then the plan would be that those goods would be shipped out that evening. I think that FedEx could – or a company that would actually do the shipment - could collect as late as 6 or 7 pm and get the product out that day – that working day". He offered no explanation as to why it was necessary for transactions to be completed so quickly.

92. Mr Fisher brushed aside one question as to the terms on which Silicon was doing business with its customers, saying that he currently traded in the same way as Silicon did in 2005/06. He was further asked, "So customers are given credit?" Mr Fisher replied, "Some customers are given some credit, but generally – and when I say 'credit' we have to understand that credit means that I might actually release and ship goods before receiving payment but not what you would consider to be standard terms of credit which might be 30 days, end of month. We don't operate that way. We operate on a fairly tight cashflow and as a result of that, credit, we're talking about hours or days. I do it today". On then being asked as to what authority Silicon had to export goods, not having paid for them, Mr Fisher answered "Well, we have a release authority from our supplier". Mr Fisher was unable to identify any such authority in the papers before the tribunal. In its absence and in the light of all the remaining evidence, we are unable to accept that any such authority was ever required by a supplier or obtained by Silicon; indeed we doubt that Mr Fisher had thought about the matter until the question was put to him.

93. CPUs sold by Silicon and transported abroad were usually dispatched to what Mr Fisher described as the foreign purchaser's freight forwarder. He implicitly claimed that Silicon was protected against loss in that it transferred them "on hold" prior to payment; they would not be released to the foreign trader until Silicon received payment for them. However, Mr Fisher explained that the foreign freight forwarders used were in fact companies recommended by its freight forwarders in the UK; Silicon itself did not choose them and carried out no checks on them. In the absence

of any documentary evidence of goods being transferred "on hold", we do not accept that they were so transferred.

94. In the papers before us, in relation to Silicon's June deal 1, is a document entitled "Release Document". No mention was made of this document during the hearing. It begins by saying, "This release document requires verbal confirmation from Silicon 8 Ltd before the goods are released. Please call on 01732xxxxxx for authorisation." The document is addressed to AdMicro Ltd of Zurich. Whether a similar document was issued in relation to any other of Silicon's deals, we cannot say. But even if the Release Document we have was sent to AdMicro Ltd in relation to June deal 1, there is no evidence that the "verbal confirmation" required was sought, and in its absence we find that it was not.

95. However, the model then required the foreign trader atypically to make payment to Silicon. Silicon would in turn make payment to its own supplier, and the supplier and earlier members of the chain would follow suit until payment was received by the true owner of the goods. So, notwithstanding that Silicon had no title to the goods, had not paid its own supplier for them and had no authority to deal with them, and had no credit agreement with its foreign customer, prior to payment they would be released to the customer to deal with as it wished. Why, in the circumstances, unlike every other trader in the chain, the foreign trader made payment to Silicon, we cannot say since no explanation for that trader's behaviour was provided by Mr Fisher; nor can we discern it on ordinary commercial principles.

96. In period 05/06, Silicon dealt with only two foreign customers, Medius Trading and Futures Brokerage. In the following two months it also dealt with 6 other such customers. Silicon's customers in the transactions concerned were based in Dubai, Hong Kong, Portugal, Switzerland and the USA. One of its Swiss customers was Futures Brokerage Inc SA ("Futures"). On that company's purchase orders it was clearly stated, "You as the supplier must have full legal title to sell the goods to [Future], the goods to be shipped must be free from any charges or claims from any third party". Clearly, that condition was completely ignored by both Silicon and Futures.

97. Despite the large numbers of CPUs in Silicon's many transactions (each transaction involved some thousands of CPUs), Mr Fisher maintained that none was ever returned to it as faulty or damaged. Bearing in mind the state of the boxes as noted in the inspection reports on them (see below), we consider it most unlikely that of the CPUs with which Silicon dealt, none was faulty or damaged.

98. Although Silicon provided us with copies of endorsements said to be attached to insurance policies covering the goods in which it dealt, it did not produce the policies themselves. It did however produce documentary evidence to indicate that premiums were paid on some policies which may well have included those which were missing. In those circumstances, we propose to treat the absence of the policies as a neutral factor.

99. In periods prior to those with which we are concerned, Mr Fisher claimed that Silicon maintained a spreadsheet on which it recorded all the box numbers of the CPUs in which it had dealt. The spreadsheet had a search function enabling the company at speed to check whether it had previously dealt with a particular box. However, Mr Fisher admitted that Silicon did not use the facility. From their own enquiries, the Commissioners found that box XB18GH68, which was included in Silicon's June deal 2, was also included in June deal 5, the former being made on 7 June 2006 and the latter on 13 June 2006. They also found that box BH0BMV96 which featured in June deal 3, also appeared in June deal 7, the respective dates of those deals being 7 June 2006 and 15 June 2006; and that box XB181TO4, which appeared in June deal 4 re-appeared in July deal 2, the respective dates of those transactions being 12 June 2006 and 11 July 2006. As CPUs are products destined for inclusion in computers, the Commissioners questioned why boxes of them imported and subsequently exported were re-imported and re-exported. They claimed the evidence conclusively to prove the existence of the carousel arrangements which are a common feature of MTIC fraud. Silicon admitted it was in error in dealing with the boxes in question on a second occasion, but did not go beyond its admission and explain why it did not use the facility.

100. Between 1 June 2006 and 18 July 2006 Silicon claimed to be able to sell SL7Z9 CPUs to its foreign customers at a net price between 12 and 15% lower than that offered by Intel, their manufacturer. Mr Fisher explained that to be due to oversupply in the market. In evidence, Mr Milner admitted that Intel offered quantity discounts for its CPUs and that there was some oversupply, but said that Intel tried to identify those types of the company's products that were finding their way to the open market through, e.g. internet auction sites, etc; the company maintained a close watch on the grey market to ensure that prices on it were not substantially lower than the official price. Significantly, in our judgment, he added, "We try to obtain or stop that kind of commerce because we feel that it's illegal and problematic for Intel".

101. For almost the first seven months of 2006, the official Intel price of SL7Z9 CPUs remained at £93 per unit, but in the months of May, June and July the sale price obtained by Silicon varied between £66.35 and £81 per unit based, in Mr Fisher's opinion, on the oversupply to which we referred in the last preceding paragraph. However, on 26 July 2006 Intel reduced the price per unit to £38 (see Tables 33 and 34 in the first witness statement of Mark Thompson and para.245 of that statement (2/311)). Why, we were not informed, but we suspect it may have been because Intel produced a new model of CPU to replace the SL7Z9. But Silicon continued to deal with the SL7Z9 at a price between £68.40 and £75.20. Since, according to Mr Fisher, traders in CPUs shared information by way of the ICB website, the reduction in price must have been known within the grey market and thus by Silicon. In our judgment, that reduction would have had an immediate impact on the price at which trading took place. That it clearly did not do so on the market in which Silicon was trading indicates to us that that market was not a genuine one.

102. Silicon's mark-ups when acting as a broker in the denied deals were, at between 5.56 and 9.2%, markedly higher than those achieved by the buffers in the same chains. Further, in Silicon's own buffer deals, it achieved mark-ups of only between

1.27 and 3.93%. Mr Fisher claimed the differences in magnitude to be due to the higher costs involved in exporting.

103. Nor did Mr Fisher offer any reason as to why at least five or six traders had to be involved in each deal chain, for each buffer performed exactly the same function and none of them added any value to the goods concerned. We accept that Silicon would not have known how many traders were involved in an individual chain, but it must have known that beyond its own supplier and customer, both wholesalers, there were at least two others – the manufacturer and the end user.

104. For completeness we record that in all the transactions reconstructed by the Commissioners, notwithstanding the length of the chains concerned, every participant made a profit on its deal. That was despite Mr Fisher's claim that the market in which Silicon was dealing was competitive and crowded.

105. In a number of buffer deals, Silicon supplied goods to XEL, Sacred Solutions Ltd and Harbord Services Ltd and, each of those companies, as Silicon's customer, sold the goods to the Swiss company, Futures. The Commissioners questioned why since Futures was a customer of Silicon featuring in 11 of its denied deals, it did not purchase direct from Silicon and obtain the goods at a lower price than that at which they purchased them. Mr Fisher was unable to explain the purpose of the involvement of those other companies in its chains.

106. Three things stood out from Mr Fisher's evidence. First, his unwillingness to accept the difficulties faced by the Commissioners in dealing with MTIC fraud; secondly, his lack of acceptance of the scale of the MTIC problem; and thirdly, his failure to accept that traders are responsible for policing their own transactions.

107. In relation to the first two points, Mr Fisher claimed that, as an organisation with unlimited resources, the Commissioners should have devoted more officers and equipment to their Redhill centre to assist companies such as Silicon. What, he queried, was the point in traders making checks of that centre when the Commissioners did nothing with the information provided to them? Had they dealt with matters properly, when a trader such as Silicon enquired about a company with which it was about to do business, an officer would have telephoned the subject company and ascertained with whom it was trading in relation to the goods concerned; and that practice would have continued along the chain until the fraudster was reached. At that stage, he maintained that the fraudster could have been dealt with. He appeared unable to comprehend that a fraudster was not required to account for VAT until some time after a transaction was completed so that his status would not have been immediately apparent, and that at the time the Commissioners were, in any event, not aware of the identity of many fraudsters.

108. As to the policing problem, Mr Fisher explained that, as Silicon dealt with only two suppliers and they had been known to it for a considerable period of time, the likelihood of it becoming involved in fraudulent trading was miniscule, making it unnecessary to carry out checks on the suppliers post initial checks. And, as to its customers, since most were outside the EU it was difficult to carry out checks on them

in any event. Again, he maintained, if the Commissioners had been aware of anything untoward about a trader with whom Silicon was dealing or had dealt, they should have informed it of their concerns and knowledge; indeed he expected them to do so.

Inspection reports

109. Mr Fisher claimed that in relation to each transaction Silicon would have instructed the freight forwarder holding goods it had agreed to purchase to inspect them, saying that the inspection reports Silicon required were those generally referred to as "open box". Such an inspection requires the box containing CPUs to be opened, and a sample quantity of its contents examined. It necessarily takes much longer to carry out than a closed box inspection, which merely requires the box containing the CPUs to be checked.

110. We were provided with five inspection reports prepared by freight forwarders who held goods for Silicon. However, none was amongst the papers Silicon itself produced to the Commissioners, Mr Fisher informing us that, on each transaction being completed, he destroyed Silicon's own report. The reports we have derive from deal information provided to the Commissioners by other members of the relevant deal chains.

111. One such report, relating to Silicon's June deal 5, was prepared by Forward. Despite Mr Fisher's claim to require open box inspections, that report was the result of a closed box inspection. It showed all the boxes examined to have been opened and, whilst most were said to be in 'average' condition, the condition of at least one was described as 'poor'. We say "at least one" because the copy report produced was incomplete, so that we are unable to comment on the whole document. Further, the boxes were variously said to have scuff marks, pen marks, knife marks, etc. Clearly, all the indications were that the boxes, and hence the CPUs they contained, were anything but brand new, and their contents warranted inspection. The condition of the boxes should have put Silicon on notice that further enquiries were necessary to ensure that their contents were new and undamaged, but we find that none was made.

112. A second inspection report, on May deal 19, was prepared by All-Ways. The type of inspection carried out was not indicated. Of the 15 boxes inspected, 10 were described as "fair", 3 as "OK", and 2 as "poor". The top seals of the boxes were variously described as "original torn", "original broken" or "original frayed", and all the bottom seals were described as "original broken". Again the report indicated that the contents of the boxes were not brand new. The transaction to which the report related was carried out on 31 May 2006, yet the report was dated 5 June 2006. In those circumstances, unless it was wrongly dated, it could not have been available when the transaction was completed. As we took no evidence of wrong dating, we treat the transactions as having been completed without an inspection report having been prepared.

113. The third report was prepared by Quest Freight Ltd for Rapid in relation to Silicon's July deal 2. Once more, it did not indicate whether the inspection carried out was closed or open box. The condition of all the boxes inspected was said to be

'poor', and every one was said to have had its top and bottom seals broken. Such a report would have caused any genuine trader to make immediate further enquiry as to the condition of the CPUs concerned. But, seemingly, no such enquiry was made by Silicon. We find that if Silicon did obtain a copy of the report, its contents were ignored and that the CPUs were dealt with by it as in every other transaction.

114. The remaining two inspection reports we have are similar to the three we have just described. In just one of them was the condition of a single box of CPUs described as "good" – a fact we consider to speak for itself.

115. We should add that the inspection reports before us from Forward and All-Ways contain no indication that the boxes inspected bore Customs stamps, whereas the report from Quest shows that all the boxes inspected had Customs stamps on their labels.

116. We should also note that on being taken through the Forward inspection report in cross-examination, Mr Fisher did not appear familiar with the way in which it was set out, its contents or the abbreviations used in it.

117. No evidence was adduced to show that Silicon required a freight forwarder holding goods to prepare a report specifically for it. We suspect that, since as we earlier mentioned in every case but two with which we are concerned the freight forwarder holding the goods for the trader at the head of a deal chain continued to hold them until they were exported, a single report was prepared and was made available on payment of a charge to any trader in the chain who might request a copy.

118. However, we go further. We are not prepared to accept Mr Fisher's oral claim that Silicon did obtain inspection reports for goods in which it traded. If it had obtained reports on its transactions and destroyed them, we should have expected it to have been able to produce confirmation of its having obtained them, even if only in the form of evidence of payment for the reports, or confirmation of the freight forwarder's instructions. No such evidence was put before us.

119. All-Ways was the freight forwarder in 8 of Silicon's deals in the claim period. In the documents with which we were provided was a Creditsafe credit check on All-Ways faxed by someone unknown to an unidentified recipient on 11 August 2006, i.e. after the claim period ended. It shows that in the year to 30 April 2004, the last year for which its accounts were available, the company had a turnover of but £81,859, an operating loss of £16,504, net assets of "-£11,820", and a County Court judgment registered against it of £20,702. The report also stated that in Creditsafe's opinion, All-Ways had no credit rating, its filed financial statements being "too old".

FCIB

120. Throughout the claim period, Silicon and almost all the other traders taking part in the chains of transactions reconstructed by the Commissioners maintained accounts with the First Curacao Investment Bank ("FCIB") and used them for their purchases and sales. The FCIB was based in the Dutch Antilles, and traded until October 2006 when its banking licence was withdrawn, and administrators appointed to deal with its

affairs. The Bank's computer databases were seized by the Dutch authorities, and were later made available to the UK authorities. In September 2010, information from the FCIB's Paris server was released by the French and Dutch governments for use in civil proceedings in the UK. It provided the Commissioners with further and more detailed evidence of individual payments than they had earlier had. The evidence showed that in every transaction chain in point in the present appeal the monies due to each trader passed through its FCIB account or the FCIB account of a trader nominated by a trader in the relevant deal chain in a single day. Further, every transaction was conducted in sterling.

121. Mr Fisher contended that Silicon was forced to move its trading account to a bank such as FCIB because the UK high street banks had, at the insistence of the UK government, adopted a "so-called" blanket policy to close the accounts of traders in CPUs and mobile phones. We accept that Barclays plc did close Silicon's trading account at the end of 2005. We should add that Silicon did continue to maintain an account with a UK clearing bank, but did not use it for trading purposes.

122. Every computer has an IP (internet protocol) address. It is a numeric label which identifies each computer on a network using the internet for communication. The Commissioners were able to obtain from the FCIB Paris server the IP address of every computer used to make payment in every one of Silicon's chains of transactions. In 15 of its denied deals they found evidence of the server showing that two or more companies had used the same IP address to make payments; and in some instances those doing so were based in different countries. That is clearly demonstrated by Futures in the table containing details of the payments in Silicon's June deal 1 forming the second page of the Schedule to our decision. The Commissioners relied on the evidence in that behalf as a further indicator of contrivance in Silicon's deal chains.

123. Further information gleaned from the Paris server included the order time and date on which payment was made from one FCIB account to another. Since the payment order times for Silicon's June deal 1 were made available for all 9 traders in the money chain, we take that as an example. As we have said, it is set out in tabular form on the second page of the Schedule to our decision. The first payment in the sequence was made by Bestrad SLU, a Spanish company, to Electrade SA at 11.36 on 5 June 2006. The final payment in the chain was made by Pelikan UK Ltd to Bestrad at 12.45 on the same date. (We note that in June deal 1 the traders Athol and Pelikan each made an additional payment to its supplier on 7 June 2006). Thus payments between the nine traders concerned, including Silicon, were made within 1 hour 9 minutes. Clearly, the payments were orchestrated, and Silicon played a part in the performance.

124. One company to appear in a number of Silicon's transaction chains was ICC Corporation Ltd. In one transaction, that of Silicon's June deal 7, the FCIB Paris server evidence showed that both ICC and Rapid used the same IP address. And in Silicon's July deal 3 chain it also showed that both Rapid and Commodity used IP address 212.2.6.2. Futures, as one of Silicon's foreign customers, used the same IP address as other foreign customers which the Commissioners included in the

monetary chains they constructed, and which led to a Spanish company, Bestrad SLU, the beginning and end of a number of carousels (see page 2 of the Schedule).

125. Officer Hawkins analysed the relevant account data of the various FCIB accounts through which money passed for Silicon's 23 transactions. Additionally, he analysed the account data in respect of a further 7 transactions carried out in the appeal period by Silicon, the input tax repayment claims in respect of which the Commissioners made (6 buffer deals and one broker deal). Of the 23 transactions, Mr Hawkins found circularity in 17 of them. In relation to the 6 remaining deals, he found the money flow chain to have been blocked, so that the Commissioners were unable to prove circularity. He also identified circularity in 3 of the deals in the further 7 transactions identified. On the basis of Mr Hawkins' evidence, we are satisfied that he properly identified circularity of monies in 20 of Silicon's 30 deal chains, and that, whilst circularity could not be demonstrated in the remaining 10 deals, it could not excluded.

126. Another fact warranting recording is that, in some of Silicon's deal chains, the Commissioners established entirely to our satisfaction that there had been third party payments. Although they accepted that Silicon itself was not involved in such payments, they relied on it as yet more evidence of contrivance in its deal chains.

127. In a letter to the Commissioners of 14 February 2007, David Fisher claimed that it was due to Silicon having informed them that it suspected a company called Welcome Stationers Ltd of being a fraudster that that company's VAT registration was later withdrawn. We accept that Silicon did so inform the Commissioners, and that Welcome Stationers VAT registration was later withdrawn.

Silicon's general awareness of MTIC fraud

128. Silicon was served with Notice 726 in August 2003. On 16 September of that year the Commissioners sent SMT, a company of which, as we earlier mentioned, Mr Fisher is also a director, what is known as a Redhill MTIC awareness letter. The letter advised the company of problems within its trade sector, the scale of MTIC fraud and the procedure for clearing VAT registration numbers of prospective suppliers with the Commissioners' Redhill office. It also explained that MTIC fraud was one of the most costly forms of VAT fraud within the EU, and that the Commissioners were treating it as a priority.

129. On 5 October 2004 Silicon was visited by officers of the Commissioners when they found that at the time it was dealing with but one supplier, Rapid, supplying just one customer, Fulcrum USA Inc, and using Forward as freight forwarder. As Fulcrum was prepared to purchase all the stock Silicon could supply, the officers noted that it was not looking for new customers at the time. Silicon was recorded as not being an MTIC fraud risk at the time.

130. On 20 October 2004 Silicon itself was sent an MTIC awareness letter. It was in the same, or very similar, terms to that sent to SMT on 16 September 2003. In a letter

to the Commissioners of 14 February 2007, Mr Fisher said that he "did not specifically remember [the 20 October 2004 letter]", and could find no record of it.

131. On 10 June 2005 Silicon was visited by the Commissioners. The purpose of the visit was to verify a repayment return it had made for period 05/05. The visiting officer(s) discussed with those representing Silicon the question of joint and several liability for VAT, and the company was again issued with Notice 726. The August 2003 edition of that Notice –the issue current at the time – explained that a VAT registered trader could be held liable for net tax unpaid if certain conditions were met. It also said that the measure imposing joint and several liability for the net tax charged on specified goods had been introduced to help in the Commissioners' fraud strategy, and how MTIC fraud was a systematic attack on the VAT system. The notice also set out checks traders could undertake to ensure the integrity of their supply chains. It did, however, state that the Commissioners were not prepared to provide a series of exhaustive checks to prevent fraud, as fraudsters would ensure that they complied with all of them.

132. At para 8.1 of Notice 726 the question is asked: What is the supplier's history in the trade? Mr Thompson observed that, had Silicon asked that question of Rapid, it should have been alerted to the fact that Rapid had in 2004 and 2005 been issued with a number of de-registration veto letters (indicating that a trader had been de-registered and should not be dealt with); and that on 9 September 2005 the Commissioners had advised Rapid of a defaulting trader at the head of a chain of transactions in which it was involved. Rapid's return for period 05/06 was subjected to extended verification on 28 June 2006– another factor of which the Commissioners considered Silicon should have been, but was not, aware, the letter having been issued before Silicon carried out its 07/06 and 08/06 deals. In the event, it was not until 29 September 2006 that Silicon wrote to Rapid saying that it no longer wished to be involved in supply chains commencing with a hijacked VAT number.

133. On 2 November 2005 officer Louise King attended Silicon when she completed the Commissioners' form 'Supply of Goods and Services - An Aide Memoir'. She recorded inter alia that Silicon generally traded on CIF terms, but was contemplating changing to FOB "due to insurance costs", carried out due diligence checks, completed a supplier declaration, and made checks 'before a deal is done'. In so far as inspection was concerned, she noted that all goods were inspected by Forward, whose inspections entailed "Xray, check against list, check packaging inside and out, check physical condition of goods. Inspection report provided". In the section entitled 'Specific Supplier Details', Ms King indicated that Silicon did not obtain any trade references for its suppliers, or undertake any credit or background checks on them through a third party. Amongst other questions Ms King was required to answer was: has Notice 726 been read and understood? She responded, saying "Yes and understood". The company was advised on Notice 726, and an unidentified director confirmed that he had read and understood the Notice.

134. Mr Fisher maintained that Mrs Humphrey was frequently asked to and did confirm that Silicon's due diligence was excellent and, effectively, incapable of improvement. In evidence, whilst accepting that the Commissioners had not

challenged any of Silicon's input tax repayment claims in 2005 and early 2006, she was not prepared to accept that she had gone so far as so to describe the company's due diligence. In cross-examination, an attempt was made to discredit her evidence on the basis of certain flippant, and unnecessary, comments she had included in an exchange of emails with Michael Fisher. We consider the contents of those emails irrelevant; they certainly did not detract from the bulk of Mrs Humphrey's evidence. It appears to us that, since the Commissioners did repay all Silicon's claims up to that of May 2006, the likelihood is that Silicon assumed the position to be as it claimed.

135. On 4 January 2006 Silicon was sent an advice letter relating to a company whose VAT registered number had been hijacked. That was followed on 5 May 2006 by a letter advising Silicon that a company AR Communications Ltd had been de-registered.

136. On 5 May 2006 Silicon was sent a "veto" letter advising it that a company with which had traded or with which it was thought to be intending to trade had been using the hijacked registration details of another trader.

137. And on 26 July 2006 the Commissioners sent Silicon a letter regarding its return for period 06/06 informing it of the difficulties they were facing in Silicon's trading sector, and the extent of fraud in that sector.

138. At a meeting with Silicon on 15 August 2006, those representing the company admitted that few checks were carried out on foreign customers as the carrying out of such checks posed considerable difficulties.

Connection with fraud

139. Although Silicon conceded that the extended verification exercise carried out by officers of the Commissioners on the 23 deals carried out by it in the period in point proved that each one traced back to a fraudulent default, since we must be satisfied to the civil standard of proof that the result of the exercise is accurate, we now to proceed to deal with the example of the tracing exercise chosen by Miss Robinson, considering that to be sufficient for present purposes. It relates to June deal 1 (Silicon invoice 2029).

140. The deal sheet relating to June deal 1 was prepared by officer Bycroft. The transactions the subject of the chain, as represented by the invoices and purchase orders, may be set out in both tabular and narrative form. In the former, it is contained in the Schedule to our decision and, in the latter, we may describe it in the following way.

141. On 1 June 2006 Futures Brokerage Inc SA, one of Silicon's Swiss customers, issued purchase order no 5452 to Silicon for 4725 Intel SL7Z9 CPUs (8/2075), and Silicon issued invoice no.2029 to Futures Brokerage for an identical number of SL7Z9 CPUs in the sum of £376,818.75 (8/2077). The entire consignment of CPUs invoiced by Silicon had been purchased by it from Rapid; Silicon had issued purchase order no.2015 for 4725 SL7Z9 CPUs (8/2071). Rapid invoiced Silicon for the entire consignment in the sum of £417,778.59 (8/2072).

142. Rapid purchased the goods in question from ICC Corporation Ltd, and Rapid issued purchase order no.RGL002813 to ICC in respect of them (8/2067). ICC raised invoice number R5630019/5117 for the same quantity of CPUs for £415,002.66 (8/2068). ICC purchased those goods from Athol Marketing, having issued purchase order no.1017 for them (8/2064). Athol Marketing raised an invoice to ICC for its sale in the sum of £412,226.72 (8/2065).

143. Athol Marketing purchased the stock from Pelikan UK. The latter issued purchase order no 2517 to the former in respect of 4725 SL7Z9s (8/2062). In turn Pelikan issued invoice no.5173 to Athol Marketing, once more in respect of the same quantity of SL7Z9s in the sum of £409,728.38 (8/2063).

144. Pelikan purchased the goods from RHF Ltd, and issued purchase order no 1173 to RHF for them (8/2059). RHF issued invoice no.22 to Pelikan in respect of a purchase of 4725 SL7Z9s in the sum of £408,618 (8/2060). (In respect of invoice no.22 RHF issued to Pelikan a third party payment instruction requiring Pelikan to pay £405,175.83 to an FCIB account in the name of Bestrad SLU, with a further £3,442.17 to be paid into an account at Barclays plc in the name of RHF).

145. Northdata issued invoice no.1073 to RHF in respect of its sale to RHF of 4725 SL7Z9s, in a total sum of £405,175.83 (8/2058). On the face of that invoice the Commissioners found endorsed details of the bank account of Bestrad SLU at FCIB.

146. The tracing exercise carried out by Mr Bycroft was supported by evidence obtained by the Commissioners showing the following receipts and payments through accounts at FCIB. That is shown in tabular form on the second page of the Schedule. On 5 June 2006 Silicon received a payment of £376,818.75 from Futures Brokerage (timed at 13:15:15) (15/4113). On the same date Silicon paid Rapid £417,778.59 (timed at 13:36:08) (15/4115). Also on the same date Rapid paid ICC £415,002.66 (timed at 13:48:08) (15/4117), and ICC paid Athol Marketing £412,22672 (timed at 14:03:19) (15/4119).

147. As we mentioned earlier, Athol Marketing was supplied with the goods by Pelikan. The latter company was paid two sums by Athol Marketing for this deal: on 5 June 2007 it was paid £274,817.81 (timed at 12:27:04) (15/4122), and on 7 June 2006 £134,910.57 (timed at 16:51:04) (15/4123)

148. Pelikan made two payments to Bestrad SLU in respect of this deal chain: £274,817.81 paid on 5 June 2006 (timed at 12:45:17) (15/4125); and £134,910.57 paid on 7 June 2006 (timed at 18:48:05) (15/4123).

149. Neither Northdata nor RHF had an account with FCIB. However, invoices issued by both those companies had endorsed details of Bestrad's account with FCIB, and that the RHF invoice specifically instructed its customer to make a third party payment to that account.

Submissions for Silicon

150. Mr Ahmed maintained that Silicon had purchased CPUs from suppliers with which it had successfully traded in periods prior to May 2006, and had sold them to legitimate overseas customers; there was no evidence of its having had any direct association with any company alleged to have evaded VAT. Further, Mr Fisher claimed to continue to trade as he had done in 2005 and 2006, and the Commissioners had not alleged fraud at any time.

151. The Commissioners had not suggested any credible due diligence checks that would have alerted Silicon to the existence, or possible existence, of fraud in its supply chains. Instead, they had simply maintained that it should have carried out more checks, without specifying what those checks should be: Notice 726 merely offered advice to trade diligently. The effect of that Notice in Mr Ahmed's view almost suggested that companies such as Silicon should cease trading.

152. He observed that Silicon's due diligence was such that it obtained considerable information about its suppliers before entering into the transactions in point:

a) that all the directors, most of whom Mr Fisher had met, were experienced and reputable in the electronics industry;

b) that both its suppliers had earlier been verified at Redhill, and the verifications were extant in the claim period;

c) that Silicon had been offered products at prices consistent with their UK market value. The low prices at which deals took place were due to oversupply in the market place;

d) that all Silicon's customers required the latest products, and it was common knowledge that manufacturers such as Intel were selling over-ordered stock on the grey market;

e) that all the products concerned physically existed and must, at some point, have been supplied legitimately into the grey market. If it were common knowledge amongst traders that there was an oversupply in the UK from e.g. Intel, it stood to reason that stock would need to be exported;

f) that both Silicon's suppliers had allowed it to trade on credit, but had done so only when it had established their trust;

g) that Silicon's suppliers had been visited by Mr Fisher on many occasions and they had invited its representatives to attend social functions – a fact that demonstrated a true commercial relationship.

153. Mr Ahmed invited us to focus on the positive aspects of Silicon's due diligence, such as its having initially obtained company information, VAT registration details, the names and addresses of the directors, and their experience in the industry

154. Of a claim by Mr Fisher that Silicon had lost or mislaid many documents, Mr Ahmed maintained that he, Mr Fisher, could do no more than so state as that was the fact. Silicon could not be criticised for undertaking no due diligence after May 2005 bearing in mind the positive assurances it had received from Mrs Humphrey as to the quality of its due diligence until then. He submitted that Mrs Humphrey's positive comments could have had only one result; Silicon could rely on what she said as indicating that it was facing no real risk of becoming involved in fraud were it to continue trading with its existing trading partners.

155. To Mr Ahmed the area of most concern to Silicon was the conduct of the high street banks in closing the accounts of traders in CPUs and mobile phones at the request of the Commissioners. He did not elaborate on that claim.

156. There was nothing significant in the paperwork that would have alerted Silicon to its involvement in fraud; nor did anything Mrs Humphrey did or had said so indicate. In September 2004, the Commissioners' officer responsible for Silicon, Louise King, made a report in which she said that the company was unlikely to be an MTIC risk. Silicon was entitled to rely on that report.

157. Mr Ahmed submitted that no evidence was adduced to indicate that fraud could have been detected in a freight forwarder's warehouse. Silicon could see no more than could any other entrant to a warehouse: it could not request details of the supply chains, ask for earlier release notes, or demand sight of import CMRs. It was inappropriate to look at the situation with hindsight.

158. He further contended that those controlling the frauds hid the length of the supply chains, often using multiple freight forwarders for the purpose. The Commissioners' suggestion that fraud might be identified by Silicon asking when they had arrived in the freight forwarder's warehouse, and had they been imported, was in Mr Ahmed's submission of no assistance, since neither would have indicated fraud.

159. Mr Fisher stated that once agreement had been reached with its counterparties Silicon would attempt to get the goods shipped and paid for as quickly as possible. Given that the company had suffered a loss on one shipment (a fact we are prepared to accept although since that transaction took place long before the claim period it is of little relevance), its back-to-back style of trading was a sensible approach to take. It was possible for a chain of transactions to be constructed and completed in the course of a single day, Silicon should not be criticised for having achieved that objective on a number of occasions.

160. Mr Ahmed explained that once Silicon's foreign customers made payment to it, payment passed along a chain of traders to the true owner of CPUs very quickly because the vast majority of buffers in the chain were all controlled by a single fraudulent mind. It was not surprising that money passed along the chain so quickly; it was part of the fraud.

161. Mr Fisher accepted that, despite every effort on Silicon's behalf, it had made mistakes from time to time, as evidenced by its failure to identify the boxes Silicon had traded twice. Silicon accepted the shortfalls in its performance, but maintained that it was not aware of its errors at the time.

162. Silicon took precautions in many areas. It undertook due diligence on all its suppliers, and met their principals face to face. It also took all necessary precautions in dealing with its customers, commensurate with its perceived risk, albeit that it was unable to produce the documentary material supporting its claims in that behalf.

163. Mr Ahmed submitted that Silicon's due diligence in general was what any reasonable businessman would have carried out, given the Commissioners' advice on the subject. The company verified all VAT registration numbers with Redhill; it used only specialist freight forwarders for transport purposes, the veracity of those abroad being confirmed by those in the UK; the goods were adequately inspected by a specialist and, significantly, their boxes contained no Customs stamps.

164. Silicon claimed to have obtained an inspection report for every transaction it carried and, Mr Ahmed contended, it was not surprising that it had lost documents over time. Its goods were insured; it shipped on hold when dispatching goods abroad, maintaining control of them until it was fully paid.

165. He further submitted that Silicon believed that it had goods released to it for onward supply and export by its supplier, but again it had not retained release notes.

166. In behaving as it had done, Mr Ahmed contended that Silicon had done everything possible not to trade with missing traders, but it had no chance of identifying the complex fraud in which it had become involved.

167. Given that Silicon had not retained evidence of its MSN contacts with suppliers, it was impossible to say what goods were on offer, and what were requested. However, Mr Ahmed maintained that evidence of traders in the company's chains splitting consignments showed that they had more on offer than Silicon required; that was particularly evident when referring to the tax loss letters sent by the Commissioners to Rapid listing a number of traders.

168. Mr Ahmed accepted that Silicon had been caught up in a fraudulent industry, but submitted that the indicators of fraud put forward by the Commissioners were the result of the benefit of hindsight and years of investigation. The tribunal should look at what Silicon could see at the time, and not what the Commissioners later identified. It was clear that Silicon did not have actual knowledge of, nor could it have identified, the fraud. In those circumstances, Silicon was entitled to recover the input tax withheld by the Commissioners; the appeal should be allowed.

Submissions for the Commissioners

169. Miss Robinson submitted that the various strands of evidence before us demonstrated that Silicon's deals were contrived, and that the only proper inference to

be drawn from that evidence was that the various parties to the deal chains had actual knowledge of a connection with fraud.

170. It was important to distinguish between features of contrivance, which may or may not have been known to Silicon, and the circumstances which were, or should have been apparent to a trader in the company's position. Miss Robinson contended that it was no answer to the former category of evidence to say, "I could not have known of that at the time", or "the Commissioners have the advantage of being able to look at a particular transaction with hindsight". Such statements did not address the relevance of that evidence.

171. The evidence of contrivance, whenever obtained by the Commissioners, in Miss Robinson's submission, demonstrated what was going on at the time of the relevant transactions. She contended that a contrived chain of transactions was obviously not the product of freely negotiated transactions involving independent traders selecting their trading partners by reference to normal market forces. For there to have been contrivance, those responsible for its orchestration must have been in a position to rely on the participants in the transaction chain buying from and selling to the right traders. She maintained that it followed that those participants were either told from whom to buy or to whom to sell, or were somehow duped into buying from and selling to the right parties. In so far as the latter possibility was concerned, she contended that it could only ever happen to one trader in a given deal chain, and that trader would have had to have been naïve in the extreme.

172. Mr Fisher maintained that he was a very experienced CPU trader who conducted Silicon's deals independently, choosing with whom to deal depending on factors such as price, and the ability on a given day to match a stock offer with a purchaser. Miss Robinson submitted that Mr Fisher and hence Silicon, could not therefore have been an innocent dupe.

173. Miss Robinson further submitted that if Silicon was part of a contrived transaction chain, it must, at the very least, have known that it was being told with whom to trade. In other words, it would have been plain to Silicon that the transaction it was undertaking was connected with fraud.

174. Miss Robinson claimed there to exist a number of factors indicating contrivance. The first was the fact that Silicon, and almost every other trader to feature in its deal chains, held an account with the FCIB, and payments for the goods moved electronically through their accounts. She contended that it could not be a coincidence that each party to the transaction chains in question independently chose to hold an account with the same bank; that enabled the swift transfer of the funds between offshore accounts, ie accounts about which the Commissioners could not obtain information. Further, the fact that Barclays Bank had closed Silicon's account due to its trading in CPUs ought to have alerted Mr Fisher to the existence of fraud within Silicon's trading sector, and caused him to have increased its due diligence checks.

175. Miss Robinson invited us to consider how likely it was that circularity of payment within deal chains could be identified in so many of Silicon's chains, involving the same parties on a number of occasions, if there was no contrivance therein. She submitted that there was no legitimate explanation for such circularity of movement of funds: it was the plainest possible evidence of contrivance; the whole chain had been planned. The purpose of the chains, she contended, was not to provide goods to an end user, but to allow for repeated claims for the repayment of input tax.

176. The Commissioners relied on the facts disclosed by the FCIB Paris server as providing yet further evidence of contrivance, maintaining that the short time involved in payments was clearly indicative of communication between the parties at the time of the payments: that in itself was supportive of contrivance. The Commissioners further relied on the speed at which payments were made as being inconsistent with genuine trading at arm's length; the trickle down effect of the payments would not have taken place unless the FCIB accounts had been operated by a very few individuals or the deals were contrived in some other fashion.

177. Miss Robinson submitted that the elongation of the deal chains painted a clear picture of a fraudulent scheme: in a legitimate and competitive market where traders were seeking to obtain the best price for CPUs, one would have expected to see shorter rather than longer deal chains.

178. She further maintained that the mark-ups applied by the companies within Silicon's deal chains were highly suggestive of contrivance; the margins per unit achieved by particular traders within the deal chains were consistent regardless of the item or quantity traded. For instance, within Silicon's deal chains, in all 3 May deals in which ETP featured (deals 1-3) its mark-up per unit was 15p; in all 5 deals in which Pelikan featured (deals 5, 8, 10, 12 and 19) its mark-up per unit was 20p; and in all 3 deals in which Bluestar Electronics featured (deals 4, 5 and 6) its mark-up per unit was 20p. (We accept the information so provided as fact). That, Miss Robinson contended, was not the operation of a legitimate, free and competitive market. For no explicable reason, the broker's mark-up was many multiples that of the buffers.

179. In dealing with an observation that broker traders obtained much higher profits from broker transactions than buffer ones, Miss Robinson contended that the only reason for the much larger profits was that it was a requirement in a contrived scheme where the broker had to make the repayment claim with its accompanying risk of denial.

180. In a number of the invoices raised by Silicon in the claim period, SL729 CPUs were described as of 1Mb cache, whereas they were in fact of 2Mb cache (That is confirmed in page 1 of the Schedule). A similar error arose in the invoices of a number of traders involved in the various deal chains. Miss Robinson contended that product descriptions on sales documentation would have had to be accurate and complete to render effective any returns policy. She, therefore, submitted that the inaccuracies in the invoices concerned lent weight to the suggestion that the deal chains were contrived.

181. Miss Robinson then proceeded to deal with other evidence from which she submitted it could be inferred that Silicon had actual knowledge of fraud in its deal chains or, alternatively, from which it could be inferred that it should have known of such connection. She added that, in *Mobilx*, it had been said that all the circumstances must be considered in assessing what a trader knew or should have known.

182. As in the claim period, Silicon dealt with only two suppliers, Commodity and Rapid, and in period 05/06 with only two foreign customers, Medius Trading and Futures; and in the following two months with only 6 other customers, Miss Robinson submitted that that was not commercially realistic in the light of Mr Fisher's claim that the market was a competitive and crowded one.

183. Further, despite being encouraged to validate the VAT registrations of potential trading partners with the Redhill office of the Commissioners, the evidence as to very small number of checks carried out pointed to Silicon not seeking the most attractive deals within its chosen market. In her further submission, the evidence was strongly supportive of a contention that its deal chains were pre-arranged and contrived, such that the company had no need to carry out Redhill checks.

184. Having questioned whether Silicon had maintained a spreadsheet containing the numbers of CPU boxes that had passed through its hands, no evidence of it having been adduced, Miss Robinson further submitted that the evidence of repeated re-export from the UK was the clearest evidence that the CPU boxes in question were being carouselled, repeatedly imported, sold and exported. And the carouselling of those goods was a clear indicator of the fraudulent purpose of the deal chains in question.

185. Of the exponential increase in Silicon's turnover in 2006, Miss Robinson maintained that the observation of Moses LJ in *Moblix* at [84] that circumstancial evidence " will often indicate that a trader has chosen to ignore the obvious explanation as to why he was presented with the opportunity to reap a large and predictable reward over a short space of time" was apt.

186. In almost all Silicon's deals the goods were traded between companies in rapid succession; 5-8 transactions took place within a 24 or 48 hour period – yet another factor which Miss Robinson invited us to accept to point to contrivance in the deal chains. So too, she maintained, did the fact that none of the deal chains included a manufacturer or end user, and that none of the goods sold in the relevant period were returned as faulty or damaged.

187. Silicon claimed to have suffered a loss on a single transaction but as it took place long before the claim period, we may ignore it as being irrelevant for present purposes.

188. If Mr Fisher was right in claiming that its suppliers had title of some sort to CPUs sold to Silicon, and they authorised it to ship goods out of the UK prior to their being paid, as Miss Robinson claimed, its financial soundness would have been of importance to it either because it was able to obtain credit to the value of the

transaction, or it was able to make payments of that amount without first having received payment from Silicon. Mr Fisher claimed that he would have obtained as credit report on his supplier, but none was included in the documents before us. Mr Fisher attempted, but failed to deflect the Commissioners analysis as to payment in cross-examination.

189. Miss Robinson further submitted that Silicon's lack of title to goods it purported to release to customers was compelling evidence that Mr Fisher knew that the company was being drawn into transactions involving the evasion of VAT. She maintained that claims by Mr Fisher that the status and business terms of other traders in Silicon's chains beyond its supplier was of no concern to him, were simply not good enough. Either he was aware of the difficulties inherent in the business model at play and was unable to answer them satisfactorily, or he turned a blind eye to the question of the true owners of the goods – a question that would have been of obvious concern to a legitimate trader.

190. She also focussed our attention on May deal 12 in respect of which each transaction in the chain took place on 25 May 2006 and uniquely payment was also made by all traders on the same day. Miss Robinson submitted that it was simply unrealistic to suppose that the negotiations with traders could be carried out by each one of them within that timescale, not to mention inspection of the goods, the provision of the inspection report to the foreign customer, and the trickle-down of payments, whilst allowing each trader concerned to conduct effective checks on the supply chain and the parties to it.

191. In dealing with individual transactions as large as those involved in Silicon's deal chains, Miss Robinson maintained that it would be a reasonable expectation for there to be in place formal written contracts between Silicon and its trading partners. That Silicon considered it unnecessary to enter into such contracts was, she submitted, evidence that its deals were contrived: it knew that they would all be fulfilled.

192. Miss Robinson next submitted that it defied logic that Silicon retained copies of other documents forming part of its transaction records but did not retain inspection reports. She observed that possession of such a report would have been a vital tool in protecting Silicon had goods gone missing, considered to be faulty, or otherwise had to be returned. Assuming Silicon did obtain inspection reports on the goods the subject of the dismissed deals, they would necessarily have been in similar terms to those before us, prompting further enquiry on the part of the reasonable trader.

193. Miss Robinson invited us carefully to note that Silicon had not prior to the hearing claimed that the evidence as to its due diligence in the documents before us was incomplete so that the Commissioners must have mislaid documents provided to them (See binder 7, page 128). She maintained that his claim before us should be treated with extreme caution; its completeness supported a claim of actual knowledge on Silicon's part. She contended that the company had no need to perform effective or thorough due diligence, and had no need to take appropriate action as a result of obvious warning signs precisely because it knew the checks were connected with fraud, and Silicon was a willing participant in them.

194. As Notice 726 made plain, it was important for all wholesale traders on the genuine grey market to perform reasonable checks on the companies with whom they were dealing, as well as ensuring the integrity of their deal chains.

Conclusion.

195. In dealing with Mr Fisher's claim that Silicon neither knew nor had the means of knowing that its deals were connected with the fraudulent evasion of VAT in that (1) using the same trading model it had successfully traded with foreign traders in periods prior to the claim period, (2) there was no evidence of its having any direct association with fraudsters, and (3) that its due diligence standards were such that it took every step reasonably required to ensure that the transactions it effected did not result in its participation in tax evasion, we propose first to consider Silicon's trading model as described by Mr Fisher. We shall do so against the background of the Commissioners' competing claim that Silicon's transactions were contrived and pre-arranged; it knew or had the means of knowing that they were connected with fraud.

196. We make no apology for the fact that, in part, our conclusion follows that of the tribunal in *Fusion Electronics Ltd v Commissioners for Revenue and Customs* [2011] UKFTT 529 (TC) which was chaired by the present judge, for the issues are the same, or very similar, and the reasons for much of our decision are identical to those in the earlier case.

197. Turning then to the trading model described by Mr Fisher, it is common ground that in 2006 there was a genuine grey wholesale export market in CPUs. But we are satisfied that Silicon's disputed deals were not part of it. In our judgment, the Fisher brothers must have known that the company was not dealing in the legitimate market for it never entered into written contracts or detailed oral contracts with its suppliers, freight forwarders or customers, all its deals were back-to-back, the company was never left with surplus stock following a deal, and the transactions were carried out with unexplained and unnecessary haste. Further, it did not require payment for the goods it supplied until after the transactions were completed, despite its customers having entered into no credit agreements, and never having had their credit worthiness checked. Nor did Silicon ever pay for CPUs before supplying them to its foreign customers. As with the suppliers, Silicon had no credit agreements with its customers.

198. In our judgment, no legitimate trader with the knowledge that Silicon had of the wholesale market in CPUs would have used that model. Mr Fisher provided no explanation for it. He must have known it to have been devoid of commercial reality. Had he carefully considered the transactions in which Silicon was involved, he would have found it impossible to conclude that the deals were other than contrived and connected with fraud. We so find for a variety of reasons, none of which involves our looking at matters with hindsight.

199. First, a trader operating in a legitimate market in goods worth hundreds of thousands of pounds would not have dealt with other traders without first satisfying itself that its suppliers could provide what they had contracted to supply, and its customers could purchase what they had contracted to buy. Whilst Silicon could claim

to derive some comfort from its trade with, as opposed to knowledge of, Rapid that that company would comply with its contractual obligations, in the absence of any checks on its customers, it had no information to satisfy itself that they could pay for goods ordered. Silicon was altogether too eager to place purchase orders with Rapid and Commodity without having any assurance that it would itself be paid for goods ordered, or without obtaining any payment guarantee. We agree with the Commissioners, and infer from all the evidence adduced, that Silicon knew that its suppliers and its customers would not let it down, for all the transactions had been pre-arranged and were part of a contrived scheme. In our judgment, that is compelling evidence of Silicon having actual knowledge that its transactions were connected with fraud.

200. There is then a lack of evidence as to how title to CPUs passed from one trader to another in a chain of transactions. Mr Fisher invited us to accept that, although the indications were that each trader in a chain retained ownership of goods until it was paid in full, on the documentary evidence indicating that a transaction was complete, the supplier did in fact transfer a title of some sort to its customer, so that the customer could then trade them to its own customer. As has been said in other cases of a similar nature to the present one, it defies both logic and commercial reality that each trader in a chain, having claimed by means unsupported by evidence acquired such a title to extremely valuable goods, not merely released possession of them, but did so before receiving payment for them, or without obtaining any security to assure payment. Alternatively, by implication, Mr Fisher claimed that, even if Silicon did not obtain a title to goods prior to payment for them, its supplier gave permission for the goods to be exported to a foreign country. No corroborative evidence of the transfer of title or of the grant of export permission was adduced, nor was any reason for the granting of such permission provided. In those circumstances, we do not accept the alternative claim

201. Nor would any legitimate trader have provided goods worth hundreds of thousands of pounds to another trader knowing that it would be paid only if each trader in the chain made payment. It is impossible to believe that such a show of trust would have existed between legitimate traders where locating the goods after they had passed along a chain of transactions of unknown length would have been virtually impossible.

202. The position of Silicon's customer at the other end of the chain is equally unbelievable; that trader unilaterally decided to pay Silicon. No evidence was adduced as to why that trader, alone in the chain, would have taken such a risk. Further, we are invited to accept that the customer made payment despite the fact that Silicon, almost if not certainly to its knowledge had no title to the CPUs, and would never obtain title unless and until payments made their way through an unknown number of traders. No motive for such largesse was adduced and, in an industry rife with fraudsters, any trader in the chain could have prevented title being transferred. In our judgment, the matters referred to in this and the last two preceding paragraphs also provide compelling evidence of the Fisher brothers knowing that Silicon's transactions were connected with fraud.

203. As we earlier noted, Silicon claimed to have instructed its foreign agents not to release goods until it had in fact been paid. Mr Fisher maintained that its agents gave full effect to those instructions despite them not appearing on Silicon's invoices or otherwise being evidenced. We doubt that Silicon's customers were made aware of any such instructions to its agents, assuming they were given. In our judgment, the evidence clearly points everyone concerned having proceeded on the basis that there were no instructions as to the release of goods, the transactions having been pre-arranged, contrived and uncommercial. It is yet another piece of compelling evidence of the Fisher brothers knowing that Silicon's transactions were connected with fraud,

204. In our judgment, no responsible trader would have used the services of All-Ways in 2006; it was devoid of financial standing, and must have been at risk of going into liquidation. That Silicon was prepared to use its services indicates to us that it cared little who held the goods in which it was dealing; it knew that the transactions in which it was involved would be completed, and that the goods concerned would be dealt with as required. That, in our judgment amounts to further evidence of its having actual knowledge that the transactions were connected with fraud.

205. Other evidence adduced which we have taken into account in reaching our conclusion in part overlaps that relating to Silicon's trading model. We now proceed to deal with it. The evidence as to damaged boxes which the inspection reports revealed clearly indicate to us that Silicon was not dealing with boxes of CPUs that had only recently emerged from the manufacturer's factory, wherever that might have been. (CPUs are not manufactured in the UK, so that they must have been imported). We accept Mr Fisher's claim that damaged, or marked, boxes did not necessarily indicate damaged CPUs, but the state of most of the boxes, as revealed by the reports, was such that any conscientious trader would not only have queried whether the CPUs contained in them were new, but would also itself have inspected them to ensure that they were. It is yet another factor indicating that Silicon was not dealing in the ordinary commercial market.

206. We accept that the CPUs bought and sold existed and that at some stage they were supplied legitimately into the grey market, but their dubious state, as revealed in the inspection reports on the boxes holding them, would have indicated to any genuine trader that it was not trading in new CPUs, as Silicon claimed to be. However, since we find that Silicon did not obtain inspection reports from the freight forwarders, it is perhaps not surprising that the condition of the CPUs was in our judgment of no interest to the company.

207. We might add at this juncture that the Commissioners, correctly in our judgment, also relied on the fact that every company involved in every chain of transactions, as constructed from the invoices, made a profit on its own deals as further proof of Silicon's knowledge of its transactions being connected with fraud. Whilst we accept that Silicon would not have known the profits achieved by other traders in the various chains, since it acted as both a buffer and a broker, we are satisfied that it would have been aware that transactions were conducted in chains and

that the UK trader at the end of the chain, the broker, would have received a larger profit than the buffers.

208. Not only were all the deals the subject of the appeal completed in the course of a single day, in most cases whilst the CPUs were in the UK they remained in the possession of a single freight forwarder. No reason for the haste in completing the deals was offered, Mr Fisher simply implying that it was an agreed term of trade. That haste alone would, in our judgment, have put any legitimate trader on notice that a deal was not an ordinary commercial transaction. It will be recalled that Mr Ahmed submitted that the company could not be blamed for having participated in deals that were completed in a single day. We accept that in certain circumstances the completion of deals so quickly might have been necessary, but that would have been the exception rather than the rule.

209. Despite each deal being completed so quickly, in all but one of the cases there was then a delay before the customer made payment to Silicon. (In relation to that one case, June deal 12, not only were all the transactions in the chain carried out in a single day, so too were all the payments). We regard that delay as further evidence of uncommerciality, and indicative of pre-arrangement of the deals. In our judgment, the only way in which the transactions could have been carried out in such a short period of time was with the contrivance the Commissioners allege was present in Silicon's deals.

210. To a very limited extent we accept Mr Ahmed's submission that fraud would have been difficult to detect in freight forwarders' warehouses, but that is not to say that the forwarders could not have supplied very valuable information about traders with whom Silicon was dealing had they been asked to do so. They might have been asked how long the trader had been dealing with the forwarder, or whether an inspection of the goods had been carried out for another trader. That Silicon failed to make any enquiries of the freight forwarders at all indicates to us that it was quite content to proceed with its transactions without seeing the goods in which it was dealing and without having any evidence of their state or quality.

211. Silicon claimed to be unable to make checks on its foreign customers and obtained no trade references from them. Indeed, it went on to claim that it was not required to carry out credit checks on them as it did not provide them with credit. It was thus unable to say whether the customers constituted a high failure risk. To the company's failure to make checks and take up references, in relation to risk we should add that Futures and other companies in the payment chains with which that company dealt, as reconstructed by the Commissioners, used the same IP address - in our judgment a clear indication of association with fraud. In failing to seek references of any sort and make any checks, Silicon clearly failed to take proper precautions. We consider the matters referred to in this and the last preceding paragraph clearly to indicate that Silicon became knowingly drawn into VAT fraud.

212. Since Silicon carried out no due diligence on its overseas customers, we cannot accept Mr Ahmed's submission that the company knew its deals to be "legitimate". We take one example as being sufficient for holding that it was not. The FCIB

evidence indicated that Futures and other companies to which that company made payment used the same IP address – as we said in the penultimate paragraph a clear indicator in our judgment of involvement with fraud. We accept that had Silicon made enquiries of Futures it may not have been provided with information to show that company's true nature, but as it failed to make any enquiries whatsoever, operating on the "blind eye" principle, it cannot escape the consequences of that failure.

213. We accept that the chains of transactions concerned, again as revealed by the invoices, were planned. Silicon must have known from its participation in very high turnover deals which it had insufficient cash itself to finance, but two suppliers, one of which, Commodity, involved in but two deals, was itself a supplier to Silicon's main supplier, Rapid, in a number of deals, a very small customer pool, and its part in events required minimal effort, that they were not legitimate. To that evidence of planning, we should add that of the indication that Rapid and Commodity did not trade at arm's length on occasion using the same IP address. We do not accept that the deals were negotiated and carried through as Mr Fisher claimed, for the time available, taking account of the business checks required, such as that of authenticating the goods, making warranty checks, and the preparation of the paperwork associated with their export, was simply insufficient for the purpose. In our judgment the evidence relating to the various deals in the chain indicated that the transactions were not commercial, but rather were an example of "window dressing". Mr Fisher must have been aware that the paperwork for Silicon's own part in the chains was anything but indicative of its having carried out reasonable checks on its suppliers and customers, and bore all the hallmarks of the pre-arrangement of its deals.

214. The Commissioners advice to traders in MTIC products clearly indicated that eternal vigilance in trading must be their watchword. For Mr Ahmed to claim that in the light of Mrs Humphrey's positive assurances as to the quality of Silicon's due diligence in 2005 it faced no risk of becoming involved in MTIC trading, it could not be criticised for undertaking no due diligence after May 2005 – a claim that contains an admission we find astonishing – we simply reject.

215. Another admission of Mr Ahmed's we find surprising is that the vast majority of the buffers in Silicon's chains of transactions were all controlled by a single fraudulent mind. The Commissioners made no claim in that behalf, and it is a matter on which we need reach no conclusion in determining the outcome of the appeal.

216. Mr Ahmed invited us to accept as indicating Mr Fisher's honesty the fact that he admitted Silicon had failed to retain or had lost a great many documents which it had received. Such documents included inspection reports, emails, MSN documents, and release notes. We do not accept that invitation for the evidence available to us contains nothing to support the claim. The absence of the documentation in question merely confirms that Silicon carried out no due diligence in the claim period.

217. In our judgment, the absence of any evidence to support Silicon's implied claim that goods were held by the company's foreign freight forwarder pending its formally releasing them can only be viewed as indicating superficiality in its dealings, and of

its intending to give the impression that it was taking proper precautions to avoid becoming involved in fraud.

218. Of the claim by Mr Fisher that Silicon was unable to carry out checks on any of its counterparties in the transactions, other than its suppliers and the company's immediate customers, we observe that it was plain from the evidence that beyond obtaining basic registration documents of its suppliers Silicon made no attempt whatsoever to obtain any information about other traders involved in the transactions concerned. It could, for instance, have asked its suppliers whether they owned the CPUs they were supplying and, if not, whether they had authority to transfer possession of them to third parties. Such checks, if any, as Silicon carried out were casually undertaken and negative indicators were ignored because, in truth, they were unnecessary. The Fisher brothers knew perfectly well that Silicon's suppliers and customers would not fail in their obligations, for the transactions were pre-arranged and contrived.

219. We should have expected Silicon to have queried why Rapid made such attractive offers of credit to it: any trader in the ordinary commercial market would have anticipated questions to be put to ensure that it was a suitable trader to which to give credit. The absence of questions should have been yet another indicator to Silicon that it was not dealing in the ordinary commercial market. In itself, that indicates to us pre-arrangement and contrivance.

220. Mr Fisher acknowledged having received Notice 726 and being aware of its contents. The Notice describes MTIC fraud as a "systematic criminal attack on the VAT system", and Floyd J in *Mobilx Ltd (in administration) v Revenue and Customs Commissioners* at first instance [2009] STC 1107, having agreed with counsel that observation of its recommendations was "equally applicable to the avoiding of challenges to repayment of VAT", at [10] of his judgment noted that it contained "chilling warnings about the prevalence of MTIC fraud" in the mobile phone and CPU markets. He continued, "In several places the document [Notice 726] makes it clear that the obligation on the trader is to ensure the integrity of his supply chain"; and at [87], "...the company has to exercise independent judgment, not delegate its judgment to HMRC." Thus, the Fisher brothers had to make their own judgment as to each one of Silicon's transactions.

221. As to Mr Ahmed's submission that the effect of Notice 726 was to suggest that companies such as Silicon should cease trading, we need merely say that the Notice contains advice in plain terms as to what companies trading in the wholesale market in products such as CPUs and mobile phones should do to protect themselves such as examining those products and ensuring that the vendor of them owned them. But again, Silicon made no enquiries about its customers and freight forwarders, and the due diligence on its suppliers was restricted to that obtained at the outset of trading with them. As we mentioned earlier, Silicon ceased to make Redhill enquiries prior to the claim period. In our judgment, that was totally inadequate response to the requirements of Notice 726.

222. We accept that Silicon may not have known the identities of the individual defaulters in invoice chains but, in all the circumstances, and particularly the back-to-back nature of the chains and the apparent ease with which the transactions came about, in our judgment, it was likely to have known that there was a missing trader in each chain.

223. In our further judgment, it was beyond coincidence that Silicon always purchased from Rapid or Commodity and sold to a very small pool of customers. We are satisfied that those facts evidenced the contrived nature of the trading, and also of pre-arrangement of its deals.

224. We accept that Silicon never dealt with a defaulter but, since the company made no checks on its suppliers (and customers) subsequent to its initial checks, in ordinary circumstances we should have assumed that that was due more to its good fortune than anything else. But we are not dealing with ordinary circumstances, but rather with contrived and pre-arranged deals.

225. Of the claim by Mr Fisher to continue trading through a recently formed company in the same way as Silicon did in 2005 and 2006 as evidence that there was nothing wrong with its trading in those years, we observe that shortly after the end of the claim period, the UK government made a change in the law. That change, to be found in s. 55 of the Value Added Tax Act 1994, provided for the reverse charging of VAT on transactions involving items such as CPUs and mobile phones – a change that removed the problem of MTIC fraud overnight. All the risk in dealing in the way Silicon dealt now falls on the trader; that formerly falling on the Commissioners has now disappeared.

226. In our judgment the fact that Silicon dealt with a number of boxes of CPUs more than once in a very short space of time constitutes yet more compelling evidence that the company, by its directors, had blind eye knowledge that its transactions were involved in fraud. Similarly, when Intel reduced the official price of SL7Z9 CPUs by some 60% on 26 July 2006 and Silicon continued trading in them within the price range found earlier in the claim period, Mr Fisher and his brother must have known that Silicon was involved in fraud.

227. The table forming the second page of the Schedule also clearly shows that on 1 June 2006 every participant in the transactions in Silicon's June deal 1 chain opened its computer shortly before it received the monies due to it, and closed it shortly after making payment of those due from it, the interval between opening and closing in each case being at most slightly over one hour, but in most cases being measured in minutes. That could not have happened by accident; in our judgment it was orchestrated. (Had the evidence as to June deal 1 not been reflected in relation to Silicon's other deals, we might not have attributed much significance to it. But since it is so reflected, we place considerable importance on it). Silicon's behaviour was in all material respects identical to that of all the other traders in the deal chain. For each trader to have opened and closed its computer terminal, in our judgment, can only be explained as the result of contrivance.

228. We have dealt with all Mr Ahmed's closing submissions, and now turn to those of Miss Robinson, In her case, we have dealt with a great many of them, and need not deal with those relating exclusively to means of knowledge, except to say that they support the Commissioners' case on actual knowledge. As to their case on actual knowledge, all we need say is that we accept those of Miss Robinson's submissions with which we have not already dealt.

229. In our judgment the evidence presented by the Commissioners clearly shows that Silicon:

a) should have known from the circumstances that surrounded its transactions that they were connected to a fraudulent evasion (*Mobilx*, para 59);
b) chose to ignore obvious inferences from the facts and circumstances in which it was trading (*Mobilx*, para 61);
c) chose to ignore that the only reasonable explanation for the circumstances of which its transactions took place was that they were connected to a fraudulent evasion of VAT (*Mobilx*, paras 75 and 82);
d) chose to ignore circumstantial evidence and the obvious explanation as to why it was presented with the opportunity to make a large and predictable reward over a short period of time (*Mobilx*, para 84);
e) taken together, the facts amounted to a series of warning signals which could have caused any honest trader in Silicon's position to ask the most searching questions about the propriety of the transactions in which it was engaged (*Mobilx*, para 74).

230. Our overall conclusion, based on Silicon's admitted knowledge of the prevalence of fraud, the deficiencies we have identified in its due diligence, and its failure to take the necessary precautions in dealing with its suppliers and customers, is that the Fisher brothers did not take every reasonable precaution required of them to ensure that Silicon's transactions did not involve it in participation in VAT evasion. Applying [61] of *Kittel* that finding is justification for our holding that in relation to each transaction carried out the brothers "...knew that by [Silicon's] purchase, it was taking part in a transaction connected with the fraudulent evasion of VAT". The high standard required of a trader meant that Silicon was under a positive duty to take precautions, including the carrying out of due diligence and other checks when indications of risk were presented to it. The Commissioners have proved that the company's state of actual knowledge of fraud was such that its purchases were outside the scope of the right to deduct input tax (see [81] of the judgment in *Mobilx*). We therefore dismiss its appeal.

231. The parties agreed that the pre-2009 costs rules should apply to the appeal. Miss Robinson invited us to direct Silicon to pay the Commissioners' costs in the event of the appeal being dismissed. We grant her application, and direct Silicon to pay the Commissioners' costs of, and incidental to, and consequent upon the appeal.

232. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax

Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

DAVID DEMACK
TRIBUNAL JUDGE

RELEASE DATE: 19 June 2013

THE SCHEDULE

Step	Trader Name	Invoice Number	Invoice Date	Description on invoice	Units	Price	Net Value	VAT	Total
-6	North Data Ltd	1073	1 June 06	Intel p4 SL7 29	4725	£72.98	£344,830.50	£60,345,34	£405,175,84
-5	RHF Ltd	22	1 June 06	P4 3.0.800 1Mb SL 7Z9	4725	£73.60	£347,760.00	£60,858.00	£408,618.00
-4	Pelikan UK Ltd	5173	1 June 06	Intel Pentium SL 7Z9	4725	£73.80	£348,705.00	£61,023.38	£409,728.38
-3	Athol Marketing Ltd	5117	1 June 06	Intel 3gb 800/1mb SL 7Z9	4725	£74.25	£350,831.25	£61,395.47	£412,226.72
-2	ICC Corporation Ltd	2813	1 June 06	Intel 3gb 800/1mb SL 7Z9	4725	£74.75	£353,193.75	£61,808.91	£415,002.66
-1	Rapid Global Ltd	RGL002813	1 June 06	P4 3Gb 800 2Mb SL 7 Z9	4725	£75.25	£355,556.25	£62,222.34	£417,778.59
Broker	Silicon 8 Ltd	2029	1 June 06	Intel P4 SL 7 Z9	4725	£79.75	£376,818.75		£376,818.75
+1	Futures Brokerage, Zurich INC SA								

Silicon 8 Ltd Deal 20

Trader	FCIB/A/c	User Name	Order No	IP Address	Date	Login Time	Actual payment time	Logout time	Amount	Paid to
Bestrad	203863	2605028	1033068	88/4/161/42	05/06/06	11:32:32	11:36:00	11:36:02	-£183,444.06	203963
			1034222	83.51.140.245	05/06/06	12:45:42	12:49:40	12:51:02	-£274,817.81	203963
Electrade SA	203893	00273327	1034343	80.178.63.183	05/06/06	13:02:27	13:08:07	13:09:03	-£458,045.00	204399
Cubics International Inc	204399	36955111	1034357	80.178.63.183	05/06/06	13:08:10	13:10:40	13:12:03	-£458,500.00	202515
Futures Brokerage Inc	202515	26796823	1034373	80.178.63.183	05/06/05	13:10:44	13:14:42	13:15:15	-£376,818.75	203967
Silicon 8 Ltd	203967	41533758	1034528	83.231.128.12	05/06/06	13:11:33	13:36:08	14:00:01	-£417,778.59	204996
Rapid Global Ltd	204996	20327431	1034607	86.137.12.162	05/06/06	12:45:12	13:48:08	13:49:04	-£415,002.66	203449
ICC Corporation Ltd	203449	97287673	1034694	90.189.237.184	05/06/06	13:56.29	14:03:19	14:30:01	-£412,226.72	200747
Athol Marketing Ltd	200747	66760787	1034139	81.158.146.155	05/06/06	12:11:16	12:27:04	12:45:01	-£274,817.81	203394
			1044391	81.154.225.142	07/06/06	16:43:34	16:51:04	17:30:00	-£134,910.57	203394
Pelikan UK Ltd	203394	5474755	1034206	193.203.73.154	05/06/06	12:11:09	12:45:17	13:00:00	-£274,817.81	203863
			1045427	193.203.73.154	07/06/06	18:34:49	18:48:05	19:00:01	-£134,910.57	203863
Bestrad SLU	203863	2605028								