



**TC03489**

**Appeal number: LON/2007/01969**

*VALUE ADDED TAX – MTIC fraud – whether the appellant knew or should have known of the connection between its purchases in relation to which deduction of input VAT was claimed and fraudulent evasion of VAT – held deduction of the input tax would be denied because the appellant knew of the connection or if it did not then it knew that the only reasonable explanation for the transactions in issue was that they were connected with fraudulent evasion of VAT – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**EMJ TELECOMMUNICATIONS LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE JOHN WALTERS QC  
MR TYM MARSH MA MBA**

**Sitting in public at the Royal Courts of Justice, London on 28, 30 and 31 January 2013 and 4, 5, 6 and 7 February 2013. After the hearing, written submissions were received by the Tribunal from the Respondents (dated 18 February 2013) and the Appellant (dated 31 March 2013).**

**Kevin D Andrews, VAT Consultant, for the Appellant**

**Jenny Goldring and Howard Watkinson, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### 5 Introduction and the issues of law for decision

1. The appellant, EMJ Telecommunications Limited (“EMJ”) appeals against two decisions of the respondents (“HMRC”) denying it entitlement to the benefit of the right to deduct input tax in the total sum of £1,036,297.50 claimed in relation to EMJ’s monthly VAT accounting periods 05/06 (£614,600) and 06/06 (£421,697.50).

10 2. The first decision, communicated to EMJ by HMRC in a letter dated 7 November 2007, related to input tax, deduction of which was claimed by EMJ in relation to its monthly VAT accounting periods 05/06 and 06/06 as follows:

	<b>Deal No.</b>	<b>Date</b>	<b>Seller to EMJ</b>	<b>Input tax</b>
15	Deal 3	23/05/06	London Mobile Communications Ltd (“London Mobile”)	£60,637.50
	Deal 4	24/05/06	Cybacomms UK Limited (“Cybacomms”)	£126,787.50
	Deal 5	24/05/06	London Mobile	£66,150.00
	Deal 6	30/05/06	Cybacomms	£26,250.00
20	Deal 7	30/05/06	Cybacomms	£121,275.00
	<b>Total re: VAT accounting period 05/06</b>			<b>£401,600.00</b>
25	Deal 8	23/06/06	London Mobile	£187,425.00
	Deal 9	30/06/06	London Mobile	£117,232.50
	Deal 10	30/06/06	Oakleaze Limited (“Oakleaze”)	£117,040.00
	<b>Total re: VAT accounting period 06/06</b>			<b>£421,697.50</b>

30 3. The “Deal Numbers” of these purchases were used for ease of reference at the hearing of the appeal.

35 4. All of the above purchases were of varying numbers of mobile telephones. HMRC denied EMJ entitlement to the benefit of the right to deduct input tax because they claimed in each case to have traced the supplies back through direct chains of supply to entities (“Defaulters”) which had fraudulently defaulted on their several obligations to account to HMRC for output tax in relation to their supplies of the mobile telephones in question. This appeal is another of the stream of appeals dealt with by these Tribunals concerned with what has been termed by HMRC and is generally known as ‘Missing Trader Intra-Community Fraud’ (“MTIC Fraud”).

40 5. The second decision, communicated to EMJ by HMRC in a letter dated 10 September 2008, related to input tax, deduction of which was claimed by EMJ in relation to its monthly VAT accounting period 05/06 as follows:

<b>Deal No.</b>	<b>Date</b>	<b>Seller to EMJ</b>	<b>Input tax</b>
Deal 1	16/05/06	Cybacomms	£142,450.00

Deal 2	16/05/06	Cybacomms	£71,050.00
<b>Total re: VAT accounting period 05/06</b>			<b>£213,500.00</b>

6. These purchases were of satellite navigation systems. HMRC denied EMJ  
5 entitlement to the benefit of the right to deduct input tax on these purchases because  
they claimed in each case to have traced the supplies back through direct chains of  
supply to an entity, Wetherby Fashions Limited (“Wetherby”) – a ‘contra trader’ (a  
term used by HMRC to describe the function which it allegedly played in the  
perpetration of MTIC Fraud) – which had fraudulently claimed to set off VAT paid as  
10 input tax on other supplies of goods to it, where HMRC claim to have traced those  
other supplies back through direct chains of supply to Defaulters, against output tax  
due on supplies by it of the satellite navigation systems, which were purchased further  
down the chain of supply by EMJ. In this way, HMRC allege that Wetherby, as a  
‘contra trader’ had shifted the tax loss from chains of supply of goods connecting it  
15 with Defaulters to chains of supply of different goods (ostensibly free of any VAT  
fraud) connecting it with EMJ. Further details of Deal 1 and Deal 2 are given below.

7. In relation to every deal in issue (that is Deals 1 to 10 inclusive), EMJ  
dispatched the goods it had purchased by way of supplies to one of four entities  
20 established in another Member State of the EU. For this reason EMJ’s supplies were  
zero-rated and it was in the position of being a ‘repayment trader’, that is one which  
routinely claims a repayment of VAT from HMRC on the basis that its deductible  
input tax is more than the output tax for which it is accountable. Such a trader in the  
context of MTIC Fraud is termed a ‘Broker’ by HMRC. It is convenient to adopt  
these expressions, and in doing so the Tribunal recognises that they are terms used by  
25 HMRC to describe functions played in the performance of MTIC Fraud. Our use of  
them is entirely without prejudice to our decision on the issues which fall to be  
decided by us in this appeal.

8. HMRC’s case for denying EMJ entitlement to the benefit of the right to deduct  
input tax on these purchases is based on the judgment of the Court of Justice (the  
30 “CJEU”) in the joined cases of *Axel Kittel v État belge* (C-439/04) and *État belge v  
Recolta Recycling SPRL* (Case C-440/04) (hereinafter “*Kittel*”), and in particular their  
decision that:

35 ‘it is for the referring court to refuse entitlement to the right to deduct where it is ascertained  
having regard to objective factors, that the taxable person knew or should have known that, by  
his purchase, he was participating in a transaction connected with fraudulent evasion of VAT,  
and to do so even where the transaction in question meets the objective criteria which form the  
basis of the concepts of ‘supply of goods effected by a taxable person acting as such’ and  
‘economic activity’.’ (*ibid.* [59])

9. Although at the commencement of the hearing and up until HMRC had led their  
40 evidence, EMJ had contested HMRC’s case (a) that there was a loss of VAT in  
relation to each of the 10 deals in issue; and (b) that if there was such a loss that it was  
occasioned by fraud; and (c) that, if so, EMJ’s purchases were connected with such  
fraudulent losses of VAT; in cross-examination, the witness for EMJ, Mr Paul  
Andrew Higgs, accepted HMRC’s case on these issues and on the last day of the

hearing this was formerly confirmed on behalf of EMJ by its representative, Mr Andrews.

10. Therefore the parties are agreed that the issues for our decision are whether or not EMJ knew or should have known that its purchases were connected with the accepted instances of fraudulent evasion of VAT.

11. We heard oral evidence from the following witnesses for HMRC: Officer Daren Jason Cooley, from July 2008 the officer on HMRC's MTIC team with responsibility for EMJ – he succeeded Officer South in this responsibility; Officer Lisa Margaret Wride; Officer David John Berry; Officer Merlina Samuel-Blatch; Officer Roderick Guy Stone; Officer Jennifer Davis; Officer Michael James Downer; and Officer Andrew Kirkby. Mr John Fletcher, a Principal Advisor in KPMG LLP, gave evidence as an expert in the operation of the 'grey market' in mobile phones and other electronic goods which do not follow the normal lines of distribution from the original manufacturer to retailers. Each of the witnesses named above made one or more Witness Statements. We also received a Witness Statement from Officer Lisa Jayne Orr, whom Mr Andrews did not require to cross-examine; and Officer Kevin Wright, whom Mr Andrews did not require to cross-examine, and whose evidence Miss Goldring, for HMRC, described as no longer relevant and unnecessary to read. As indicated above, we received oral evidence from Mr Paul Andrew Higgs for EMJ. He also made a Witness statement. There was also extensive documentary evidence before us.

12. Although the issues of fraudulent tax loss and connection to EMJ's purchases are no longer in contention, we state for the record that the relevant fraudulent evasions of VAT were as follows:

13. In relation to Deal 1 and Deal 2: the evasions of VAT were by USM IT Suppliers Limited (trading as First Point) ("USM IT"). Officer Davis's evidence was that USM IT had been identified as a fraudulent defaulter and that VAT losses totalling £3,917,968.20 had been incurred in respect of 5 identified invoices issued by USM IT between 8 and 11 May 2006. The transactions giving rise to those VAT losses were in chains which HMRC had traced forward to Wetherby, the contra-trader in issue, which was the Broker in relation to those transaction chains.

14. Officer Kirkby's evidence was that £3,922,362.50 of input tax (which related to the transaction chains in which Wetherby was a Broker in May 2006, which chains traced back to the defaulter USM IT) had been sought to be offset by Wetherby against output tax for which it was accountable in relation to 24 acquisition deals in that month.

15. Officer Cooley's evidence was that the 2,000 Tom Tom Go 910 satellite navigation systems which were purchased by EMJ in Deal 1 from Cybacomms (and dispatched by EMJ to Freitex GmbH & Co KG ("Freitex") on 16 May 2006) traced back to an acquisition of 6,000 such systems by Wetherby from Protophonia (a Portuguese entity) on the same day.

16. Officer Cooley's evidence in relation to Deal 2 was that 1,000 Snooper Indigo satellite navigation systems, which were purchased by EMJ also on 16 May 2006, also from Cybacomms (and dispatched by EMJ to Freitex), traced back to an acquisition, also by Wetherby, from Protophonia on the same day.

5 17. The relevant fraudulent evasion of VAT in connection with Deals 3 to 10 inclusive were as follows.

18. In connection with Deal 3, £60,031.13 output VAT was fraudulently evaded by an entity purporting to be Clifton Comms Ltd (a hi-jacked VAT number), which was at 5 places removed in the chain of supply of 1,100 N9 300i phones from EMJ's  
10 supplier, London Mobile. All transactions in the chain, including EMJ's sale to its customer, H & H Import Export ("H & H") (an entity established in France), took place on 23 May 2006.

19. In connection with Deal 4, £125,117.13 output VAT was also fraudulently evaded by the entity purporting to be Clifton Comms Ltd, again at 5 places removed  
15 in the chain of supply from EMJ's supplier, which, this time, was Cybacomms. The goods supplied in the chain were 2,300 N9 300i phones and the transactions in the chain, including EMJ's sale to its customer, Westcom SA (a Luxembourg entity), took place on 24 May 2006.

20. In connection with Deal 5, £65,520.00 output VAT was not accounted for by  
20 ATB Enterprises (UK) Limited ("ATB") and HMRC (according to Officer Cooley's evidence) originally thought that ATB was the defaulting acquirer of the goods in the chain (1,200 N9 300i phones). However Officer Cooley, deriving his information from Officer Wride, stated that HMRC had established that the entity purporting to be Clifton Comms Ltd was in fact the defaulting acquirer in this chain also. Although no  
25 paperwork had been made available to HMRC in relation to the supply by the entity purporting to be Clifton Comms Ltd to ATB, an assessment for an overall sum of £353,282.97 was made on that entity on 27 August 2008 and that sum included £65,520 in respect of VAT fraudulently evaded on the supply in this chain. ATB was at 4 places (and the entity purporting to be Clifton Comms Ltd at 5 places) removed in  
30 the chain of supply from EMJ's supplier, which was London Mobile. The transactions in the chain flowing from ATB to EMJ and the supply by EMJ to its customer, Westcom SA, all took place on 24 May 2006.

21. In connection with Deal 6, £25,865 output VAT was fraudulently evaded by a  
35 company called Golden Limited ("Golden"), at 4 places removed in the chain of supply from EMJ's supplier, Cybacomms. The goods supplied in the chain were 1,000 Motorola Pebble U6 phones and the transactions in the chain, including the supply by EMJ to its customer, World Communications IMP-EXP SLU (a Spanish entity) took place on 30 May 2006.

22. In connection with Deal 7, £120,447.25 output VAT was fraudulently evaded  
40 by Golden at 4 places removed in the chain of supply from EMJ's supplier, Cybacomms. The goods supplied in the chain were 2,200 N9 300i phones and the

transactions in the chain, including the supply by EMJ to its customer, H & H, also took place on 30 May 2006.

23. In connection with Deal 8, £185,595.38 output VAT was fraudulently evaded by iPartner Limited (“iPartner”) at 4 places removed from EMJ’s supplier, London Mobile. The goods supplied in the chain were 5,100 N6280 phones and the transactions in the chain, including the supply by EMJ to its customer, H & H, took place on 23 June 2006.

24. In connection with Deal 9, £117,020.00 output VAT was fraudulently evaded, again by iPartner, at 4 places removed from EMJ’s supplier, again London Mobile. The goods supplied in the chain were 2,200 N9 300i phones and the transactions in the chain, including the supply by EMJ to its customer, Freitex, took place on 30 June 2006.

25. In connection with Deal 10, £116,250.75 output VAT was fraudulently evaded, again by iPartner at 4 places removed from EMJ’s supplier, which in this case was Oakleaze. The goods supplied in the chain were, again, 2,200 N9 300i phones, and the transactions in the chain, including the supply by EMJ to its customer, again Freitex, also took place on 30 June 2006.

#### **The facts**

26. From the evidence we find facts as follows – where we relate evidence given by any witness, we accept it unless the contrary is stated in this Decision or otherwise we indicate that we do not accept it.

#### *Mr Higgs*

27. Mr Paul Andrew Higgs, the sole director of EMJ, is an entrepreneur by nature. His first “trade” was the purchase of a used car and the sale of it (to an aunt of his) for a profit at the age of 13. At the age of 17 or 18 he started working for himself, setting up a car valeting company, and at 23 he was trading in cars on his own account. He traded in cars on a ‘back to back’ basis, that is, by finding a customer for a car before he purchased it from his supplier. He also, from time to time, traded in second-hand white goods and as a florist. After the car trading business ceased (in which he estimated that he earned between £20,000 and £30,000 a year), he became a salesperson in reprographics, being photocopiers and other office equipment. But that was a hard business to break into and in late 2005 he looked around for another area to work in. He estimated that he made a profit of about £1,000 a month over the 10 months (December 2004 to October 2005) during which he operated the reprographics business.

28. His evidence was that he was “very good friends” with one Mark Cook, whom he had known since childhood. Mr Cook had a business in wholesaling mobile phones, which he ran through a company called Crouch Commodities Limited (“Crouch”). He asked Mr Higgs if he would like to help him in the business, on a commission basis, because he was going to be involved in a major refurbishment of his house. (He had another house, in Lanzarote, where he intended to live while the refurbishment works were going on.) Mr Higgs’s commission was £200 per deal,

with a cap of £500 per day. He accepted that his work could be described as ‘filling out a few bits of paper’ for £200. Mr Higgs made regular visits to Crouch’s business lasting anywhere between two and six hours each, starting in October 2005, and saw what was involved close at hand. He was to help run the office and be responsible for the paperwork. Mr Higgs was aware of the large profits being made by Crouch when he was working for Crouch.

29. Mr Higgs saw an opportunity to get involved in the wholesale of mobile phones on his own behalf and in November or December 2005 took out a loan of £111,000 to raise the necessary funds. The loan was secured by a mortgage on a property owned by his wife, Mrs Michelle Higgs. This trade was to be operated through EMJ Telecommunications Limited, which was a company formed at that time by Mr Higgs. EMJ was incorporated on 28 November 2005.

30. Mr Higgs’s evidence in chief was:

‘The next few months were just spent looking and learning and watching how the trades were operated, and ie how Crouch created his – I suppose putting his deals into motion, really, contacting buyers, contacting sellers, and really just learning what was going on and making sure that when I was in a position to trade, I was ready to operate on a basis which was going to be for my benefit.’

31. Mr Cook went to Lanzarote in March or April 2006, and he left Mr Higgs to trade “with his blessing”. Mr Higgs said that he ‘would have had permission to deal with the people who Crouch had dealt with’ and that Mr Cook ‘had no problem with me trading with the people who he traded with’. Mr Higgs continued to deal with Crouch’s paperwork after Mr Cook’s departure to Lanzarote – Mr Cook would telephone him with the details of the deals he had arranged for Crouch. Mr Higgs also said that he conducted due diligence for Crouch and handled the money movements for Crouch after Mr Cook’s departure. On 23 June Mr Higgs handled for Crouch a purchase of 5,100 Nokia 6280 phones from London Mobile and sale to an entity called 3G Trade, and on the same day Deal 9 for EMJ which was a purchase of an identical number of the same phones from London Mobile and the sale of them to H & H. The gross profit of Deal 9 was £22,950 and it was put to Mr Higgs by Miss Goldring that that was a profit which he had effectively taken away from Crouch. Mr Higgs did not see it that way – his evidence was that ‘it was a friend of mine and he allowed me to conduct a business’. It was also put to Mr Higgs that Crouch discontinued dealing between 19 May and 8 June 2006 and EMJ traded in that period, purchasing from London Mobile as well as Cybacomms. He was asked why it was that EMJ was able to do these deals while Crouch did not trade, but Mr Higgs did not know why Crouch stopped trading in this period.

32. HMRC’s documents which were put to Mr Higgs and accepted by him showed that in virtually all the deals which Crouch entered into in March, April, May and June 2006, Crouch’s supplier was London Mobile. He accepted that in May and June 2006 he was working both for Crouch and for EMJ (effectively himself), dealing with virtually the same pool of customers and suppliers. Crouch sold in May 2006 to each one of EMJ’s customers. In four of EMJ’s ten deals, its supplier was London Mobile. Of EMJ’s remaining two suppliers, Oakleaze was the supplier to London Mobile in 8

of the transactions in May 2006, where London Mobile sold to Crouch. Cybacomms, however, did not feature in any of the chains involving Crouch in that period.

33. Between 13 and 21 June 2006, HMRC wrote letters to Crouch at the UK address where Mr Higgs attended to work on Crouch's paperwork – indeed one of the letters was addressed for Mr Higgs's attention. Those letters informed Crouch (and Mr Higgs, who was opening and dealing with Crouch's post at that time) that 30 out of the 35 transactions undertaken by Crouch in March 2006 had been traced to defaulting traders. All of Crouch's deals in this period had involved purchases from London Mobile. This prompted a fax message from Crouch to London Mobile dated 22 June 2006 asking to see a copy of the due diligence performed by London Mobile on its suppliers for 'any stock brought by [Crouch] from [London Mobile]'. But Crouch continued to deal with purchases from London Mobile from 23 to 27 June 2006 – 10 deals in all. Mr Higgs handled the paperwork for them. Indeed on 23 June and 30 June 2006 (Deals 9 and 10) EMJ also purchased phones from London Mobile. On this matter, Mr Higgs accepted in cross-examination that he 'should have looked at that properly [ie the letters from HMRC] and taken it on board and not traded'. His evidence was that knowing the goods were in stock and had been inspected was enough to suggest that they were not going to trace back to a missing trader. He also agreed that he took a calculated risk or decision to trade with London Mobile. He accepted that HMRC's letters to Crouch put him on notice that missing traders existed in many of the chains of supply leading to London Mobile but he said that at the time he had not put that knowledge into 'the correct context' and still thought that if London Mobile itself was not a missing trader then it was safe to trade with them.

34. There was a letter in our papers dated 24 January 2006 from Crouch to Mr Higgs at EMJ in which Crouch informed EMJ that it would be happy to trade with EMJ subject to various simple conditions being satisfied. In the event Crouch did not trade with EMJ but Mr Higgs accepted that the letter envisaged a situation where Crouch would sell to EMJ, allowing EMJ to make a dispatch outside the UK (at a higher margin) rather than Crouch itself making the dispatch.

35. In relation to Deals 1 and 2, Mr Higgs accepted that he had never dealt in satellite navigation systems before and that he was paid by his customer (Freitex) on 16 May 2006, one day before the goods were shipped out of the UK on EMJ's behalf (on 17 May 2006). He commented in cross-examination that Freitex 'would have done that deal on trust'. Furthermore, although Mr Higgs said he was not aware of this at the time, the goods, to the value of over £1.2m, were not insured before the goods were released to Freitex by EMJ. In Deal 2, the goods were released to Freitex by EMJ (on 16 May 2006) before EMJ had obtained title to them itself, because it had not paid its supplier, Cybacomms. EMJ paid Cybacomms on 24 May 2006. (In Deal 1, EMJ paid its supplier, Cybacomms, on 16 May 2006, but after payment by Freitex had been received by EMJ, therefore, in this Deal also, title was passed by EMJ to Freitex before title had passed from Cybacomms to EMJ.) In addition, the purchase orders from Freitex were considerably more detailed (as to colour, language of manual, etc.) than the invoices from Cybacomms. Mr Higgs accepted that he did not know whether the goods shipped to Freitex actually answered to all the details on their purchase orders – the inspection reports did not reveal those details.



36. EMJ did arrange insurance for other stock through Edge Logistics. However there was no insurance cover while the stock was at the freight forwarder's warehouse. Mr Higgs explained this on the basis that he had not title to the goods while they were in the warehouse because they were 'shipped on hold'. Miss Goldring suggested to him that at some point, while the goods were in the warehouse, EMJ would have obtained title to the goods and they should have been insured from that point. Mr Higgs agreed.

37. Mr Higgs said that his understanding of MTIC fraud at the time when EMJ was trading was that he had to make sure that the goods which his supplier was selling him were 'actually physically there', and his supplier was not a missing trader. This equates to an understanding of MTIC fraud as being a fraud where non-existent goods are sold and the purchase price is fraudulently taken for them by a supplier who disappears – which is not HMRC's understanding of MTIC fraud, which is a scenario where liability for VAT is fraudulently evaded and sums representing that fraudulently evaded VAT are obtained from HMRC by way of claims for repayment of input tax.

38. Mr Higgs said that he opened a bank account with First Curacao International Bank ("FCIB"), established in the Netherlands Antilles, because he had seen, when working for Crouch, that "every person who you'd speak to was trading with a FCIB account" and he decided to do the same, because he thought it might have been for practical purposes necessary to have such an account in order to trade with the entities he was coming into contact with, and, besides, he thought the banking services offered by FCIB were cheaper and quicker in operation than those available from NatWest, his UK bank. He said that he was advised by Mr Cook to set up an FCIB account 'for ease of transaction and speed of payments' and that Mr Cook 'will have helped me go through the process of filling out the documentation' for opening an FCIB account.

39. Mr Higgs said that his mode of trading was first to find stock (from a potential supplier) and then to find a customer for that stock. He said: "the purchasing price was given [by suppliers]. No negotiation was allowed". He never purchased stock advertised on a trade website ('the IPT website'), although he did find contacts in that way. On the other hand, his evidence was that his customers did negotiate on price and 'laughed at' him if he suggested too high a price. He said that he had observed that Crouch obtained a margin of about 2% and that was what he was aiming for. He said that he had tried to negotiate a bigger profit margin on a deal, but he lost the deal – so there was one deal which did not go through to fruition. He lost the goods on the purchase side (ie from his supplier) before he could close the deal. He had had those goods inspected. There were no documents to support this evidence.

40. Mr Higgs said that he found some suppliers himself (giving Cybacomms and Oakleaze as examples) and others (for example, London Mobile) through contacts of Crouch. All of his customers were contacts of Crouch which he also used. (As noted above, Oakleaze had been a supplier of London Mobile in deals where London Mobile sold to Crouch.)

41. Once a customer was found, the necessary paperwork (purchase orders and invoices) were put together, together with introductions and shipping instructions. Then Mr Higgs (following the pattern of work at Crouch) contacted HMRC's Redhill department to obtain confirmation of the validity of the VAT numbers concerned. He  
5 arranged for inspection of the goods to be traded and recorded IMEI numbers of mobile phones, though not the serial numbers of satellite navigation systems. Mr Higgs made the point that Crouch had not recorded IMEI numbers but that he "wished to try and have as much due diligence for HMRC as possible".

42. At a late stage in his cross-examination, Mr Higgs said that "it would have  
10 happened" that enquiries came from customers asking if EMJ had particular stock to sell. Mr Higgs's evidence was that when this happened no price was ever mentioned by the potential customer. Mr Higgs said he did not think he conducted any actual trades in this way.

43. The first deal (Deal 1) which Mr Higgs entered into on behalf of EMJ, on 16  
15 May 2006, yielded a gross profit of £17,000. He accepted that he had put in a couple of hours' work for this profit. On the same day he entered into Deal 2, which yielded a gross profit of £8,500. Formerly he had put putting in a full month's work for £1,000 in the reprographics business. When asked by Miss Goldring what he thought when he made £25,500 profit for a few hours' work, his response was "Hallelujah".  
20 With all ten deals in issue, 30 to 40 hours' work was involved and the gross profit was £122,050.

44. Mr Higgs never attempted to sell to UK customers. He explained this at first by saying that he did not have the negotiating skill to do that. Later he said that that 'probably wasn't the correct answer'. He then said that he never looked into trading  
25 in the UK and 'only had the skill [he'd] learned from Crouch', who, as far as we know, between April and June 2006 only sold to customers outside the UK. Mr Higgs made the point that 'the margins were bigger at exporting'.

45. In an interview on 29 August 2006 conducted by Officer Christine South for HMRC, Mr Higgs completed an "Annex 38" questionnaire. One of the questions he  
30 was asked was: "How is the VAT input financed?" His reply was that he had mortgaged a house owned by his wife. As stated above, this mortgage transaction realised £110,000, which Mr Higgs's answers to the questionnaire indicated was the only financing used. In particular, he stated that there were no applicable bank loans or overdraft facilities.

46. The so-called funding deficit incurred by EMJ in its trading was the difference  
35 between the amounts due to be paid to suppliers by EMJ (including VAT) and the amounts receivable by EMJ from its non-UK customers (excluding VAT). The evidence is that for Deal 1, transacted on 16 May 2006, payment of £831,000 was received from its customer (Freitex) and payment of £956,450 was made to its  
40 supplier (Cybacomms). This gave rise to a funding deficit of £125,450. For Deal 2, payment of £414,500 was received by EMJ from its customer (Freitex) also on 16 May 2006, but EMJ's supplier (also Cybacomms) was not paid in full (£477,050) until 24 May 2006. The totality of EMJ's 10 deals gave rise to a funding deficit of

£914,547.50. It was obviously Mr Higgs's intention that this deficit should eventually be met by a refund of input tax claimed from HMRC. Although EMJ's monthly VAT returns for the periods 05/06 and 06/06 were, as one would expect, submitted on a timely basis, HMRC advised EMJ by a letter dated 5 July 2006 that its return for the  
5 05/06 VAT period had been selected for extended verification, and, by a letter dated 9 August 2006, that its return for 06/06 had been selected for extended verification. In those circumstances, of course, any repayment of VAT by HMRC was deferred until such time as the extended verification process was complete, which, in practical terms meant that the funding deficit could not be met by EMJ, which, in turn, meant that  
10 EMJ could not pay its suppliers in full.

47. However, on 7 July 2006 (two days after the date of HMRC's first letter informing EMJ of the selection of its 05/06 VAT return for extended verification) a payment of £900,000 was received into EMJ's FCIB bank account from H & H's FCIB bank account. The payment is marked "DEPOSIT" on EMJ's FCIB bank  
15 statement. This payment, as a practical matter, covered EMJ's funding deficit and enabled EMJ to pay the amounts due to its suppliers (London Mobile and Oakleaze, in respect of Deals 9 and 10 respectively, who were paid £781,082 and £117,216 respectively on 7 July 2006).

48. Mr Higgs said that the receipt of £900,000 from H & H had nothing to do with  
20 EMJ's funding difficulties. His evidence was that H & H had asked for stock and Mr Higgs in response 'found that some was going to be offered to [him] by' London Mobile and H & H 'offered a deposit'. We note at this stage that this was not Mr Higgs's normal mode of business which started, as noted above, with a supplier informing him that he had stock available to sell, which prompted Mr Higgs's search  
25 for a customer. Furthermore, Mr Higgs was unable to remember what the full value of the deal was, in relation to which he said the payment of £900,000 was a deposit. Although HMRC Officers South and Byford had been made aware at their visit to EMJ on 29 August 2006 of H & H being a "trade creditor" for £900,000, no further information was given to them at that time. Just before the hearing, on 29 January  
30 2013, a document purporting to be a letter dated 20 July 2006 from H & H to EMJ referring to a deposit of £900,000 for "some goods" – no description or quantity of goods was given – and requiring repayment of the deposit and/or interest thereon, was provided to HMRC. The document gave EMJ's address as "United Kingdom", whereas an example of a purchase order from H & H to EMJ in our bundle gave  
35 EMJ's address in French as "Royaume Uni". Mr Higgs said that EMJ did not receive any further demand from H & H. Mr Higgs was asked whether the document was 'cover', and he denied that it was. He agreed under cross-examination that his case was that the payment of £900,000 had been paid by H & H to EMJ as a deposit for a deal for which there was no paperwork, that it was not chased by H & H apart from  
40 the purported letter of 20 July 2006, and that the payment must have been made in the expectation that EMJ would pass it on to the 'right place', being the right place to send the money on the basis that EMJ had been duped into being a conduit. Further Mr Higgs's case was that it was a coincidence that the payment almost exactly matched the amounts which EMJ at that point owed to London Mobile and Oakleaze.  
45 Furthermore Mr Higgs had not mentioned this payment in his witness statement and

had not made any attempt to pay any of the £900,000 back to H & H, even when he was in a position to, and did, transfer £40,000 into his NatWest account.

49. When Miss Goldring put it to Mr Higgs that the £900,000 payment was made to enable EMJ to pay London Mobile and Oakleaze, his response was: “That looks that way, exactly, but that wasn’t done that way by myself”. He said that at the time he didn’t really want the payment but he had been assured that the goods were going to come through and H & H (he believed it was Nicholas Villeneuve at that company) were “happy to send the money through”. He added that later on that month (July 2006) he was “beginning to realise that should not have taken place”.

50. Mr Higgs’s evidence was that London Mobile’s attitude was to confirm that “there was stock coming through” but requiring that their invoice (on Deal 9) was paid. Mr Higgs told them (on 7 July 2006) that he couldn’t pay that, and London Mobile’s response was “Can you get a deposit for the goods that I’ve got?”.

51. Later in the cross-examination Mr Higgs hesitated over whether the supplier in this proposed deal would have been London Mobile or Cybacomms, but then said he was sure it was London Mobile. Although he was able to say that the stock in question was “Nokia phones” he did not raise a purchase invoice and he said: “I was just asked to give a deposit or receive a deposit from HMRC [*sic*] presumably H & H was meant]”. There was no paperwork raised in relation to this proposed transaction. Mr Higgs accepted that ‘with hindsight’ H & H were using EMJ as a conduit for £900,000, although he denied that H & H (who had by the time of the appeal hearing “gone off the radar”) had told him to whom the £900,000 was to be paid. He said under cross-examination that he wished that he had not taken that money.

52. Miss Goldring pointed out to Mr Higgs that whereas EMJ owed London Mobile and Oakleaze an aggregate of a little over £898,000 in respect of Deals 9 and 10, the repayment claim made to HMRC in respect of the VAT period 05/06 was for £614,000. She asked him where he had expected the balance of £284,000 to come from (if not from the deposit from H & H) and he replied referring to the repayment claim made to HMRC in respect of the VAT period 06/06.

53. Mr Higgs’s evidence was that the payment in of £900,000 from H & H was a coincidence as far as he was concerned, at the time, but that with the benefit of hindsight he thought that “it was a situation where knowledge was known of what my invoices were, money was offered to me, and I paid my invoices off”.

54. The phones supplied by EMJ to its customers had two-pin European-style chargers, which must have been imported into the UK before EMJ supplied them to customers outside the UK. Mr Higgs accepted in cross-examination that it would have been ‘highly irregular’ for two-pin plug chargers to be imported into the UK. The same situation had pertained in relation to Crouch’s trade which Mr Higgs had been observing for some months before EMJ started to trade.

55. Mr Higgs accepted that he made no investigation into market price when structuring EMJ’s deals. He simply looked for a mark-up of roughly 2 per cent on the

(non-negotiable) price offered to him by his supplier (which he took to be the market price). Freight and shipping costs were, following Crouch's experience, of an amount that would bring down his net mark-up to 1.3 or 1.5 per cent. Mr Higgs said that sometimes when he asked a potential customer for a bigger mark-up he lost the deal.  
5 His mark-up was the same on Deals 1 and 2, which concerned satellite navigation systems, as on the other deals which related to phones.

56. Miss Goldring pointed out to Mr Higgs that EMJ's gross profit bore a steady relationship (11 or 12 per cent.) to the amount of the VAT defaults to which the respective deals were connected. Mr Higgs's response was that it was "a situation  
10 which looks too good to be true". He thought that 'someone' had worked out the figures beforehand, taking into account his 2 per cent. mark-up.

57. When Miss Goldring put to Mr Higgs that phones for non-UK customers with European style two pin chargers could have been more cheaply sourced in Europe than in the UK and more cheaply delivered to non-UK customers, his response was  
15 that he "didn't look into that trade".

58. Mr Higgs always managed to find a customer for precisely the amount of stock he had sourced, so he was never left with stock in hand.

59. Mr Higgs acknowledged that at the time of the Deals in issue he was aware of MTIC fraud and of its presence in the industry in which EMJ was operating. On 24  
20 May 2006 he was sent by HMRC a copy of the then-current Notice 726, which dealt with joint and several liability to combat MTIC fraud. He accepted that it was obvious from HMRC's communication that a large proportion of the industry was caught up in MTIC fraud.

60. Mr Higgs did not conduct any credit checks on customers or suppliers. He did  
25 not normally meet customers or suppliers personally. He once met Matthew Sheridan of London Mobile. His due diligence checks for EMJ's May deals consisted of contacting HMRC's Redhill office for VAT number verification. EMJ purchased goods from Cybacomms in May 2006 – a supplier which was new to Mr Higgs and which he had not known through his connection with Crouch – before receipt back of  
30 the VAT number validation from HMRC's Redhill office.

61. In EMJ's due diligence documents for Deal 2 with our papers, there was a paper copy of Cybacomm's webpage. On that page there was in manuscript the word "Team" with two telephone numbers (one apparently a fax number and one a normal  
35 telephone number) and the word "Ali". Mr Higgs accepted that these annotations were in his handwriting, but he said he did not know why he had made them. He also confirmed that he had never, through EMJ or when assisting Crouch, dealt with a company called 'Team Mobile'. TM Global, trading as Team Mobile International ("Team Mobile") was in fact the supplier to Cybacomms (who were EMJ's suppliers) in Deals 1 and 2 and they had at least one of the telephone numbers mentioned. In re-  
40 examination, Mr Higgs made the point that he had had company introduction details from Team Mobile, although he had never dealt with them. Mr Higgs denied that he knew who was further down the chain in these Deals, behind Cybacomms, and

specifically that he knew that Team Mobile was the supplier to Cybacomms. He said that it was a coincidence that the annotation in his handwriting was on the copy of Cybacomms webpage. There was not in evidence any connection between Team Mobile and anyone called Ali.

5 62. Mr Higgs instructed Veracis to provide a report on Cybacomms before EMJ  
dealt with them, but the report was not provided until 8 July 2006, after Deals 1 and 2  
had gone through, and, indeed after the other deals (Deals 4, 6 and 7) in which EMJ  
purchased from Cybacomms. Similarly he commissioned a report on London Mobile,  
10 but traded with them before receipt of the report. He said he had no difficulties about  
dealing with London Mobile before receipt of the report because Crouch had traded  
with them during the time he was observing their business and he “believed them to  
be who they were and where they are”. He accepted that the report, when it came,  
would have given him cause for concern. Mr Higgs instructed Global Law  
15 Consultants to prepare a report on Oakleaze. Miss Goldring put to him that Victoria  
Boyle, the secretary of Oakleaze used to be the secretary of Global Law. Mr Higgs  
did not know whether it was a coincidence that Global Law approached EMJ to do  
this report on Oakleaze for them or whether it was “coercion”. He accepted that the  
report was in fact highly deficient – ‘not worth the paper it’s written on’.

20 63. Mr Higgs accepted that his due diligence “wasn’t sufficient”, indeed he put  
down his involvement with fraudulent chains (in hindsight) to “lack of complete due  
diligence”. In particular he found out little or nothing about the background, history  
and genuineness of EMJ’s non-UK customers. Miss Goldring pointed out concerns in  
relation to 4G, the company EMJ commissioned to collect IMEI numbers on mobile  
25 phones traded by it. Crouch had dealt with 4G and there was in our papers a copy of a  
letter sent by 4G to Crouch in which they say that in their reports it sometimes  
happens that a box is ticked in a report indicating that a full scan has been performed  
when in fact a scanning procedure has not been carried out. Furthermore, when EMJ  
instructed 4G to inspect its goods (acquired from suppliers) 4G was itself trading in  
30 mobile phones – although this was not known to Mr Higgs at the time. Thus, 4G had  
access to the identity of EMJ’s suppliers. When he was asked if this knowledge  
would have caused him some concern, he replied that it would not have, because “a  
lot of companies operate two different arms of their company under the same banner”.

#### *Wetherby*

35 64. Officer Andrew Kirkby gave evidence, which we accept and which was not  
disputed by EMJ, that Wetherby was knowingly involved in an MTIC fraud scheme,  
designed to defraud the Revenue of VAT due to it in the period from February to May  
2006 inclusive, by action as a Broker, Buffer and contra trader. Specifically, in  
relation to EMJ, his evidence was that Wetherby knowingly acted as a contra trader,  
and we so find.

#### 40 *FCIB*

65. Officer Downer’s evidence was that in all 10 of EMJ’s deals the monies  
associated with the transactions effectively moved in a circle, and showed that an  
orchestrated scheme was being operated. His evidence was that there were different  
patterns of circularity and that three main accounts had been set up at FCIB in the

names of Technology PLC Ltd., Koornmarkt and Whitehart Marketing. There were sub-accounts to each of these three accounts. The main Technology PLC account and its sub-accounts had Sajjad Sadiq as the signatory. The main Koornmarkt account and its sub-accounts had Mohammad Akram as the signatory. The main Whitehart account and its sub-accounts had Air Nawaz as the signatory. Both Technology PLC and Koornmarkt has sub-accounts in the name of Protophonia Telecommunicacoes, who were the EC supplier in the contra-acquisition chains leading to Wetherby in connection with the supplies to EMJ in Deals 1 and 2.

66. In Deal 1, Officer Downer was able to trace from FCIB records the likely flow of funds in a circle, starting at Technology PLC who paid to Freitex, who paid to EMJ who paid to Cybacoms, who paid to Team Mobile, who paid to Wetherby who paid to Technology PLC.

67. In Deal 2, the same likely flow of funds was identified by Officer Downer from FCIB records.

68. In Deal 3, Officer Downer had again been able to trace a likely circular flow of funds starting with Technology PLC, who paid H & H, who paid EMJ, who paid London Mobile, who paid Oakleaze who paid an entity called Crescent, who paid an entity called Easy MSI who paid Westcom SA and H & H.

69. In Deal 4, Officer Downer had shown a similar likely flow of funds, again starting with Technology PLC who paid Westcom SA, who paid EMJ, who paid Cybacoms, who paid Oakleaze, who paid Crescent, who paid Easy MSI who paid Whitehart.

70. In Deal 5, Officer Downer had shown a similar likely flow of funds to Deal 4, except that London Mobile took the place of Cybacoms.

71. In Deal 6, Officer Downer had shown a similar likely flow of funds, again starting with Technology PLC who paid Westcom SA, who paid EMJ who paid Cybacoms, who paid Crescent, who paid Easy MSI, who paid Whitehart.

72. In Deal 7, Officer Downer had shown a similar likely flow of funds, again starting with Technology PLC, who paid H & H, who paid EMJ, who paid Cybacoms, who paid Crescent, who paid Easy MSI, who paid Whitehart.

73. In Deal 8, Officer Downer's evidence was that the likely circular flow of funds started with Koornmarkt, who paid H & H, who paid EMJ, who paid London Mobile, who paid Team Mobile, who paid Easy MSI who paid Koornmarkt.

74. In Deal 9, Officer Downer had shown a likely flow of funds starting with Koornmarkt, who paid Freitex, who paid EMJ, who paid London Mobile. He had been unable to trace a payment from London Mobile to an entity called Fair General Traders, although he believed that the funds had flowed that way. He had traced payments from Fair General Traders to an entity called R K Brothers, who paid Koornmarkt.

75. In Deal 10, Officer Downer's evidence was that the payments followed a similar likely flow to those in Deal 9, except that Oakleaze took the place of London Mobile.

76. There was also unchallenged evidence from Officer Orr that West Midlands Police had obtained compact discs in connection with a criminal investigation which showed the organized participation of several companies, one of which was R K Brothers in orchestrated MTIC fraud.

#### *Mark-ups*

77. Officer Cooley gave evidence of HMRC's analysis of the deal chains and of the profit participation of each of the entities involved. This showed that in Deal 1 and Deal 2, EMJ achieved a profit equivalent in each case to 12% of the output VAT liability of the contra-trader Wetherby, whereas Wetherby and the intermediate Buffers in those chains had achieved a profit equivalent to 1% of that output VAT.

78. Similarly, HMRC's analysis showed that in Deals 3, 4, 5, 6, 7 and 8, EMJ achieved a profit equivalent to 12% of the output VAT defaulted on by the Defaulters in the respective chains. For Deals 9 and 10 the figure was 11%. Again, the profit participation of the identified Buffers was much lower (equivalent to 1% or 2% in most cases, the highest participation being 4% in two instances).

#### *Circularity of goods*

79. Officer Cooley also gave evidence of HMRC's checking of IMEI numbers of mobile phones featuring in EMJ's Deals 3 to 10 (the only deals in mobile phones) and provided by EMJ to HMRC against NEMESIS, a database containing a selection of the IMEI numbers of the mobile phones passing through UK ports and airports.

80. His evidence was that Deals 3 to 7 involved the purchase and sale of a total of 7,800 mobile phones of which 406 (that is 18%) had been exported through a UK port or airport prior to EMJ's transactions in them. Further, 3,996 (51% of the total) of the mobile phones traded by EMJ in these deals were traced to NEMESIS reports both before and after the respective deal dates. For Deals 8 to 10 inclusive, the analysis showed that of the 9,500 mobile phones dealt in by EMJ, 2,196 (23%) had been exported through a UK port or airport prior to EMJ's transactions. Further, 3,810 (40% of the total) of the mobile phones traded by EMJ in these deals were traced to NEMESIS reports both before and after the respective deal dates. Significant numbers of mobile phones in all the deals transacted by EMJ were traced to NEMESIS reports in this way.

#### *Other evidence*

81. Much other evidence was led by HMRC tending to show that EMJ, though Mr Higgs, knew that its transactions were connected with VAT fraud. For example, the fact that EMJ's trading pattern was sporadic, mainly clustered around the end of the month, the fact that EMJ had an uncommercial approach to breaches by their suppliers, Cybacoms and London Mobile, of their terms of business as to the passage of title and release of goods, inadequacies in EMJ's procedures for inspection of goods, and insurance and due diligence generally. Although we have regarded this evidence as proof of EMJ's relevant knowledge, we have not thought it necessary to



set it out in detail, because we consider it would be superfluous to do so in the light of the evidence which we have set out in detail above.

### **The submissions**

5 82. Miss Goldring submits that HMRC has proved the connection between EMJ's transactions in Deals 1 and 2 and the transactions of a dishonest contra-trader (Wetherby) whose acquisitions functioned as a cover-up for its (ie Wetherby's) participation in fraudulent tax loss chains. We did not understand Mr Andrews to suggest that HMRC had failed to prove these connections. And, as stated at the beginning of this Decision, EMJ accepts that there was a fraudulent loss of VAT in  
10 relation to each of the 10 deals in issue and that EMJ's several purchases were connected to those losses.

83. As we have already stated, the issues for our decision are whether EMJ (through Mr Higgs) knew of those connections and, if not, whether by reference to objective factors, they ought to have known of them.

15 84. Miss Goldring places much emphasis on the evidence of the existence of an overall scheme to defraud the Revenue. The existence of such a scheme was accepted by EMJ. The difference between the parties is that Miss Goldring submits that the true inference to be drawn from EMJ's appearance in the pivotal role of Broker in contrived transaction chains is that it knew of the connection between its transactions  
20 and the fraudulent evasion of VAT. Mr Andrews argued that the overall scheme only worked because those in the know (whom he termed "naughty boys") were few and they manipulated other traders (whom he termed "the Wild"), EMJ being among them, who were innocent dupes, being honourable traders with fixed roots and a genuine desire to succeed in an historical, honourable and profitable market place.  
25 Mr Andrews submits that we have no evidence to support HMRC's proposition that EMJ knew of the connection between its transactions and the fraudulent evasion of VAT.

30 85. In relation to Deals 1 and 2, Miss Goldring points out that EMJ had never before traded in satellite navigation systems, and neither had Crouch. Mr Higgs had no experience in these goods and had not checked their market price. The evidence was that there was no insurance in place for these Deals. The relative inspection reports were received after the stock had been released. No serial numbers for the goods were collected and a freight forwarder who was new to EMJ and to Crouch at the time (Globe Distribution) was used.

35 86. Mr Andrews's response is that these were commercial deals. Mr Higgs achieved for EMJ a profit on sale after taking account of costs and expenses. Mr Higgs thought he had insured the goods and it turned out from banking records that he may not have done. This fact therefore has no relevance to the question of knowledge of connection with fraud. Mr Higgs was under no obligation to collect serial numbers  
40 and it is noteworthy that he did collect IMEI numbers, a greater due diligence in this respect than that practised by Crouch.

87. In relation to all the Deals in issue, Miss Goldring submitted that the 100% incidence of fraud in connection with every transactions undertaken by EMJ was beyond coincidence. The fact that EMJ made vastly greater profits than any other party in the chains was indicative of its knowing the true function of its transactions. She commented that ‘innocent dupes would not be paid so handsomely’. To this, Mr Andrews replied that there was no evidential support to Miss Goldring’s submissions.

88. Miss Goldring submitted that the evidence showed that EMJ’s transactions were not negotiated – instead the tightly controlled circular fund structures could not have operated without each party (including EMJ) being told from whom to purchase and to whom to sell, at what price and when payments were to be made. Chiefly she relied on the same mark-up achieved by EMJ regardless of the make or quantity of goods traded and regardless of its counterparties, there being no commercial reason for EMJ to make far larger profits than any other party in the chains, simply because it exported the goods, the steady proportion (11% or 12%) of the VAT defaulted on or the contra-trader’s output VAT being achieved as profit by EMJ, and Mr Higgs’s repeated admission in his evidence that he did not negotiate his process with his suppliers, stating: “no negotiation was allowed”.

89. Mr Andrews responded by submitting that the evidence showed that the ‘unknowing part of the chain’ (which included EMJ) was controlled as to the prices paid and charged by the ‘perpetrators’ simply setting the entry and exit price range for the goods, thus ensuring that their scheme, even when outside their control, was ‘profit limited’. He submitted that at all times the perpetrators have control over the goods and will not release them until they are content that ‘the deal is set from where it leaves direct control back to where they regain control’. The advantage to the perpetrators of the broker being an innocent dupe is that the broker has no idea who the perpetrators are when he gets questioned by HMRC and so ‘would never be in a position to turn Queen’s Evidence or plea bargain’. Mr Andrews added that HMRC’s submission that there is no commercial reason for an exporter to make a bigger gross profit than a trader who trades domestically demonstrates a complete lack of common sense.

90. Miss Goldring submitted that there was no credible explanation for the involvement of Mr Higgs in Crouch, and Mr Cook’s apparent sponsorship of EMJ’s activities. Mr Andrews’s response to this was that Mr Higgs was a lifelong friend of Mr Cook and, considering the help Mr Higgs gave Mr Higgs in running Crouch’s business, ‘it can be of no surprise whatever that Mr Cook may have helped his lifelong friend, Mr Higgs’.

91. Miss Goldring submitted that Mr Higgs must have known from his own commercial experience that the profits from his transactions were far too good to be true. £122,050 profit from what amounted to a week’s work in deals where he was at no commercial risk must have appeared to him as unrealistic in the context of honest trading. Mr Andrews dismissed this argument as a ‘convenient lack of commercial understanding on the part of [HMRC]’.

92. Miss Goldring submitted that the payment of the ‘deposit’ of £900,000 into EMJ’s FCIB account by H & H had no commercial basis to it. Mr Higgs must have known full well that the only purpose of the ‘deposit’ was to ensure that EMJ could make final payments to London Mobile and Oakleaze as part of a fraudulent scheme, because he never had the funds to cover the VAT deficit incurred in the 10 deals and would never, in fact, have to reimburse H & H. Mr Andrews submitted that this part of HMRC’s case made no commercial sense – it would point to the perpetrators financing the fraudulent VAT themselves.

93. Miss Goldring submitted that EMJ’s due diligence checks had no commercial reality in them, but were window dressing produced to reassure HMRC rather than for any commercial purposes. Mr Andrews responded that Mr Higgs satisfied himself that the suppliers he traded with were not missing and there was nothing further to be found by Mr Higgs by any check available to him which would have been a clear indicator of fraud.

94. Miss Goldring submitted that the evidence that Mr Higgs gave no thought to any method of trading, otherwise than as a Broker (or dispatcher of goods to other EC member states) is indicative of his knowledge of the connection of EMJ’s transactions with VAT fraud. Mr Higgs gave no thought to making sales to the UK and gave no thought to sourcing goods (more cheaply) in other EC member states. He had no credible explanation for this. Mr Andrews’s response was that Mr Higgs had effectively said that he was not happy to conduct UK to UK trade. Mr Andrews asked rhetorically, why was this wrong?

95. Miss Goldring submitted that the relationship between Mr Higgs and Mr Cook (Crouch) was wholly lacking in commerciality and that there was a compelling inference to be drawn that Mr Higgs was told when to start using EMJ as a Broker as part of the overall scheme to defraud. Mr Andrews complains that HMRC’s suggested conclusion is unsupported by any evidence.

96. On the question of whether Mr Higgs (and EMJ) was an innocent dupe, Miss Goldring submitted that HMRC accepted that logically speaking it would be possible for an innocent trader to be duped into transactions such as those in issue. However, she submitted that the evidence in this case showed that EMJ had to deal with the parties it was told to deal with, in order to maintain the circularity of funds. This existed not only to divide the profits of the fraud – in EMJ’s case it was paid 11% or 12% - but also to ensure that capital remained within the orchestrated group of traders so that it would be used time and gain. The circularity itself was important, but also the timing of the payments was important to achieve the fraudsters’ ends. Tight control was needed and this would be impossible if any innocent dupes were included in the chains. In summary, Miss Goldring’s submission on this aspect was that on the evidence in this case, the circularity of funds and of goods shows that EMJ had to deal with whom it was told to deal.

97. Mr Andrews submitted in response that Mr Higgs and EMJ had no idea that circularity was occurring and there was no evidence supporting a contrary conclusion.

He submitted that the fraud would work perfectly well with an innocent dupe in the role of broker.

5 98. Miss Goldring submitted that Mr Higgs at the time of the transactions in issue had full warning of the (i) the fact that fraud was rife in the trade sector in which he chose to operate and (ii) that transactions involving London Mobile had been connected with the fraudulent evasion of VAT. She referred to the special VAT certification which Mr Higgs completed when he applied to open an FCIB account in December 2005 and correspondence from HMRC in May 2006 to EMJ and in June 2006 to Crouch, regarding the connection of London Mobile's transactions with fraud. Notwithstanding this knowledge, Crouch and EMJ continued to buy goods from London Mobile.

15 99. In response, Mr Andrews submitted that Mr Higgs was looking for missing traders, and London Mobile was not a missing trader, and it would be logical for Mr Higgs to have supposed that the missing trader in London Mobile's earlier chains had been 'closed down' by HMRC and would therefore no longer be a threat.

20 100. Miss Goldring submitted that the fact that Mr Higgs could offer no explanation for the reference to Team Mobile in his handwriting on the print out from the IPT website for Cybacomms (EMJ's supplier in Deals 1 and 2) with the telephone and fax numbers for Team Mobile was indicative of his knowledge that EMJ's transactions were connected with fraudulent evasion of VAT. Team Mobile were the supplier to Cybacomms in these deals but neither EMJ nor Crouch had ever dealt directly with Team Mobile.

25 101. Mr Andrews's response was that this was a mischievous suggestion and that Mr Higgs had clearly explained the reference to Team Mobile on the document as a name that he had in his company introduction details. Team Mobile had sent introduction details but EMJ had never traded with them.

30 102. Miss Goldring submitted that the payment of the £900,000 'deposit' from H & H pointed to Mr Higgs's knowledge of the connection with fraud of EMJ's transactions. She contended that it was beyond coincidence that the right amount of money for EMJ to pay off its outstanding invoices should have been paid into EMJ's bank account the day after Mr Higgs would have learned that he could not pay those invoices at all (because HMRC were conducting an extended verification of its 05/06 VAT return). It was clear on Mr Higgs's own evidence that EMJ was never in a position to fund its trading model and required external support in order to operate as it did. She submitted that Mr Higgs must have known from the outset of EMJ's trading that with neither an overdraft nor a loan, nor any investors, he would barely be able to fund any transactions. She contended that the conclusion to be drawn from this was that EMJ's transactions could only have taken place with outside sponsorship, and that this was a fact which Mr Higgs must have known. The payment of the £900,000 'deposit' in the circumstances in which it was made was proof of this.

40 103. Miss Goldring submitted that no documentation in relation to the payment of £900,000 had been produced by EMJ before the first day of the hearing. Then the

document purportedly from H & H dated 20 July 2006 was produced. That letter made no reference to any type or quantity of goods or invoice number, referring simply to 'some goods that we were supposed to receive by mid-July'. Further, the letter stated at the end of EMJ's address "United Kingdom", whereas every other document apparently produced by H & H stated "Royaume Uni" instead. She submitted that the evidence points to Mr Higgs having created the document after the event to try to explain away the difficulty. She contended that Mr Higgs's evidence that H & H had placed the £900,000 into EMJ's account for a deal that fell through and had nothing to do with the payment of EMJ's outstanding invoices was not credible. Mr Higgs's use of the monies to pay the outstanding invoices rather than remitting them to H & H is, in her submission, proof that he knew why the payment of £900,000 had been provided to him. The circumstances surrounding the payment of £900,000 were, in her submission, when taken together, compelling evidence that Mr Higgs knew that EMJ's transactions were connected with fraudulent evasion of VAT.

104. Mr Andrews's response was that HMRC's case was that the perpetrators of the fraud were financing it themselves, which was obviously unlikely. Mr Higgs's evidence had been that EMJ was funding each purchase with the proceeds of the next sale. He submitted that the letter from H & H dated 20 July 2006 had been seen and noted by a visiting officer.

105. Miss Goldring submitted that the due diligence carried out by EMJ had no commercial function and was window dressing to satisfy HMRC that EMJ had taken reasonable care to avoid its transactions being connected with VAT fraud. She referred amongst other things to the fact that he carried out transactions without waiting for the results of relevant checks to come back to him.

106. Mr Andrews did not accept that the due diligence carried out was unsatisfactory – even though as much had been admitted by Mr Higgs. He said that Mr Higgs had difficulty understanding the points put to him. He submitted that in any case due diligence would never reveal any true indicator of missing trader fraud. He denied that the due diligence carried out was window dressing and submitted that it would have been useful to EMJ in connection with future trades with the persons on whom the checks had been made.

107. In summary, Miss Goldring submitted that the Tribunal can be satisfied on the evidence that EMJ was no innocent dupe in the transactions chains. EMJ, through Mr Higgs, had actual knowledge of the connection between its transactions and fraudulent evasion of VAT through an MTIC scheme.

108. In the alternative, she submitted that EMJ should have known of the connection between its transactions and the fraudulent evasion of VAT. The cumulative circumstances presented to it permitted of no explanation other than fraud. In particular: EMJ's chosen trade sector was rife with fraud; EMJ had been informed on numerous occasions that transactions involving London Mobile had been traced to fraudulent transactions; EMJ was allowed to make large gross profits for doing nothing more than exporting goods; EMJ was allowed to take Crouch's place as a

5 Broker in chains of transactions; EMJ's deal documentation was inconsistent with the reality of the transactions; EMJ had not availed itself of the recommended checks in Notice 726; EMJ failed to assess properly the commercial viability of its counterparties; and Mr Higgs's admitted that had he carried out proper due diligence he would not have undertaken the transactions.

10 109. Mr Andrews submitted that not only did EMJ not know of the fraud, it could not possibly have known of the fraud, and indeed the fraud was set up in such a way that it was essential for it to function efficiently and securely that EMJ did not know of it. The border between entities controlled by fraudsters (who therefore would have known of the fraud) and entities not controlled by fraudsters (who, Mr Andrews submitted, would not have known of the fraud) could, he argued, be detected from HMRC's analysis of the FCIB payments. In particular, that border can be detected at the point where third party payments are made – these being a strong indication of fraud in diverting funds from an entity with an obligation to pay VAT to HMRC. 15 EMJ was not involved in any third party payments. HMRC are further criticised by Mr Andrews for their policy of seeking to recover the 'lost' VAT from the exporting trader, rather than seeking to proceed against entities (e.g. Defaulters) who were obviously themselves knowingly fraudulent.

20 110. Mr Andrews submitted that EMJ's trade was an honest trade of brokerage, involving back to back deals where the sale proceeds received by the broker are used to discharge its obligation to pay its supplier for the goods. Mr Higgs proved, in Mr Andrews's submission, to be a reliable straightforward man who took as much care over his paperwork and records as could be reasonably expected, as was confirmed by HMRC following a visit. Moreover he is a strong family man with deep and settled 25 roots, not the type of individual who would knowingly risk all in a fraudulent adventure with a person or persons unknown.

30 111. Mr Andrews submits that there are reasonable explanations for EMJ's transactions apart from that they were connected with fraudulent evasion of VAT (that is, that EMJ had honestly and reasonably conducted its trade and was used as an innocent dupe by the entities who were perpetrators of the fraud) and that therefore, on the test propounded by the Court of Appeal in *Mobilx Ltd (In Administration) v Commissioners for HM Revenue and Customs* [2010] EWCA Civ 517, the Tribunal should find that EMJ was not someone who ought to have known that its transactions were connected with fraudulent evasion of VAT.

### 35 **Discussion and Decision**

112. The applicable law was not in dispute between the parties. It is convenient to refer to the judgment of Moses LJ in *Mobilx*, with which Carnwath LJ (as he then was) and Sir John Chadwick agreed.

113. At *Mobilx* [41], Moses LJ, explaining the *Kittel* principle, said:

40 'In *Kittel* after § 55 the Court developed its established principles in relation to fraudulent evasion. It extended the principle, that the objective criteria are not met when tax is evaded, beyond evasion by the taxable person himself to the position of those who knew or should have

known that by their purchase they were taking part in a transaction connected with fraudulent evasion of VAT:-

5 “56. *In the same way*, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.

57. That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.

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

15 59. *Therefore*, it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person *knew or should have known* that, by his purchase he was participating in a transaction connected with fraudulent evasion of VAT, and to do so even where the transaction in question meets the objective criteria which form the basis of the concepts of ‘supply of goods effected by a taxable person acting as such’ and ‘economic activity’. [emphasis added]”

20 The words I have emphasised “in the same way” and “therefore” link those paragraphs to the earlier paragraphs 53-55. They demonstrate the basis of the Court’s approach. It extended the category of participants who fall outwith the objective criteria to those who knew or should have known of the connection between their purchase and fraudulent evasion. *Kittel* did represent a development of the law because it enlarged the category of participants to those who themselves had no intention of committing fraud but who, by virtue of the fact that they knew or should have known that the transaction was connected with fraud, were to be treated as participants. Once such traders were treated as participants their transactions did not meet the objective criteria determining the scope of the right to deduct.’

25 114. Moses J added (*ibid* at [62]) that:

30 ‘If the circumstances of [a trader’s] purchase are such that a person knows or should know that his purchase is or will be connected with fraudulent evasion, it cannot matter a jot that that evasion precedes or follows that purchase. That trader’s knowledge brings him within the category of participant. He is a participant whatever the stage at which the evasion occurs.’

35 115. The last quoted passage is authority for the proposition that the *Kittel* test is to be applied in the same general way whether the purchase transaction in issue is connected with fraudulent evasion of VAT by a direct chain of transactions (as in Deals 3 to 10 in this appeal) or whether that connection is through a fraudulent ‘contra trader’ such as Wetherby (as in Deals 1 and 2 in this appeal).

116. This is the context in which we have to decide whether or not EMJ, through Mr Higgs ‘knew or should have known’ of the connection between its purchases in the 10 Deals under consideration and fraudulent evasion (that connection being accepted by EMJ as having existed).

40 117. Our conclusion on the evidence is that EMJ, through Mr Higgs, knew that all its transactions in Deals 1 to 10 inclusive were connected with fraudulent evasion of VAT and, if this is wrong, EMJ, through Mr Higgs, should have known of that connection in that EMJ, through Mr Higgs, should have known from the circumstances surrounding the transactions that the only reasonable explanation for

them was that they were connected with fraud – and it has turned out that they were, all of them, connected with fraudulent evasion of VAT.

118. Our reasons for this conclusion can be relatively briefly stated.

5 119. We accept (as did EMJ) that the evidence adduced by HMRC proved the existence of an overall scheme to defraud the Revenue, in which the transactions of EMJ – purchases from UK suppliers and supplies to customers established in other EU Member States – were constituent elements.

10 120. We are not, however, prepared to conclude on the evidence before us that simply because there was such an overall scheme and EMJ’s transactions were constituent elements in it, that EMJ, through Mr Higgs, knew or should have known of the connection of its transactions with fraudulent evasion of VAT.

121. We are not prepared to speculate whether or not the overall scheme would have “worked” without all of its participants (including EMJ) having knowledge of its fraudulent object.

15 122. To justify the conclusion that we have reached, we must (and do) accept that the evidence proves relevant facts (objective factors) within the knowledge of Mr Higgs at the time the transactions were entered into, which, alone or in combination, support the conclusion that, on the balance of probabilities, he knew of the connection with fraudulent evasion of VAT, or should have known that the only reasonable  
20 explanation for them was such a connection.

123. As already indicated, in our judgment the evidence does prove relevant facts, which, certainly in combination, prove Mr Higgs’s knowledge of the connection between EMJ’s transactions and fraudulent evasion of VAT, or alternatively that he should have known that the only reasonable explanation for them was such a  
25 connection.

124. Those facts (objective factors) are as follows. We set them out in no particular order of importance or probative value.

30 125. First, we find that it is indeed, as Miss Goldring submitted, noteworthy that EMJ received the same mark-up regardless of the make or quantity of goods traded and regardless of who its counterparties were. The mark-up was, as HMRC have demonstrated, always in the region of 11% to 12% of the VAT liability defaulted on or (in relation to Deals 1 and 2) Wetherby’s output VAT, against which the input tax set off related to a purchase connected to VAT fraud committed by USM IT. The consistency of the mark-up was, or should have been, known to Mr Higgs.

35 126. This consistency is unusual and uncommercial. We accept that there is no commercial reason which can account for the fact that EMJ consistently made far larger profits than any other party in the chains, even when costs of insurance and carriage are taken into account, simply because it was the party making dispatches to other EU Member States. The consistency shows that the transactions which EMJ



entered into were contrived (and we so find) and that EMJ, through Mr Higgs, knew this.

127. This point is connected to the second relevant probative fact. EMJ's profits were at a very high level. This was known by Mr Higgs. Not only were EMJ's profits at a very high level - £122,050 for what amounted to a week's work in deals where EMJ was (as we find Mr Higgs knew) at no commercial risk – but they were at a far higher level than any other profits that Mr Higgs had been able to earn from other activities undertaken by him. Formerly, he had been earning in the region of £20,000 to £30,000 a year. The level of profit from EMJ's wholesale trade in mobile phones and satellite navigation systems was so much higher that it well merited Mr Higg's response of "Hallelujah". So far from being simply a sign that EMJ had fortuitously hit upon an honest trade that was highly lucrative, we find that the fact that EMJ suddenly and immediately earned profits at this high level proves Mr Higgs's knowledge that EMJ's transactions were connected with fraud.

128. Mr Higgs (as he accepted in evidence) knew that the wholesale trade in which he was engaged was rife with fraud at the time of the transactions in issue. He accepted that HMRC's letters to Crouch (written and received between 13 and 21 June 2006) put him on notice that missing traders existed in many of the chains of supply leading to London Mobile. We do not accept his evidence that his understanding of missing trader fraud at the time was that one would only be caught up in it if one traded with a party who went missing or bought or sold goods which did not exist. We find that Mr Higgs understood at the time(s) of all the transactions in issue that it was a characteristic of missing trader fraud that there were links in the chains of supply between fraudulent defaulters and Brokers claiming input tax repayments from HMRC, and that the fraud could and did operate where there were supplies of goods which existed. We find, in particular, that the reason that EMJ entered into Deals 1 and 2, which were in products (satellite navigation systems) in which neither Mr Higgs, nor EMJ, nor Crouch had ever dealt before, and for which EMJ paid by its customer (Freitex) before EMJ had shipped the goods, was that Mr Higgs knew that those transactions were connected with fraud.

129. The third relevant probative fact is that Mr Higgs's connection with Crouch can, in our judgment, only be explained by reference to the fact that Crouch was, in effect, easing EMJ into participation in the fraudulent scheme. It is clear that Crouch was a participant in the fraudulent scheme – all its purchases were from London Mobile. We do not accept that Crouch enabled EMJ to make large profits from business connections which it (Crouch) had established, and in competition with it (Crouch), leaving Mr Higgs to trade "with his blessing" simply because Mr Cook was a lifelong friend of Mr Higgs. Instead, because, as we find, all the transactions concerned were contrived and connected with fraudulent evasion of VAT, it was of no disadvantage to Crouch that EMJ effectively "poached" some of its business and we find that Mr Higgs knew this fact or had the means of knowing that this was the only reasonable explanation for the fact that Crouch let EMJ in on its business enabling EMJ to earn thereby such large profits so easily and without risk. The letter from Crouch to EMJ informing EMJ that Crouch would be happy to trade with EMJ can, in our judgment, only be credibly explained on the basis that both Crouch and EMJ knew that the

business in which both were engaged was contrived and fraudulent. Particular support for these conclusions is found in the evidence that EMJ conducted Deal 9 on the same day (23 June 2006) on which Mr Higgs handled a purchase and sale of an identical number (5,100) of an identical product (Nokia 6280 phones) for Crouch – see: paragraph 31 above. We also find support for these conclusions in the evidence that Mr Cook helped Mr Higgs fill out the documentation necessary for EMJ to open an FCIB account.

130. The fourth relevant probative fact was that Mr Higgs annotated the printout from the IPT website for Cybacomms (EMJ's supplier in Deals 1 and 2) with the telephone and (probably) fax numbers for Team Mobile. Mr Higgs explained this by saying that Team Mobile was a company whose name and telephone and fax numbers he had because Team Mobile had introduced itself to EMJ. This may be so, but it does not explain why Mr Higgs annotated the printout from the IPT website for Cybacomms with these details. Team Mobile was the supplier to Cybacomms in the chains in which Deals 1 and 2 feature. We find that it is not a coincidence that Mr Higgs made this annotation on this particular document. We find on the basis of this evidence that he knew that Team Mobile were the suppliers to Cybacomms. With this knowledge Mr Higgs could have, on his case, arranged for EMJ to deal directly with Team Mobile, thus cutting out Cybacomms and earning a larger profit. But he did not do so. We find that there is no credible explanation for the annotation apart from Mr Higgs's knowledge that Deals 1 and 2 were contrived transactions connected with fraudulent evasion of VAT.

131. The fifth probative fact was that although EMJ's trading pattern was sporadic, mainly clustered around the end of the month, leaving plenty of time for other transactions, Mr Higgs gave no thought to any method of trading other than as a Broker. EMJ could have profitably used this idle time in selling to UK customers or purchasing from suppliers established in other Member States to supply its non-UK customers. But it did not do so. Mr Higgs gave no credible explanation for this fact, and changed his evidence as recorded above. The only reasonable explanation is that Mr Higgs had no intention other than that EMJ should trade in the contrived and fraudulent trade which Crouch was also involved in.

132. The sixth probative fact was that Mr Higgs, as he admitted, did not take adequate care over due diligence – credit checks, visits to customers and suppliers, care over Redhill checks, etc. – despite the commercial necessity for legitimate traders in mobile phones and similar electronic goods to carry out necessary checks in the context that this trade sector was at the time rife with fraud. We find that the reason for this was Mr Higgs's knowledge that due diligence was only required as window dressing for the benefit of HMRC, because in fact the transactions entered into by EMJ were contrived and fraudulent. This is why Mr Higgs said in evidence that he "wished to try and have as much due diligence for HMRC as possible". Mr Higgs's lack of care in the matter of insurance of EMJ's goods is a similarly probative fact for the same reason.

133. Finally, the seventh probative fact was the receipt by EMJ and its dealings with the 'deposit' of £900,000 from H & H. This payment, we find, had no commercial

basis to it. It was intended to be, and was, used by EMJ to fund the outstanding invoices issued to EMJ by London Mobile and Oakleaze respectively. It was received by EMJ the day after Mr Higgs learned that he could not pay those invoices at all because HMRC were conducting an extended verification of EMJ's 05/06 VAT return. We reject Mr Higgs's explanation for the payment, which he had not mentioned in his Witness Statement. We find that the document purporting to be a letter dated 20 July 2006 from H & H to EMJ, which was produced for the first time on 29 January 2013, was not genuine. We consider that the case advanced by EMJ that it had received a deposit of such magnitude for "some goods", which were not described and for which no quantity was given – and in a deal in relation to which there was no paperwork – was not credible. Mr Higgs's explanation suggested extraordinary dealings which were at variance with his evidence as to the way he conducted his trade – first to find stock, and then a customer for the stock found. Furthermore, beyond the doubtful letter of 20 July 2013, there had been no effort by H & H to recover its 'deposit' notwithstanding that no purchase had transpired. Far from returning the 'deposit' to H & H, when there were funds in EMJ's account, Mr Higgs transferred £40,000 to his own NatWest account. The answer to Mr Andrews's point that it would make no commercial sense for the perpetrators to finance the fraudulent VAT themselves is, of course, that the £900,000 paid by H & H to EMJ was (as H & H and others knew it would be) immediately paid on to London Mobile and Oakleaze. The funds were therefore kept within the fraudulent carousel of funds proved by Officer Downer's evidence, and no part of the funds was used to pay VAT to HMRC. All the circumstances surrounding the payment of £900,000 by H & H to EMJ persuade us that Mr Higgs knew that EMJ's transactions were connected with fraudulent evasion of VAT and that he was, in a real sense, a participant in that evasion.

134. As we have said, if we are wrong in our conclusion that EMJ, through Mr Higgs, had actual knowledge of the connection between its transactions and the fraudulent evasion of VAT, we find, on the basis of the evidence, that EMJ, through Mr Higgs, had the means of knowing that the only reasonable explanation for the transactions was that they were so connected.

135. We dismiss the appeal and deny the recovery of the input tax in issue in application of the *Kittel* principle. Further, we order EMJ to pay HMRC's costs of the appeal to be assessed if not agreed.

136. 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.

5

**JOHN WALTERS QC  
TRIBUNAL JUDGE**

**RELEASE DATE: 16 April 2014**