TC04341

Appeal number: MAN/2007/00599

VAT –input tax - MTIC fraud – direct tax losses and losses through contra-traders – whether tax losses established – yes – whether losses due to fraudulent evasion – yes – whether appellants transactions connected to fraudulent losses – yes – whether appellants had knowledge of connection of fraudulent losses – yes – appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

BTS SPECIALISED EQUIPMENT LTD (in liquidation)	**First Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**
NTS SPECIALISED EQUIPMENT LTD	**Second Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: **JUDGE DAVID DEMACK**
MR ALBAN HOLDEN

Sitting in public at The Crown Court Manchester on 25, 26 & 29 November, 2-6, 9-13 & 16-18 December 2013. 8-10 & 13-16 January and 24 & 25 March 2014.

James Pickup QC & Simon Gurney, instructed by Hill Dickinson & Co, Solicitors, Manchester for the Appellant

Mark Cunningham QC & Joshua Shields, instructed by the General Counsel & Solicitor to HM Revenue & Customs, for the Respondents

DECISION

1. INTRODUCTION

1. These are the appeals of BTS Specialised Equipment Limited ("BTS"), a company in liquidation, and NTS Specialised Equipment Limited ("NTS"). BTS, through its liquidator, appeals against decisions of HM Revenue and Customs ("HMRC") contained in letters of 10 May 2007, 15 June 2007, 27 July 2007 and 28 August 2009 denying its entitlement to the right to deduct input tax in relation to various transactions occurring in its monthly VAT periods 04/06, 05/06 and 06/06. NTS appeals against a decision of HMRC contained in a letter of 25 June 2008 denying its entitlement to the right to deduct input tax in relation to transactions occurring in NTS's quarterly VAT period 04/06.

2. In relation to BTS:

(a) the decision in the letter of 10 May 2007 relates to input tax of £1,591,372.35 claimed in respect of 9 deals which took place in April 2006;

(b) the decision in the letter of 15 June 2007 relates to input tax of £5,657,177.94 claimed in respect of 41 deals which took place in May 2006;

(c) the decision in the letter of 27 July 2007 relates to input tax of £4,164,467.54 claimed in respect of 37 deals which took place in June 2006; and

(d) the decision in the letter of 28 August 2009 relates to input tax of £612,955.00 claimed in respect of a further 4 deals which took place in June 2006.

3. In relation to NTS, the decision in the letter of 25 June 2008 relates to input tax in the sum of £3,051,538.75 claimed in respect of 23 deals which took place in the quarter ended April 2006.

4. The input tax sought by the two companies totals £15,077,511.58.

5. In order to consider whether the Appellants were involved in MTIC fraud, HMRC subjected their returns for the VAT periods in question to extended verification. That involved officers using copies of transaction documentation provided by BTS and NTS, and transaction documentation obtained from other traders, to establish "deal chains" for each of the transactions in issue. All the claims were denied on the basis that the director of both companies, Mr Nigel Christopher Tomlinson, knew their transactions were connected to fraud, or should have known that to be the case.

6. In notices of appeal given on 30 May 2007, 10 July 2007, 17 August 2007, 11 July 2008 and 25 September 2009, the Appellants broadly claimed that their transactions did not form part of a scheme or schemes to defraud the public revenue, nor were there features of the transactions that they entered into, and conduct on their part, which demonstrated that they knew, or should have known, that the transactions formed part of such scheme or schemes.

7. BTS did not accept that it deliberately or recklessly ignored factors which indicated that the transactions may have formed part of an overall scheme or schemes to defraud the revenue.

8. In the case of NTS, the company claimed:

(a) that it invested "significant" sums in undertaking sufficient, appropriate and reasonable due diligence procedures and on many occasions it decided not to conduct business with third parties due to their failure to meet its due diligence criteria;

(b) that there was no legal requirement for any trading business to use detailed written contracts;

(c) that there was no legal requirement to record IMEI numbers and historically it had never been directed to do so;

(d) that there was no legal requirement for goods in transit to be insured, and in any event many of the goods were covered by insurance policies of the freight forwarding companies; and

(e) that HMRC had failed to take into account relevant factors regarding the company's trading experience and reputation.

9. In what became the consolidated Statement of Case, HMRC plead that, in relation to the fraud limb of the MTIC test, the Appellants' transactions in the periods in question were connected to the fraudulent evasion of VAT, and that the Appellants knew or, alternatively, should have known of the connection with fraud.

10. Both the two main versions of MTIC fraud and the jargon developed to describe participants therein were helpfully described by Christopher Clarke J in *Red 12 Trading Ltd v HMRC* [2009] EWHC 2563(Ch) as follows:

"2. … The classic way in which the fraud works is as follows. Trader A imports goods, commonly computer chips and mobile telephones, into the United Kingdom from the European Union ('EU'). Such an importation does not require the importer to pay any VAT on the goods. A then sells the goods to B, charging VAT on the transaction. B pays the VAT to A, for which A is bound to account to HMRC. There are then a series of sales from B to C to E (or more). These sales are accounted for in the ordinary way. Thus C will pay B an amount which includes VAT. B will account to HMRC for the VAT it has received from C, but will claim to deduct (as input tax) the output tax that A has charged to B. The same will happen, mutatis mutandis, as between C and D. The company at the end of the chain – E – will then export the goods to a purchaser in the EU. Exports are zero-rated for tax purposes, so trader E will receive no VAT. He will have paid input tax but because the goods have been exported he is entitled to claim it back from HMRC. The chains in question may be quite long. The deals giving rise to them may be effected within a single day. Often none of the traders themselves take delivery of the goods which are held by freight forwarders.

3. The way that the fraud works is that A, the importer, goes missing. It does not account to HMRC for the tax paid to it by B. When HMRC tries to obtain the tax

from A it can neither find A nor any of A's documents. In an alternative version of the fraud (which can take several forms) the fraudster uses the VAT registration details of a genuine and innocent trader, who never sees the tax on the sale to B, with which the fraudster makes off. The effect of A not accounting for the tax to HMRC means that HMRC does not receive the tax that it should. The effect of the exportation at the end of the chain is that HMRC pays out a sum, which represents the total sum of the VAT payable down the chain, without having received the major part of the overall VAT due, namely the amount due on the first intra-UK transaction between A an B. This amount is a profit to the fraudsters and a loss to the Revenue.

4. …

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

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

7. There are variants of the plain vanilla version of the fraud. In one version ('carousel fraud') the goods that have been exported by the broker are subsequently re-imported, either by the original importer, or a different one, and continue down the same or another chain. Another variant is called 'contra-trading', the details of which are explained in paragraphs 9 and 10 of the judgment of Burton J in *R (on the application of Just Fabulous (UK) Ltd) v HMRC* [2008] STC 2123. Goods are sold in a chain ('the dirty chain') through one or more buffer companies to (in the end) the broker ("Broker 1") which exports them, thus generating a claim for repayment. Broker 1 then acquires (actually or purportedly) goods, not necessarily of the same type, but of equivalent value from an EU trader and sells them, usually through one or more buffer companies, to Broker 2 in the UK for a mark up. The effect is that Broker 1 has no claim for repayment of input VAT on the sale to it under the dirty chain, because any such claim is matched by the VAT accountable to HMRC in respect of the sale to Broker 2. On the contrary a small sum may be due to HMRC from Broker 1. The suspicions of HMRC are, by this means, hopefully not aroused. Broker 2 then exports the goods and claims back the total VAT. The overall effect is the same as in the classic version of the fraud; but the exercise has the effect that the party claiming the repayment is not Broker 1 but Broker 2, who is, apparently, part of a chain without a missing trader ('the clean chain'). Broker 2 is party to the fraud."

11. In the instant case, in relation to those transactions alleged to involve a contra-trader, the appellant company concerned is in the position of Broker 2. In relation to other transactions we must also consider, NTS acted as a buffer in dirty chains.

12. HMRC do not accept that in contra-trading cases the chain connected to the appellant is "clean": they assert that it is fraudulent. They observe that the difference between the two chains is that the clean chain does not have a fraudulent loss in it. Nevertheless, for ease of reference, we shall throughout our decision continue to use the expression "clean chain".

13. Mr James Pickup QC and Mr Simon Gurney appeared for the liquidator of BTS and for NTS, and HMRC were represented by Mr Mark Cunningham QC and Mr Joshua Shields.

14. Initially the parties presented us with 27 lever arch files of witness statements and 196 such files of exhibits. Two more files of exhibits were added during the hearing, and we were also presented with three files entitled "Deal Sheets", "Materials Bundle" and "Mr Vincent D'Rozario's Progress Logs". Further evidence of the deals with which we are concerned was included on 3 CD roms.

15. The amended consolidated statement of case and the supplemental statement of case in relation to BTS were served on the CD roms. The CD roms contain supporting materials referred to as Annexes A to L. The contents of the Annexes were corrected and amended by statements of officer Murphy of 8 June 2011 and 21 March 2013.

16. Pursuant to a direction of Judge Bishopp made on 28 September 2010 ("the Direction") Annexes C, F, G, I and K and the deal sheets of Annex H on the CD roms are admissible in evidence of the truth of their contents and are deemed to be agreed by the Appellants..

17. Some of the witness statements were agreed, so that their makers did not give oral evidence. The witness statements in question were those of:

> Andrew Shorrock, Stephen Mills, David Young, Andrew Leatherby, Andrew Adamson, Angela McCalmon, Elizabeth Rowlands, Wayne Conroy, Richard Saxon, Matthew Lee, Huw Gingell, David Berry, Michael Downer, Daniel Outram, Steve Jenner, Des Lewis, Julie Sadler, Stephen Crooks, Andrew Monk, Andrew Siddle, Graham Taylor, David Ball, Jennifer Davies, Martin Evans, Dean Foster, Kulvinder Kumar, Fu Sang Lam, Romaine Lewis, Michael McBrine, Vivian Parsons, Barry Patterson, Kym Richards, Allistair Strachan, Lisa Connelly, Anthony Gray, Susan Tressler, Michael Quartey, Phyllis Mee, Graham Speight, Huw Griffiths, Frank Spackman, Mark Appleby, David Lee, Daniel O'Neill, Stephen Doyle, Daniel Payne, Patricia Westwell, Gail Savage, John Foy, Sue Hirons, Laurence Smith, Verna Gellvear, Heather Arnold, Sarah Allen, Howard Flint, Claire Sharkey, Chris Harbidge, Victoria Clarke, Reginald Broers, Elaine Isaacs, Mark Jarrold, Lynda Baker, Peter Davies, Rebecca Jackson, Pamela Banks, Paul Cole, Wendy Gilbert, Farzana Malik, Karen Cummins, Catherine Clarke and Roderick Guy Stone.

18. The remaining witness statements formed the evidence in chief of the witnesses who appeared before us but, in some cases, for completeness the evidence was updated or added to orally. The witnesses in point, with their respective offices or positions, were:

Nigel Humphries, a specialist officer of HMRC dealing with MTIC fraud

Roger Cooper Murphy, a senior officer of HMRC

David Kenneth Leach, an accountant with HMRC who carried out a review of BTS's rapid increase in turnover

Philip Sarocka ACCA, an accountant with HMRC who carried out a review of work of officer Stephen Crooks

Peter Richard Birchfield, the team manager of HMRC's special investigation appeals and review technical team

Elaine Yvonne Emery, HMRC's assurance officer for First Touch Communications Ltd ("First Touch")

Smita Parikh, an HMRC higher officer who, on Mr Birchfield's instructions prepared a series of charts showing the movement of monies between various traders in the Appellant companies' transaction chains.

Vincent Gregory Mark D'Rozario, HMRC's assurance officer for BTS

Gordon Murray Fyffe, HMRC's assurance officer for a defaulter company, Bullfinch Ltd

Fidelis Mayungbe, HMRC's assurance officer for Brightime Ltd

Matthew Charles Bycroft, an HMRC higher officer responsible for Midwest Communications Ltd ("Midwest")

Ian Michael Simmons, HMRC's assurance officer for Kwality Trading International PLC ("Kwality")

Alan John Ruler, HMRC's assurance officer for Digital Satellite 2000 Ltd which traded under the name of Powerstrip ("Powerstrip")

Graham Taylor, HMRC's assurance officer for C&B Trading (UK) Ltd ("C&B")

Richard Hywel Davies, HMRC's assurance officer for David Jacobs Ltd ("David Jacobs")

Ian Clifford White, HMRC's assurance officer for Epinx Ltd ("Epinx")

Nigel Huw Clarridge, HMRC's assurance officer for Selectwelcome Ltd ("Selectwelcome")

Christopher Alexander Williams, HMRC's assurance officer for Svenson Commodities Ltd ("Svenson Commodities")

Sara Evans, HMRC's assurance officer for NTS

Nigel Christopher Tomlinson, the director of BTS and NTS

Kenneth Peter Edmonds FCA, CTA, the accountant for BTS and NTS

Gary Taylor, a director of PricewaterhouseCoopers, and an expert witness called for HMRC

Nigel Attenborough, an expert witness called for BTS and NTS

19. The files produced to us bore either the prefix WS, indicating that they contained witness statements, or E, indicating that they contained the exhibits referred to in the witness statements. We propose to indicate the files to which we refer by means of their prefixes followed by the relevant page numbers, e.g. E4/111 relates to Exhibit file 4 page 111. In some cases the files contain tabs, and in relation to them we interpose the tab numbers between the file name and the page number, e.g. E5/B/100 relates to Exhibit file 5, tab B, page 100.

20. It is from the whole of the evidence presented to us that we make our findings of fact.

Two-tier contra-schemes

21. The present appeal also involves consideration of what HMRC describe as "Two-tier" contra-schemes. In such schemes they say that the first contra-trader ("Contra 1") operates in the same way as in a single contra-trading scheme. However, it uses an additional source of supply for the goods it sells to its EU customers. The additional source is a second contra-trader ("Contra 2") which also follows the normal single contra-trader pattern of trading in that the net input tax in a third chain is offset against the net output tax in a fourth chain. Contra 1 takes the position of broker for Contra 2's UK suppliers. That results in Contra 2's repayment claim arising from the third chain "shifting up" the chains to Contra 1. However, because Contra 1 is not acting simply as a broker, the claim does not remain there. Contra 1 is itself offsetting the tax liabilities on different types of supply (input tax in the first and fourth chains against output tax in the second chain). Because of the relative values of the first and fourth chains against the second chain, the bulk of the repayment claim is further shifted to the broker sourcing goods from Contra 1. In such a scheme the repayment claim made by the broker is linked partly to the tax loss at the defaulter in the first chain (Contra 1) and partly to the tax loss at the defaulter in the third chain (Contra 2).

2. THE LAW

22. Articles 167 and 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of VAT provide:

> "167 – A right of deduction shall arise at the time the deductible tax becomes charged.
>
> 168 – In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person."

23. Sections 24, 25 and 26 of the Value Added Tax Act 1994 ("VATA") provide:

"24.-(1) Subject to the following provisions of this section, "input tax", in relation to a taxable person, 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; and

(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…"

(6) Regulations may provide-

(a) for VAT on the supply of goods or services to a taxable person, VAT on the acquisition of goods by a taxable person from other member States and VAT paid or payable by a taxable person on the importation of goods from places outside the member States to be treated as his input tax only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases;

25.(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 accounting periods') at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.

(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.

26.(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 in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below."

24. Regulation 29 of the VAT Regulations 1995 provides:

> "29.-(1) Subject to paragraph (2) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable.
>
> (2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of –
>
> (a) a supply from another taxable person, hold the document which is required to be provided under regulation 13; …
>
> provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold, instead of the document or invoice (as the case may require) specified in sub-paragraph (a) … above, such other documentary evidence of the charge to VAT as the Commissioners may direct."

25. Thus, 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, receive a repayment.

26. However, the European Court of Justice ("the ECJ"), in its judgment dated 6 July 2006 in the joined cases *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL* [2008] STC 1537 ("Kittel"), confirmed that, in the context of MTIC fraud, traders who "knew or should have known", that the transactions in which they were engaging were connected to such frauds would not be entitled to reclaim any input tax incurred. In particular, in the *Kittel* judgment the ECJ stated:

> "56. … 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.
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> 57. That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.
>
> 58. In addition, such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them.
>
> 59. Therefore, it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and to do so even where the transaction in question meets the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity'.

> 60. It follows from the foregoing that the answer to the questions must be that where a recipient of a supply of goods is a taxable person who did not and could not know that the transaction concerned was connected with a fraud committed by the seller, Article 17 of the Sixth Directive must be interpreted as meaning that it precludes a rule of national law under which the fact that the contract of sale is void – by reason of a civil law provision which renders that contract incurably void as contrary to public policy for unlawful basis of the contract attributable to the seller – causes that taxable person to lose the right to deduct the VAT he has paid. It is irrelevant in this respect whether the fact that the contract is void is due to fraudulent evasion of VAT or of other fraud.
>
> 61. By contrast, where it is ascertained, having regard to objective factors, that the supply is to a taxable person who knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, it is for the national court to refuse that taxable person entitlement to the right to deduct."

27. Mr Cunningham maintained that paras 56 and 57 of the judgment in *Kittel* showed that it was not the trader's transaction that was the fraudulent one referred to in the former paragraph, but rather the transaction with which his transaction was ultimately connected, however many times further removed. Further, actual participation in the relevant transaction was unnecessary; participation was a matter of deeming. We agree.

28. In *Mobilx, Blue Sphere Global and Calltel v HMRC* [2010] STC 1436 ("Mobilx"), the Court of Appeal (Moses LJ giving judgment) dismissed a submission that the principles enunciated by the ECJ in *Kittel*, applied in the UK required domestic legislation (see paragraph 47 of the *Mobilx* judgment). In paragraph 59 of *Mobilx*, the Court of Appeal formulated the following test and approach for the purposes of the application of the principle in *Kittel*:

> "59. The test in *Kittel* is simple and should not be over-refined. It embraces not only those who knew of the connection [with fraudulent evasion of VAT] but those who 'should have known'. Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in *Kittel*."

29. Mr Cunningham contended that para 59 of *Mobilx* confirmed that HMRC did not have to show that the Appellants were actual participants in the fraudulent evasion of VAT; although HMRC might prove that they were, it was not a necessary part of the case they had to establish. Again, we agree.

30. However, the Court of Appeal emphasised the need for certainty as to the existence of fraud stating that:

"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. That is not the approach of the Court in *Kittel.* In those circumstances I am of the view that it must be established that the trader knew or should have known that by his purchase he was taking part in such a transaction.

. . .

60. The true principle to be derived from *Kittel* does not extend to circumstances in which a taxable person should have known that by his purchase it was more likely than not that his transaction was connected with fraudulent evasion. But a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion."

31. As to the time in identifying a connected fraud the Court said:

"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 have known that his purchase is or will be connected with fraudulent evasion it cannot matter a jot that that evasion precedes or follows the purchase. That trader's knowledge brings him within the category of participant. He is a participant whatever the stage at which the evasion occurs."

32. The Court of Appeal gave further guidance to domestic tribunals as to how to approach the matter of due diligence:

"75. The ultimate question is not whether the trader exercised due diligence but rather whether he should have known that the only reasonable explanation for the circumstances I which his transaction took place was that it was connected to fraudulent evasion of VAT,

. . .

33. We pause there to observe that in his skeleton argument (at paras 2.12 and 2.13), Mr Pickup said, "A supplier/trader must equally be able to rely on the lawfulness of the transaction it carries out (its purchase) without risk in the loss of its right to deduct, when it is in no position – even by exercising commercial care – to identify fraud. There are parameters to the reasonable commercial checks that a trader can make namely that a trader (absent actual knowledge – as a co-conspirator) is limited to questioning his commercial partners. If where exercising due commercial care, a trader would not be able to deduct fraud connected with his transaction, then he should be allowed to deduct his input tax." As Mr Cunningham observed, almost the Appellants' entire defence was that they carried out proper due diligence and that took them into a safe harbour: due diligence was all that was

required. Mr Cunningham added that due diligence was only a factor to be taken into account, and not an escape route. The appeal was not a trial of the Appellants' due diligence, but rather one of their trading. Once more, we agree with Mr Cunningham.

34. Later in its judgment in *Mobilx*, the Court of Appeal provided the following further guidance on the application of the *Kittel* test:

> 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 [Blue Sphere Global] Appeals, tribunals should not unduly focus on the question whether a trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is that his transactions have been or will be connected to fraud. The danger in focussing on the question of due diligence is that it may deflect a tribunal from asking the essential question posed in *Kittel* namely whether the trader should have known that by his purchase he was tasking part in a transaction connected with fraudulent evasion of VAT the circumstances may well establish that he was."

35. Finally, the Court of Appeal said:

> "83. The questions posed in BSG by the Tribunal were important questions which may often need to be asked in relation to the issue of the trader's state of knowledge. I can do no better than repeat the words of Christopher Clarke J in *Red 12 v HMRC* (2009) EWHC 2563:
>
> > '109. Examining individual transactions on their merits does not, however, require them to be regarded in isolation without regard to their attendant circumstances and context. Nor does it require the tribunal to ignore compelling similarities between one transaction and another or preclude the drawing of inferences, where appropriate, from a pattern of transactions of which the individual transaction in question forms part, as to its true nature e.g. that it is part of a fraudulent scheme. The character of an individual transaction may be discerned from material other than the bare facts of the transaction itself, including circumstantial and "similar fact" evidence. That is not to alter its character by reference to earlier or later transactions but to discern it.
> >
> > 110. 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.'"

3. DOES A RIGHT TO A VAT CREDIT EXIST UNTIL IT IS DENIED?

36. Although nothing turns on it, since it was the subject of disagreement between the parties it is appropriate that we deal with the question whether a right to a VAT credit exists until it is denied.

37. In his skeleton argument, Mr Pickup stated at 2.10 that a trader's right to deduct input tax was just that – a right, and one that could be displaced only by HMRC satisfying the tribunal to the appropriate standard that the taxable person was actually a participant (either directly or by reason of what he knew or should have known) in the fraudulent evasion of VAT.

38. Mr Cunningham maintained that it was unnecessary for the taxable person to be an actual participant for the right to deduct to be denied; that was a misunderstanding of both the *Kittel* and *Mobilx* cases, and *Kittel* was an extension of the *Optigen* case. *Optigen Ltd v Commissioners of Customs and Excise* (Decision 18113) ("Optigen"). For that purpose, Mr Cunningham relied on the statement in para 59 of the *Kittel* judgment that the referring court should deny entitlement to the right to deduct where the "taxable person knew or should have known by his purchase he was participating in a transaction connected with the fraudulent evasion of VAT." Mr Cunningham maintained that it was not the trader's transaction to which that sentence referred, but rather the transaction with which his transaction was ultimately connected, however many further times removed. Further, actual participation in the relevant transaction was unnecessary; participation was a matter of deeming. As the ECJ explained at para 56 of its judgment in *Kittel* a person who knew or should have known that he was taking part in a fraudulent transaction "must … be regarded as a participant in that fraud" because he" aids the perpetrators of the fraud and becomes their accomplice "(para 57). And as Moses LJ added at [59] in *Mobilx,* if the only reasonable explanation for the transaction in which the taxpayer was involved was that it was connected with fraud, and it turned out so to be, he should have known of that fact; "he may properly be regarded as a participant for the reasons explained in *Kittel*." In other words, Mr Cunningham submitted, HMRC did not have to establish that the appellants were actual participants; although HMRC might prove they were participants, it was not a necessary part of *Kittel* or *Mobilx.*

39. We accept Mr Cunningham's submission for the reasons he advanced in support of it, and reject that of Mr Pickup.

4. THE CONNECTION OF THE APPELLANTS' TRANSACTIONS IN CONTRA-TRADING CASES WITH THE FRAUDULENT EVASION OF VAT

40. It is common ground that in contra-trading cases it is for HMRC to prove that there is a connection between the Appellants' "clean" transaction chains and the "dirty" chains containing the defaulting traders and the fraudulent evasion of VAT. The Appellants accept that their despatch transactions were connected to the contra-traders' acquisition transactions in the "clean" chains, so that the issue for us is whether they are further connected to the defaulting traders' acquisitions in the "dirty" chains. HMRC maintain that those distinct transaction chains were connected by virtue of the offsetting exercise allegedly undertaken by the contra-traders in the various cells.

41. Mr Cunningham submitted that, given the interpretation of "connection" in case law, any challenge must be unsustainable on the evidence in the present case. He relied on the statement by Sir Andrew Morritt C in *Blue Sphere Global Ltd v Revenue and Customs Commissioners* [2009] STC 2239, where the Chancellor explained that the necessary connection between a broker's deals and tax losses in a contra-trader's chains is a question of fact, and is established simply by the tracing of an appellant's deals to the contra-trader:

> 44 … The nature of any particular necessary connection depends on its context, for example electrical, familial, physical or logical. The relevant context in this case is the scheme for charging and recovering VAT in the member states of the EU. The process of off-setting inputs against outputs in a particular period and accounting for the difference to the relevant revenue authority can connect two or more transactions or chains of transaction in which there is one common party whether or not the commodity sold is the same. If there is a connection in that sense it matters not which transaction or chain came first. Such a connection is entirely consistent with the dicta in *Optigen* and *Kittel* because such connection does not alter the nature of the individual transactions. Nor does it offend against any principle of legal certainty, fiscal neutrality, proportionality or freedom of movement because, by itself, it has no effect.
>
> 45 Given that the clean and dirty chains can be regarded as connected with one another, by the same token the clean chain is connected with any fraudulent evasion of VAT in the dirty chain because, in a case of contra-trading, the right to reclaim enjoyed by [the contra-trader] … in the dirty chain, which is the counterpart of the obligation of [the defaulter] … to account for input tax paid by [the defaulter's customer] …, is transferred to [the broker] … in the clean chain.

42. At [46] the Chancellor added that the control mechanism, which ensures that not all persons in the chains, whether dirty or clean although connected should be refused the deduction of input tax, lies in the need for either direct participation in the fraud or sufficient knowledge of it. There is no need, in assessing whether connection with fraud has been made out, for the purchase to be found to have assisted the fraud.

43. Mr Cunningham further submitted that the evidence in the present case clearly showed that the fraud ran through each transaction chain both individually and collectively; there could realistically be no argument but that the transactions were connected to fraud.

44. Mr Pickup, acknowledged that the necessary connection between a broker's deals and the tax losses in a contra-trader's chains was a question of fact and that was established simply by the tracing of a trader's deals to a contra-trader

5. PARTICIPATION IN CONTRA-TRADING FRAUD

45. In Mr Pickup's submission, whether the Appellants, in their position as the brokers in 'clean' transaction chains, were or were not knowing participants in an overall scheme to defraud was a matter of fact for the tribunal to determine. If it concluded that the Appellants' broker transactions were part of a contra-trading fraud, that did not necessarily mean that the Appellants were knowing participants in the fraud. The fact of connection did not prove knowledge. It was equally possible for the broker to be an innocent dupe. His knowing participation was not a necessary ingredient of either aspect of the fraud.

46. We shall deal with Mr Pickup's submission in that behalf in our conclusion.

6. HMRC's CASE

47. In opening, Mr Cunningham explained HMRC's case as being a "cumulative" one; an accumulation of strikingly uncommercial features, the sum total of which pointed clearly to a connection with fraud, and of Mr Tomlinson knowing of that connection.

48. HMRC sought to build their case on four cumulative layers:

> (1) to show that the Appellants' trading was connected to the fraudulent evasion of VAT;
>
> (2) to show that the trading was part of orchestrated and contrived trading through the medium of cells;
>
> (3) to show that the movement of money within FCIB bank accounts was controlled and orchestrated; and
>
> (4) to show that the Appellants' trading, when viewed contemporaneously, was obviously uncommercial such that they, i.e. Mr Tomlinson, must have known that their trading was connected with fraud.

7. THE FRAUDULENT SCHEMES GENERALLY

49. A particular feature of HMRC's case is that many of the transactions with which we are concerned were conducted through cells or schemes that were collectively organised. They contend that 75 of BTS's 91 transactions were conducted through a scheme identified as Cell 5, 12 were conducted through other cells, and the remaining

4 were non-cell transactions. In the case of NTS, HMRC maintain that four of its 23 transactions were in cells; the remaining 19 were non-cell.

50. In relation to their claim that the Appellants were knowing participants in the fraudulent evasion of VAT, HMRC through officers Humphries and Murphy assert that the majority of the transactions under appeal were part of an overall contrived and orchestrated scheme to defraud HMRC in which all participating traders must have played a knowing part. In cross-examination Mr Humphries did, however, accept that, although unlikely, an innocent trader may have been inserted into the transaction chains.

51. HMRC maintain that a compelling aspect of evidence of the fraud related to the cells within which traders they allege to be fraudulent contra-traders operated. They say that transactions within each of the cells they identified followed a pattern distinct to that cell. They contend that the Appellants' broker transactions fitted those patterns, in each case following the same pattern as that forming the chains of other brokers operating within the cell, and varied according to the cell in which the transactions were conducted.

52. The Appellants concede that HMRC's evidence suggests that there may have been contrivance or artificial trading patterns between certain traders. But they do not admit the nature and extent of such patterns, and whether they constitute the alleged overall scheme or schemes. They put HMRC to strict proof of the scheme, its nature and extent, and whether the evidence establishes the Appellants' knowingly participated in it.

53. In cross-examination, Mr Tomlinson accepted that, looked at objectively, HMRC's evidence established that there was an element of fraud in the overall scheme presented and, with hindsight, he said he could see that at least some of his counter parties in the relevant transaction chains must have been involved in the fraudulent evasion of VAT. He was, however, adamant that he was unaware of any specific counter party having been a knowing party to a fraudulent scheme. He further claimed that, in the relevant transactions, he had been manipulated or duped by other traders themselves engaged in fraud who must have been traders with whom he engaged in business. He recognised that there must have been some form of collusion occurring between the supply side and the customer side of the Appellants' transactions.

54. Against that background, Mr Cunningham submitted that the case we were required to decide was a very narrow one: were the Appellants duped as they claimed to have been?

55. The Appellants' own case on duping was that there was an overall VAT fraud being conducted on their supplier and customer sides with BTS and NTS innocent and unknowing brokers in the middle. However, Mr Pickup did not confine the Appellants' case to that of duping, but rather extended it to challenges against every, or almost every, aspect of HMRC's case.

56. In view of the extent of the evidence we heard and the amount of money at stake in the appeal, we propose to deal with every question raised before us, rather than deal with the appeal solely on the basis that the Appellants were duped.

57. In cases such as the present one, it is for HMRC to prove in respect of every disputed transaction:

(i) that there is a tax loss;

(ii) if so, that tax loss results from the fraudulent evasion of VAT;

(iii) that if there is fraudulent evasion, the Appellants' transactions were connected with the fraud; and

(iv) that if they were connected, the relevant appellant company knew or should have known that its transactions were connected with the fraud.

58. In relation to the deals involving contra 2 traders, HMRC must also prove that the contra-traders were parties to conspiracies involving the defaulters in their transaction chains.

59. In relation to the first question we must answer – whether there was a tax loss – as we earlier said, the Appellants admit that, with the benefit of hindsight and knowledge of the results of HMRC's extended verification programme, the transactions they undertook in the relevant periods of trading fell into HMRC's template of MTIC trading.

60. They further admit that in their direct tax loss transaction chains the UK traders acquiring the goods from the EU failed to account for the VAT collected on the sale of the goods on selling them within the UK, so that in each such case there was a tax loss. They also admit that in the clean chains involving contra-traders, those traders engaged in different, unconnected transactions in which they despatched goods to the EU, which goods had been acquired by traders who had themselves defaulted in accounting to HMRC for the output tax due.

61. The Appellants also admit that there was fraudulent evasion of VAT in their direct tax loss chains except those of Anfell Traders Ltd, and in the broker chains of the alleged contra-traders.

62. As to (iii), connection, the Appellants admit that in their direct tax loss chains their transactions were connected to the fraudulent evasion of VAT

63. However, they do not admit that, where HMRC allege that their transactions were connected with a tax loss by way of a contra-trader, such a connection is established on the evidence, and put HMRC to strict proof of connection.

64. The Appellants also do not admit that at the time of entering into their transactions they knew or should have known that their transactions were connected with the fraudulent evasion of VAT, and put HMRC to proof of knowledge or means of knowledge of connection.

65. The issues for determination are therefore whether HMRC have proved, in the transactions alleged to be connected to a tax loss by way of contra-trading, a connection between the Appellants' transactions and a fraudulent tax loss and, if so, whether at the time the Appellants entered into those transactions they knew, or should have known, of that connection. In relation to the direct tax loss chains, the issue for determination is, in the case of Anfell, whether there was a tax loss and, in all the chains, whether at the time the Appellants entered into those transactions they knew, or should have known, of the connection between their transactions and the fraudulent evasion of VAT.

66. It is common ground that, in determining whether the Appellants knew, or should have known, of the connection between their transactions and the fraudulent evasion of VAT, the relevant state of mind is that of Mr Tomlinson, as director of both Appellants.

67. It is convenient at this juncture to deal with what might be described as the "Anfell point", and we proceed to do so.

8. ANFELL TRADERS LTD

68. Anfell was the UK acquirer in the deal chains in which NTS's deals 5-13, 16, and 18-23 took place. Deals 5-9 were carried out on 13 April 2006, deals 10-13, 16, and 18-20 on 19 April 2006, and deals 21 to 23 on 26 April 2006.

69. Anfell failed to account for VAT it had charged its customers, and was classified as a defaulting trader. Consequently, the company was deregistered for VAT on 18 April 2006, i.e. before NTS deals 10-13, 16, 18-20 and 21-23 were carried out.

70. Although NTS accepted that Anfell was a defaulting trader, it disputed that its, NTS's, deals occasioned any tax loss that could be connected to the company's input tax reclaims in respect of the transactions conducted after 18 April 2006. It claimed that Anfell was deregistered at the time those supplies were made, and thus was unable to charge output tax; the amount purportedly charged as output tax was recoverable as a debt due to the Crown, and not as VAT.

71. The transactions in question resulted in NTS reclaiming the sum of £1,679,475.

72. Anfell was originally registered for VAT as a college providing private tuition. On 6 March 2006 it informed HMRC of various changes to its registration details, a change in director, and that its new business activity was general trading. It wished to change its VAT registration details, but to continue trading using the same VAT registration number. Officer Peter Davies visited Anfell's principal place of business to obtain details of the changes sought and to enquire into information HMRC had obtained indicating that the company was trading in MTIC products. Having done so, and considered the evidence before him, he was not prepared to accept that Anfell's revised business activities met the criteria for transfer of a going concern. Consequently, HMRC deregistered Anfell for VAT.

73. However, Anfell continued trading and purported to charge VAT on supplies using its old registration number. It should, of course, have issued invoices without charging VAT.

74. In three letters to Anfell in the final quarter of 2006, HMRC wrote to it claiming as debts due to the Crown the VAT it had purported to charge on supplies made following its deregistration.

75. On 20 February 2007 HMRC wrote to Anfell amending its effective deregistration date from 18 April 2006 to 1 May 2006. They then withdrew the letters referred to in the last preceding paragraph.

76. Next, HMRC assessed Anfell to VAT covering the deals in deal chains involving NTS. They made two assessments, one on 1 March 2007 in the sum of £18,279,289, and the other on 16 March 2007 in the sum of £5,344,312. The former covered NTS deals 21, 22 and 23, and the latter the eight NTS deals 10-13, 16, and 18-20.

77. It was against that factual background that NTS required HMRC to prove that there was the fraudulent evasion of VAT in the Anfell tax loss chains. The legislation we must consider in dealing with the point is to be found in the following sections of and schedules to VATA.

78. Section 3 of VATA provides that a person is a taxable person while he is, or is required to be, registered under the Act.

79. Pursuant to Schedule 1, paragraph 13 to VATA, where HMRC are satisfied that a registered person has ceased to be registrable, they may cancel his registration with effect from the day on which he so ceased or from such later date as may be agreed between them and him. HMRC "shall not cancel a person's registration unless they are satisfied that it is not a time when that person would be subject to a requirement, or entitled, to be registered under this Act."

80. Section 4 of VATA addresses the "scope of VAT on taxable supplies." It provides that "VAT shall be charged on any supply of goods … made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him."

81. Paragraph 5 of Schedule 11 to VATA provides that:

> (1) VAT due from any person shall be recoverable as a debt due to the Crown.
>
> (2) Where an invoice shows a supply of goods or services as taking place with VAT chargeable on it, there shall be recoverable from the person who issued the invoice an amount equal to that which is shown on the invoices as VAT or, if VAT is not separately shown, to so much of the amount shown as payable as is to be taken as representing VAT on the supply.
>
> (3) Sub-paragraph (2) above applies whether or not –

(a) the invoice is a VAT invoice issued in pursuance of paragraph 2(1) above; or

(b) the supply shown on the invoice actually takes or has taken place, or the amount shown as VAT, or any amount of VAT, is or was chargeable on the supply; or

(c) the person issuing the invoice is a taxable person;

(d) and any sum recoverable from a person under the sub-paragraph shall, if it is in any case VAT be recoverable as such and shall otherwise be recoverable as a debt due to the Crown.

82. Mr Pickup submitted that, as Anfell was not registered for VAT at the time of the relevant supplies to NTS, it was not a taxable person under s.3 of VATA, and therefore was not able to charge output tax on its supplies; the amount shown as VAT on Anfell's invoices was not output tax as defined in s. 24 of VATA, and therefore was not payable to HMRC under s.25 thereof. There was no tax loss caused to HMRC and, consequently, there could be no connection between NTS's despatch transactions and the fraudulent evasion of VAT. Para 5 of Schedule 11 to VATA provided that VAT shown on invoices that was not VAT was recoverable as a debt due to the Crown; and it was on that basis that HMRC wrote to Anfell in 2006 notifying it that the amount shown as VAT on the invoices concerned was owed as a debt to the Crown, rather than an amount of VAT for which it was to be assessed.

83. At the beginning of the hearing, Mr Pickup did, however, concede that all NTS's direct tax loss claims, including those in which Anfell was involved, traced back to defaults. That contrasted with a reservation of the Appellants' position on the Anfell point in previous correspondence. However, he withdrew the concession in his closing submissions, doing so without warning, saying that the earlier withdrawal of it had been due to his "oversight".

84. It is simply not good enough for leading counsel to try to resile from a concession his client has made, particularly where, as here, no notice whatsoever of the intention to do so has been given to the opposing party. Nevertheless rather than deciding whether NTS can resile from its concession, since we are able quickly and easily to deal with the underlying question, we propose to do so. We are grateful to Mr Cunningham for having been able without notice to deal with the matter.

85. In Mr Cunningham's submission, the ECJ judgment in *Kittel* clearly indicated that Mr Pickup's submission should be rejected. Relevantly, at paras 51 and 52 of its judgment, the ECJ said:

> "51 …it is apparent that traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud, be it the fraudulent evasion of VAT *or other fraud*, must be able to rely on the legality of those transactions without the risk of losing their right to deduct the input VAT …
>
> 52 … It is irrelevant in this respect whether the fact that the contract is void is due to fraudulent evasion of VAT *or to other fraud.*

53…

54. As the Court has already observed, preventing tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive …" (Mr Cunningham's emphasis).

86. Thus Mr Cunningham maintained that the notion that a debt due to the Crown was not caught by the *Kittel* principle was belied by the *Kittel* case itself; it was a much wider principle than the extremely technical version Mr Pickup would have us accept. We agree. Plain reading of the relevant paragraphs of *Kittel* is sufficient to enable us so to hold.

87. But we can take further comfort from para 125(2) of the recent judgment of Hildyard J in *Edgeskill Ltd v Comrs of Revenue and Customs* [2014] UKUT 0038 (TCC), where he said:

> "The submission that there was no VAT loss, if the transactions fell out with the scope of VAT for input deduction purposes is untenable. I accept the Commissioners' argument that the fact that a defaulting trader's transaction is outside the scope of VAT does not mean that he has not charged and received an amount of tax due to HM Treasury: there was still a tax loss created by the defaulting traders whether or not their own transactions were within the scope of VAT."

88. In our judgment, it is clear on the authorities that there is no merit in Mr Pickup's submission, and we reject it. Having done so, it follows that we proceed on the basis that in all NTS's direct tax loss cases the tax loss was occasioned by a defaulter.

9. THE APPELLANTS' BACKGROUND

89. Before we consider the cell schemes on which HMRC rely, we propose to disclose the Appellants' background leading to and their involvement in the wholesale trade in mobile phones. Evidence was given to us by Mr Tomlinson and Mr Edmonds, the latter having been responsible for carrying out most of the Appellants' due diligence. It took the following form.

90. Throughout his business life Mr Tomlinson has been engaged in the telecommunications industry. In 1988 he commenced employment with NAS Ltd as general manager of its branch at Hyde. That company's principal business was the retailing of car accessories, including car phone units. It was part of Mr Tomlinson's duties within NAS to ascertain how the mobile phone industry operated. In the process he began to acquire specialist knowledge, attending a number of training courses arranged by, amongst others, Vodafone.

91. By the early 1990's NAS had moved its focus to the growing personal mobile phone trade, a leading player in which was Martin Dawes Telecom, an accredited Vodafone distributor.

92. In 1993 Mr Tomlinson decided to set up in business on his own account trading in the wholesale distribution of mobile phone handsets. Together with a colleague, Mr Paul Bradshaw, he established BT Specialised Equipment Ltd. The company initially operated through one retail outlet but later expanded to three shops.

93. Mr Tomlinson became an accredited agent of Phones 4U. As part of his commitment, he was required to sign up about 100 customers per month. He supplemented his income by trading handsets directly to the trade. BT Specialised Equipment Ltd registered for VAT from 6 March 1994, the business engaging in the "retailing of cellular equipment and in-car accessories". Mr Tomlinson concentrated on retail sales from the shop while Mr Bradshaw marketed directly to local businesses. Delays in receipt of commissions from Phones 4U meant that trading in handsets played a larger and larger part in the running of the business. Once mobile network operators such as Vodafone and Orange opened retail shops in high streets small independent operators such as BT Specialised Equipment Ltd could not compete and many were forced to close.

BTS

94. As the business of BT Specialised Equipment Ltd expanded it became obvious to Mr Tomlinson that the company would require further capital. He and Mr Bradshaw decided to approach the Royal Bank of Scotland in Stockport for funds. The bank offered to help but required security in the form of a mortgage on each director's home. Mr Bradshaw was not prepared to enter into such a commitment, leaving Mr Tomlinson to decide how to proceed. Mr Tomlinson then formed BTS, the company being incorporated on 23 May 1996. Mr Tomlinson remained the company's director until it went into liquidation in 2007, and his wife was the company secretary. The VAT registration number of BT Specialised Equipment Ltd was transferred to BTS in August 1996.

95. At about that time Phones 4U moved into direct retailing. The company approached Mr Tomlinson and invited him to become a franchisee selling Vodafone products. He considered the targets set by the company to be too high and ended the relationship with Phones 4U to concentrate on trading in mobile phones.

96. Whilst trade in mobile phones had steadily expanded between 1994 and 1998, the introduction of pay-as-you-go in 1996 had led to a significant increase in demand for phones. In the same period the retail market became dominated by multiple retailers such as Carphone Warehouse and Phones 4U. At the same time traders in the wholesale distribution market were in a position to take advantage of the technological developments on handsets. There were opportunities to take advantage of price differentials between markets which Mr Tomlinson sought to take advantage of.

97. In BTS's early trading years Mr Tomlinson traded in volumes of between 50 to 100 handsets per transaction. But as demand for phones grew the volumes in which he traded rose. However, to achieve a reasonable return on capital, he said he found it necessary to trade in larger quantities to ensure the commercial viability of BTS.

98. Between 1996 and 2002 Mr Tomlinson claimed to have developed a wide range of contacts in the mobile phone market. He said his method of trading in those years was exactly the same as it was between 2003 and 2006, and as it substantially remains for NTS today, save for the introduction of the reverse charge in 2007. He also claimed the phones he currently trades not only to have a market within the UK and the EU, but also in the middle and far east. He did not further develop his claim to continue to trade as he did in earlier years, nor did he produce any corroborative evidence as to that matter. In those circumstances, we are unwilling to accept his evidence.

99. On formation, Mr Tomlinson was the sole (100%) shareholder in BTS. On 28 March 2001 he sold his shares in the company to Blue Moon Holdings Limited ("Blue Moon"). Mr Tomlinson was at all material times, and remains, the sole owner of the entirety of the issued share capital in Blue Moon. He and Andrea Tomlinson are respectively the director and secretary of that company. Blue Moon has three other wholly-owned subsidiary companies, namely Browns Bistro Limited, Scotia Trading Services and NTS. BTS was wound up on 26 November 2007 on the petition of a creditor, and the company's VAT registration was cancelled with effect on 6 December 2007.

100. In relation to period 12/02, BTS made an input tax repayment claim. It was based on the company having made a standard-rated purchase of phones in the UK, followed by a sale to a customer in the EU in a zero-rated supply. HMRC submitted its claim to extended verification. They rejected it on the basis that the sums claimed were not for amounts which were input tax within s.24 VATA, and were not allowable amounts of input tax within s. 26 of VATA. On a similar basis, HMRC later rejected an input tax repayment claim by BTS for period 11/02. To recover the input tax BTS had offset against its liability to VAT in periods 12/02 and 11/02, on 26 June 2003 HMRC made an assessment for period 12/02 in the sum of £105,420, and on 9 October 2003 one for period 11/02 in the sum of £93,747.50.

101. BTS appealed both assessments, claiming HMRC's decisions to be "incorrect". The appeals were subsequently consolidated and, in the consolidated statement of case, HMRC disclosed that the goods the subject of the appeals had been supplied in a series of transactions in the UK, all of which were standard rated for VAT purposes and took place on the same day, until they eventually reached BTS. They had then been exported to customers in the EU in zero-rated supplies. Consequently, judged objectively, HMRC claimed the relevant sales and purchases were devoid of economic substance and were not part of any economic activity.

102. In the cases of *Bondhouse Ltd v Commissioners of Customs and Excise* (Decision 18100) and *Optigen Ltd v Commissioners of Customs and Excise* (Decision 18113) two VAT and Duties Tribunals separately held, in circumstances very similar to those in BTS's case, that HMRC were right; the sales and purchases of phones were devoid of economic substance and were not part of any economic activity. The tribunals dismissed the traders' appeals. Their decisions were appealed to the European Court of Justice ("the ECJ"), and BTS's appeal was stood over the ECJ judgment.

103. Mr Tomlinson knew that unless and until the appeals were determined in the company's favour it would not have the liquidity to trade. It was apparent to him that the "*Bond House* problem" would not be resolved quickly. Nevertheless, he said he did not want to end his involvement in the mobile phone sector given the experience he had and his range of contacts. However, for him to continue, since he was reliant upon regular input tax repayments for working capital, he would either have to refinance BTS or, alternatively, re-enter the market with a new company.

104. He considered using factoring services provided by Barclays Bank. The bank was prepared to advance some 85% of the total value of input tax repayment reclaims to fund further trading but did not wish to continue to fund BTS given the existence of the VAT assessments and the fact that HMRC indicated their intention to offset those assessments and any further repayment claims BTS made against the company's outstanding corporation tax claim for trading expenses. Consequently, the bank suggested that he form a new company through which to trade.

105. In the event of providing factoring services Barclays insisted on a one off fee of £20,000 plus VAT and a service charge of 0.6% of the total VAT repayment due in any given month. Mr Tomlinson considered that too high a price to pay and consequently looked for alternative sources of funding. However, at that time the wholesale refusal by HMRC to repay traders' input tax repayment claims not only in his opinion significantly reduced market volume but also meant that investors and finance houses were reluctant to provide funding. Mr Tomlinson further claimed that it was in the interests of existing traders to fund other traders to promote market liquidity. He therefore discussed potential funding with fellow phone traders including Re Cellular U.K. Limited and Britwap LDA, a Portuguese trader, both having indicated that they would be willing to support a new venture were he minded to embark on one.

106. Mr Tomlinson agreed with the two companies that each would advance £50,000 should it be necessary to enable a new company to trade. No formal agreement was entered into, Mr Tomlinson claiming that the arrangement was an understanding between established business colleagues that did not require formalisation. The understanding provided Mr Tomlinson with the necessary comfort to permit a new company to begin trading on a limited basis. In the event he found it unnecessary to take up those funding offers.

107. The *Optigen* appeal was listed for hearing with that of *Bond House*. In the *Optigen* case, as we shall hereafter call the joined case, before the ECJ the Advocate General opined that a taxable person who did not and could not know that a transaction which was connected to fraud and/or lacked any economic substance could not be denied the benefit of the right to deduct.

108. On the Advocate General's opinion being delivered on 16 February 2005, HMRC, recognising that the ECJ would almost certainly follow his opinion, started to make repayment of claims made by traders that had been withheld on a non-economic substance basis, and consented to appeals made to the tribunal being allowed.

109. On 12 January 2006 the ECJ gave judgment in *Optigen*, essentially confirming the Advocate General's opinion. Following release of that judgment, both BTS and NTS were allowed the credits they had taken, the assessments made against them were discharged, and their accounts with HMRC were adjusted accordingly.

110. We should record that the statements of case prepared for the appeals of both Mr Tomlinson's companies included full details of how HMRC claimed carousel fraud to work, and set out in full the chains of transactions in which the relevant company was involved. Consequently, Mr Tomlinson could have been in no doubt as to what MTIC fraud was, how fraudsters operated and the steps necessarily being taken by HMRC to prevent it occurring.

NTS

111. NTS was incorporated on 10 June 2003 as a wholly owned subsidiary of Blue Moon. Mr Tomlinson claimed that all the events leading to its formation, its rationale and funding were communicated to HMRC in a meeting on 25 September 2003 at the offices of Mr Edmonds. Mr Tomlinson explained to Mr D'Rozario as BTS's assurance officer that NTS intended to follow the same trading pattern as that for BTS, i.e. to purchase mobile phones from UK suppliers and to export them to EU customers. He also stated that in the future NTS intended to trade with companies in South Korea and Dubai.

112. At the same meeting Mr Tomlinson and Mr Edmonds discussed with Mr D'Rozario the threat of MTIC fraud within the mobile phone sector and the methods NTS proposed to adopt to minimise the risk of the company becoming involved in it. The methods included the use of a freight forwarder to transport the goods, payment by telegraphic transfer; and NTS operating both a sterling and Euro account to accommodate customers from the Eurozone. Mr Tomlinson said he intended to insist on 100% IMEI scanning, to arrange insurance through the freight forwarder instructed, and stated that he would sign up to the Memorandum of Understanding which a number of mobile phone wholesalers had entered into with HMRC.

113. Subsequently, it was claimed that the Appellants had not entered into the Memorandum of Understanding as they had not been provided with a copy of it. We should also record that, on a date unknown but prior to period with which we are concerned, the Appellants ceased to record the IMEI numbers of phones, Mr Tomlinson saying that they did so as HMRC did not ask to see their records of them and the operation was expensive (about 10p per handset was quoted by Mr Tomlinson).

114. NTS was registered for VAT on 7 October 2003 its registration being effective from 14 August 2003.

115. Despite the cash flow difficulties encountered by all mobile phone traders resulting from HMRC acting on the *Optigen* decision and refusing to meet input tax repayment claims, Mr Tomlinson maintained that the global market for mobiles phones continued to expand.

116. In 2003 NTS obtained a short term loan of £25,000 from Pacific Communications to enable it to begin trading. It continued to trade throughout the remainder of 2003. During that year BTS was dormant, it having no cash; as we have said, it could not trade until the *Optigen* decision was effectively reversed.

117. On 17 December 2003 Mr Edmonds, acting for NTS, requested that the company be allowed to make monthly returns to assist its cash flow since an increasing amount of its trade was exporting to the EU. The request was refused.

118. For period 02/04 NTS submitted a VAT repayment return to HMRC in the sum of £65,613.15. The return was selected for full verification and on 3 June 2004 HMRC notified Edmonds & Co. that one of the traders NTS had dealt with, Excalibor, had not traded since October 2003. Nevertheless, HMRC's Redhill office, which was established specifically to deal with the verification of trades in MTIC goods, confirmed that Excalibor's VAT number was valid at the time of its transaction with NTS.

119. On 8 July 2004 HMRC concluded their verification of NTS's 02/04 return and decided that its transactions had "no economic substance". As a result, on 3 August 2004 they notified it that they were denying its repayment claim. It appealed the decision, but having little working capital to continue trading, and against a background of HMRC having generally denied wholesalers their own repayment claims, trading ground to a halt. Again the appeal was stood over the decision of the ECJ in *Optigen*.

120. Due to "uncertainty" in the wholesale market arising from the tribunal decisions in *Optigen* and *Bond House*, NTS did not trade between February and October 2004. It resumed trading in October 2004, and in the following accounting period its turnover was some £728,500. The company's turnover gradually increased between February and December 2005, reaching a peak of over £14 million in July before declining towards the end of that year. Turnover again increased in what Mr Tomlinson maintained was a "vibrant market" early in 2006, but trading was abruptly halted by HMRC's policy of extended verification and their denial of the input tax repayment claim for period 04/06. Mr Tomlinson claimed that that had a catastrophic effect on the ability of NTS and other traders in the market resulting in their having to stop trading.

121. Mr Tomlinson claimed to have welcomed the introduction of the reverse charge in June 2007saying that he accepted it as a guarantee that the sector would go forward free from fraud, and seeing it as an opportunity to continue to pursue his business activities. NTS resumed trading in 2007 and has continued to trade in the wholesale mobile phone market, albeit on a very much smaller scale than in 2006, to the present day.

NTS/BTS

122. Faced with what Mr Tomlinson described as a "dilemma" on the Advocate General's opinion in *Optigen* being released, and it becoming apparent to mobile

phone traders that the ECJ would reverse the tribunals' decisions, he claimed to have had to decide whether to dissolve NTS and trade solely through BTS or trade through both companies in tandem. In the event he decided it was more sensible to continue to trade through both companies. He gave his reason for so deciding as that each company was on a different VAT stagger. BTS was on monthly returns whereas NTS was on quarterly returns. By entering NTS into BTS's deal chains he could improve cash flow. By purchasing from NTS, BTS could remit VAT which NTS then held as output tax to be paid to HMRC no later than one month following its return date – a date that could be four months after a transaction. The presence of NTS in the deal chains gave Mr Tomlinson an opportunity to invest the NTS output tax in further transactions. NTS was always able to pay its output tax, but both NTS and BTS had more working capital available.

Process of extended verification

123. From 1 May 2006 HMRC greatly extended their verification programme of input tax repayment claims of large numbers of wholesale traders in CPUs and mobile phones, effectively withholding the claims until they had determined the extent to which (if any) they considered their sales had been tainted by MTIC fraud. BTS submitted VAT returns for the VAT periods 04/06, 05/06 and 06/06, in the usual way; and NTS submitted its VAT return for the quarterly VAT period ending 30 April 2006. The returns submitted by the Appellants were selected for in-depth verification due to the large repayments sought, and HMRC conducted detailed enquiries into the build-up of the figures on the returns and traced the transactions back through the supply chains.

124. Following completion of the verification process, being satisfied that the Appellants' claims were tainted with fraud, HMRC issued the decisions under appeal denying entitlement to the right to deduct input tax.

Funding of the Appellants

125. As the Appellants were not required to make payment to their suppliers until they had been paid by their customers, the financial risks they faced were minimal. They did, however, require cash to finance the VAT on goods they purchased and which were then exported in zero-rated supplies. The finance they required was arranged in the following way.

126. In May 2005 Mr Tomlinson met representatives of Desert Wing LLC at a trade fair in Dubai. They expressed an interest in funding the Appellants as established traders in technology stock. BTS entered into an agreement with Desert Wing whereby it agreed to provide a drawdown facility for BTS's use in mobile phone trading in return for a percentage return on the monies drawdown. BTS started to take advantage of the facility in the autumn of 2005. By then Mr Tomlinson believed that BTS would receive repayment of the input tax it had been denied, so that the company resumed trading. Mr Murphy confirmed that he had seen the loan agreement between the two companies, and we were provided with a schedule of advances and repayments which established a pattern of trading between them. A second agreement, made in May 2006, contained the facility for any sums outstanding under

the first agreement to be rolled forward. Desert Wing is a creditor in BTS's liquidation.

127. In February and June 2006 BTS was lent sums of £250,000 and £300,000 by Afzal Khan and 3 Cuba Real Estate. The loans were not subject to interest, but rather to profit sharing calculated in terms of the business operation of BTS. The agreement with Mr Khan operated on the basis of a cash injection to allow BTS to trade pending repayment of its input tax, and represented a 66:33 division of profits in his favour.

128. The first loan of £250,000 made on 7 February 2006, was repaid on 5 June 2006, together with a premium of £60,000. But BTS could not repay the later loan of £300,000 as its repayment claim for period 06/06 was subjected to extended verification. Subsequently, Mr Khan successfully petitioned for the winding up of BTS on the basis of its failure to repay the loan.

129. Mr Khan lent a further £250,000 to NTS on 31 March 2006, the monies being paid to the company via a business associate of Mr Tomlinson, one David Pilkington. Because NTS was denied its right to deduct VAT on its sales to EU customers in 04/06 the loan has not been repaid. Mr Khan has taken civil proceedings to recover the monies lent against Mr Tomlinson and Mr Pilkington.

10. THE TRADING MODEL OF BTS AND NTS

130. We then proceed to explain the trading model of BTS and NTS. Mr Tomlinson claimed the market in which the Appellants traded in the appeal period was very competitive and involved a large number of traders. Implicitly, he claimed that in the Appellants' dealings time was of the essence.

131. Mr Tomlinson described himself and Mr Campbell, BTS's only employee, on a general trading day as being in contact by phone and fax with suppliers to confirm stock availability and the location of goods, and with customers regarding their stock requirements. He said that contact with both suppliers and customers could be initiated by either potential party to a deal, and that negotiations were generally started by telephone. Prices and product descriptions quoted by potential counter parties were recorded on a whiteboard in the office and on sheets of paper. Mr Tomlinson added that attached to the whiteboard was a list of traders with which the appellant companies were prepared to trade, they having met his due diligence criteria. No corroborative evidence was adduced to confirm that position. He further added that the whiteboard was updated throughout the day to show the current position as to availability of stock and customers' requirements. His companies "usually traded in the latest products", and sought to keep up to date with which products were attracting the most interest.

132. Mr Cunningham challenged Mr Tomlinson's evidence in that regard as "rubbish", observing that on the latter's own admission fraudsters successfully manipulated him on every occasion. The cross-examination, critically in our judgment, then proceeded as follows:

"C. Where is the evidence to support this? Where are your jottings? Where are the suppliers and customers who would testify to this description of your trading?

T. There are no jottings. We didn't keep any records. We weren't required to keep any jottings or post-it notes of negotiations. I didn't take pictures of our dry whiteboard on a daily basis to show.

C. No, there is nothing, is there … There is your say so and nothing else at all to confirm that this all went on.

T. There is my honesty, Mr Cunningham."

133. We accept Mr Tomlinson's admissions as to not keeping records, jottings and notes of negotiations as fact. We shall deal with the matter of Mr Tomlinson's honesty in some detail later, and for the present confine ourselves carefully to note that he himself raised it as central to the Appellants' case

134. A little later in cross-examination, following a claim by Mr Tomlinson to have been "a victim" in that he had been duped, the exchange again in our opinion significantly, continued:

"C. Can you think of any reason why a successful and clever fraudster would allow a free agent into his fraud?

…

T. I can't think of any reason, no."

135. The Appellants required their suppliers to provide a suppliers' declaration form saying that they had purchased the phones they were selling. Mr Tomlinson provided very little information about the way in which he and Mr Campbell went about identifying possible purchases and sales, of reaching agreement with suppliers and customers, and of creating and processing the related documentation. Whilst a lack of absence of evidence is not conclusive, we must record that the Appellants produced nothing to counter HMRC's contention that they were trading in contrived markets.

136. The Appellants undertook "back-to-back" trades, Mr Tomlinson implicitly claiming that expression to include not only consignments disposed of as a whole but also those split on sale but sold on a single day. He maintained that such dealing protected his companies in that in customer led deals it agreed no purchases until corresponding sales were agreed, and in supplier led ones arranged no sales until supplies had been secured. Thus there was no possibility of either company being left with stock on a deal being completed.

137. Mr Tomlinson also contended that periodically Nokia reduced the prices of certain of its products, and issued a credit note reflecting any price reduction to each of its agents holding the particular model(s) concerned. As a result of his extensive experience of the mobile phone market, he said it was unnecessary for him to record emerging information; he could take advantage of such situations and predict movements within the market. We were presented with no records to confirm his

evidence as to his taking advantage of emerging information and, in its absence, are not prepared to accept it.

138. Mr Tomlinson also claimed that where more than one deal was available to him he would consider a number of factors before deciding which deal to carry out. Perhaps the most important was the profit that could be obtained. Another factor he said he would take into account was the situation of the goods, i.e. where they were held and by whom. BTS and NTS had accounts with some freight forwarders but not all, and he did not wish to incur the expense of moving stock from one freight forwarder to another, so that if a deal were on offer including stock at a freight forwarder with which the Appellants had an account it would be preferred to one involving stock at a forwarder not so qualifying. We might add that since in every transaction with which we are concerned whilst in the UK stock remained with the UK freight forwarder holding it for the trader identified as the head of the chain reconstructed by HMRC, i.e. the UK acquirer, Mr Tomlinson's claim was irrelevant.

139. The Appellants never held stock themselves, nor did Mr Tomlinson, Mr Campbell or Mr Edmonds ever personally inspect stock they had agreed to purchase.

140. Mr Tomlinson claimed further to take into account the identity of the freight forwarder nominated by a customer, and said that it was important whether there was an agreement in place between the UK freight forwarder holding stock and the EU freight forwarder nominated by the customer. He did not explain what evidence he sought as to the existence of such an agreement; certainly none was produced to us and in the absence of any such agreement, we reject the claim.

141. The only documents put before us from the freight forwarders holding stock whilst phones were in the UK were some inspection reports on the stock, invoices for inspection of it and documents relating to its transport to destinations in the EU. We thus had no confirmation to the Appellants that the forwarders held the stock being traded.

142. Nor were we provided with any instructions to the Appellants from suppliers or their freight forwarders.

11. MR TOMLINSON'S KNOWLEDGE OF MTIC FRAUD

143. HMRC contend that Mr Tomlinson contemporaneously knew that the only reasonable explanation for his trading was fraud. They rely for the purpose on a number of factors.

144. By letter of 22 January 2002 HMRC informed Mr Tomlinson that 13 of his suppliers had to that date been identified as missing traders and had, between them, failed to account to HMRC for VAT in excess of £15 million.

145. Mr Tomlinson was informed that MTIC fraud had infected BTS's trading. Between 11 March 2002 and 10 March 2006 HMRC sent it 14 veto letters. Each letter stated that either a UK supplier or EU customer BTS had previously validated with HMRC Redhill had been removed from the VAT register.

146. On 26 February 2003, Mr D'Rozario, as assurance officer for BTS, held a meeting with Mr Tomlinson and Mr Edmonds to discuss BTS's VAT repayment claims for periods 11/02 and 12/02. At that meeting Mr Edmonds said that he thought HMRC could perform better in undertaking more appropriate checks. Mr D'Rozario recorded in his progress log "… it is the trader's responsibility to undertake all due diligence checks." The question of BTS providing security for the tax on its future supplies was discussed, but Mr Tomlinson said that it would cost the company approximately £1 million and was therefore not feasible. It would appear that HMRC did not pursue the question of provision for security.

147. On 25 September 2003 Mr D'Rozario paid a pre-registration visit to NTS. During it Mr Tomlinson undertook to maintain records of all IMEI numbers of telephones in which BTS and NTS traded, and to enter into the Memorandum of Understanding that a number of major traders in the wholesale phone market had entered into with HMRC. Mr D'Rozario noted that Mr Tomlinson was provided with a copy of Public Notice 726. On a date not disclosed to us, but admitted by Mr Tomlinson to have been before the appeal period, the Appellants ceased to record the IMEI numbers of the phones in which they dealt.

148. Mr Tomlinson acknowledged having received Public Notice 726 in September 2003 and having read it. That Notice was published in August 2003. It concerns the operation of s.77A VATA and explains the ability that section gives HMRC to impose liability on a trader receiving supplies for the VAT payable by a supplier if the recipient knew, or had the means of knowing, that the supplier or any previous supplier had defaulted in the payment of VAT.

149. The Notice describes MTIC fraud as a "systematic criminal attack on the VAT system". 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 contains "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."

150. In evidence, Mr Tomlinson claimed that as a trader he had knowledge only of his own suppliers and customers; he knew no one above or below them in the deal chains. He accepted that Notice 726, which he claimed to have read and understood, required him to make a judgment on the integrity of the whole supply chain, but said that he could make a judgment only on his own counterparties; he "had to believe" that his counterparties were doing their own due diligence on their own counterparties and that correct behaviour was taking place throughout each chain. That, he maintained, amounted to the Appellants taking reasonable steps to ensure that they were not involved in MTIC fraud.

151. Mr Tomlinson said he understood that Notice 726 provided for the possibility of the Appellants being jointly and severally liable for VAT on previous supplies. He

further admitted that the import of goods from the EU formed the first part of the MTIC template, and that wholesaling of goods back to the EU formed the second part of the template

152. Notwithstanding Mr Tomlinson's familiarity with Notice 726, he claimed not to have realised that in selling on phones to customers in the EU, he was completing the MTIC model.

153. We were presented with a significant volume of material showing the due diligence said to have been carried out by the Appellants on their customers. We shall later deal with that material. However, we record that they carried out no due diligence checks on their suppliers, the UK freight forwarders who held goods whilst they were in the UK, or the EU freight forwarders to whom the goods were shipped on their being sold to EU customers.

Discussion

154. It is plain, indeed we regard the evidence as overwhelming, that throughout the periods concerned in the appeal the Appellants in the form of Mr Tomlinson knew that there was fraud in the wholesale mobile phone industry, and that the fraud involved an importer of phones defaulting on its VAT liability on selling the phones to another UK trader. He also knew that the fraud was fed by the sale of phones in a chain of transactions within the UK and by the export by brokers such as the Appellants. He was further aware of the possibility that their purchases could be connected to a fraud committed by a trader who was not the Appellants immediate supplier. He had been informed that the fraud was widespread, involved very large sums of money, and that HMRC were extremely concerned about it.

155. We are simply unable to accept his claim to have "had to believe" that the Appellants' counterparties in deals were doing their own due diligence: the claim completely ignores all the advice offered in Notice 726.

156. Whilst Mr Tomlinson could claim that the information he had was insufficient for him to conclude that every transaction the Appellants entered into was connected with fraud, he must have known that the information he had indicated that fraud might be present in each one, and that he should consider that possibility in the forefront of any unusual factors that might emerge in their transactions.

157. That HMRC did not apply s. 77A could not be said to have afforded the Appellants any comfort, for the operation of that section relies on similar factual conclusions before HMRC's reliance on it. Delays were only to be expected before the section was invoked.

12. THE APPELLANTS' TRADING IN THE APPEAL PERIODS

BTS

Period 04/06

158. In period 04/06, BTS carried out 10 broker deals, of which 9 are under appeal. The deal sheets relating to those 9 deals appear in Annex H of the CD Rom, and pursuant to the Direction are deemed to be evidence of the truth of their contents and agreed.

159. Four of the deals appealed led directly back to the defaulter C&B (deal sheets at Annex C of the CD rom). Pursuant to the Direction the deal sheets are deemed to be evidence of the truth of their contents and agreed by BTS. Evidence of the tax loss in those chains was provided by Graham Taylor [WS9/114].

160. The remaining five deals led back to fraudulent tax losses through chains leading back to contra-traders. The contra-traders identified by HMRC were Svenson Commodities (4 deals) (deal sheets at Annex D) and Powerstrip (1 deal) (deal sheets also at Annex D). Those traders entered into transactions which led directly back to tax losses. The traders also entered into transactions which led back to tax losses through other contra-traders. HMRC maintain that those deals were part of a broader scheme to defraud the revenue. That scheme was referred to in the documents as "Cell 5". The scheme, and the relevant tax losses, are discussed below under that heading.

161. BTS's final broker deal in the period was a purchase from an EU supplier and sale to an EU customer, which, pursuant to the triangulation rules, was not liable to UK VAT. As such, no denial was issued in relation to that deal, and it is not under appeal.

Period 05/06

162. In period 05/06, BTS carried out 45 deals, of which 41 are under appeal. The deal sheets relating to those 41 deals also appear in Annex H of the CD Rom, and pursuant to the Direction are deemed to be evidence of the truth of their contents and agreed.

163. Thirty eight of the 41 appealed deals were broker deals that led back to tax losses through Svenson Commodities (5 deals), Powerstrip (10 deals), David Jacobs (14 deals) (deal sheets at Annex D), Selectwelcome (5 deals) (deal sheets also at Annex D) and TC Catering Supplies Limited ("TCCS") (4 deals) (deal sheets at Annex F). HMRC maintain that those transactions were within the Cell 5 scheme, and again the tax losses are dealt with in more detail below under that heading.

164. Three were broker deals that traced back to the fraudulent defaulter Eutex Limited ("Eutex") (deal sheets at Annex E). Evidence of the tax loss was provided by Andrew Siddle [WS9/ 103].

165. The remaining 4 deals were acquisition deals. As such, no denial was issued in relation to them and the deals were not appealed. The effect of those deals was to reduce the VAT claim in relation to the 3 broker deals mentioned in the last preceding paragraph. HMRC maintain that BTS acted as a contra-trader in relation to those deals, and that they formed part of a broader scheme to defraud the revenue – a scheme distinct from Cell 5, and which is also dealt with in more detail below.

Period 06/06

166. BTS carried out 41 deals in period 06/06, all of which are under appeal. The deal sheets relating to them again appear in Annex H of the CD Rom, and pursuant to the Direction are deemed to be evidence of the truth of their contents and agreed. All of the deals traced back to fraudulent defaulters through alleged contra-traders.

167. Thirty-two were broker deals which led back to tax losses through Powerstrip (15 deals) and TCCS (17 deals) (deal sheets at Annex G). HMRC maintain that those transactions were within the Cell 5 scheme, and the tax losses are dealt with in detail below under that heading.

168. The remaining 9 deals were also broker deals that led back to tax losses. They did so through the alleged contra-traders Epinx (5 deals) and Kwality (4 deals) (deal sheets of both companies at Annex H). Those 9 deals were said to form part of an overall scheme to defraud the public revenue which was separate from Cell 5, and which HMRC say operated with the knowing participation of all involved, including BTS. Beside Epinx and Kwality, this scheme also involved the contra-traders A-Z Mobile Accessories Ltd, Intertrade Worldwide Limited, S&R International ltd, Waterfire Limited, Highfield Distribution (UK) Limited t/a Celex UK, Prime Telecom Limited, Skywell UK Limited and Worldwide Distribution (NW) Limited. HMRC further say that BTS also acted as a contra-trader within the scheme, carrying out both broker and acquisition transactions. The contra-traders purchased from one of 10 EU suppliers. The goods were sold through chains of UK traders before being exported by one of a group of 24 UK traders, including BTS, to one of a group of 11 EU customers, of which 9 were among the 10 EU suppliers from whom the contra-traders purchased.

NTS

169. In the three month accounting period 04/06 NTS carried out 57 deals, of which 23 were broker deals. All 23 broker deals are under appeal.

170. Sixteen of those 23 deals led directly back to the defaulter Anfell. Evidence of the tax loss was provided by Peter Davies [WS14/1]. Although that tax loss was not admitted by NTS, it will be recalled that we earlier held the loss to be one of VAT.

171. Three deals led directly back to Midwest, a company admitted by NTS to be a fraudulent defaulter. Evidence of the tax loss was given by officer Matthew Bycroft [WS15/39].

172. The remaining 4 broker deals led back to tax losses through the alleged contra-trader First Touch. Evidence in relation to that company was given by officer Lynda Baker [WS13/1]. The movement of goods in relation to those four deals was circular. In the relevant period, First Touch entered into 10 transactions which led directly back to tax losses. Evidence of the tax losses was given by officers Farzana Malik [WS15/5], Pamela Banks [WS15/1] and Rebecca Jackson [WS14/15]. The tax losses are shown in the deal sheets within Annex K if the CD rom. Yet again, pursuant to the Direction, the deal sheets are deemed to be evidence of the truth of their contents

and agreed by NTS. HMRC maintain that the deals leading back to First Touch were part of a broader scheme to defraud the revenue. The scheme is described in the evidence of Nigel Humphries, and a diagram showing an overview of the scheme appears at E3/26.

173. Of the remaining 34 deals carried out by NTS in period 04/06, 32 were buffer deals all of which traced back to a fraudulent tax loss. The other 2 deals were acquisitions from Pol Comm, each of which was carried out the day after NTS engaged in broker deals where it sold to Pol Comm, and which involved a circular movement of goods tracing back to Pol Comm.

174. HMRC say that NTS's transactions in 07/06 were similarly connected with fraud. In that period, NTS was involved in 38 deals. In 34 deals, NTS's customer was BTS. In 3 deals, NTS's customer was David Jacobs and in one deal its customer was Megantic Services Limited. Three deals traced directly back to tax losses. The remaining deals were said to be contra-trading.

175. Having broken down the Appellants' transactions by accounting period, we then proceed to allocate them to the groups to which HMRC consider them to belong.

BTS

176. In the case of BTS, HMRC maintain that its sales in the appeal period fell into the following 4 groups:

1. its April 2006 deals 2-5 were direct tax loss deals. As we have said, all took place on 27 April 2006 and involved as UK acquirer the defaulter C&B. Thereafter the phones C&B bought in each consignment passed through the hands of different chains of buffers before in every case reaching NTS as the final buffer. NTS proceeded to sell them to BTS, taking a nominal profit or commission on each phone. BTS then sold all the phones it had bought to Planetmania. By way of example we set out in tabular form the transactions in April deal chain 2, each invoice relating to 3750 Nokia 8800 phones:

Step	Trader	Invoice No	Invoice Date	Price	Net Value	VAT	Total
-6	C&B Trading*	270406/40	27/4/06	383.75	1,457,812.50	255,117.19	1,712,929.69
-5	Bluestar Com	533	27/4/06	384.00	1,440.000	252,000	1,692.000
-4	Platinum	138	27/4/06	384.25	1,440,937.50	252,164.06	1,693,101.56
-3	Adworks UK	P0150	27/4/06	384.50	1,441,875	252,328.13	1,694,203.13
-2	Elextrex Mid	69	27/4/06	385.00	1,443,750	252,656.25	1,696,406.25
-1	NTS	212	27/4/06	385.25	1,444,687.50	252,820.31	1,697,507.81
Broker	BTS	4988	27/4/06	393.00	1,473,750	-	1,473,750
+1	Planetmania						

*Defaulter

2. its April 2006 deals 6-10, May deals 5-31 and 35-45, and June deals 1-15 and 25-41 all involved companies identified by HMRC as contra-traders in Cell 5. In many of the transactions the UK acquirer of the goods sold them direct to

NTS as buffer, which in turn sold them on to BTS as broker. In others of the transactions the goods passed from the UK acquirer through a single buffer (or in one case two buffers) before reaching NTS. Later in our decision we shall carry out an analysis of deals in which BTS divided consignments it had purchased into two or three smaller consignments before onward sale, which we describe as "split deals". Such deals covered 63 of the 75 BTS deals in Cell 5. In that analysis we shall show that BTS sold to but six EU traders. We take April deal 6 as the example for this group of transactions, each invoice relating to 2100 Nokia 8801 phones. The table therefor reads:

Step	Trader	Invoice No	Invoice Date	Price	Net Value	VAT	Total
-3	Mighty Mobile	P357	27/4/06	372.65	782,565	-	782,565
-2	Svenson Commodities*	2355	28/4/06	373.75	784,875	137,353.13	922,228.13
-1	NTS	216	28/4/06	375.00	787,500	137,812.50	925,312.50
Broker	BTS	4992	28/4/06	390.00	819,000	-	819,000
+1	Sigma Sixty						
	*Contra-trader						

3. its May deals 32-34, all of which involved Eutex as UK acquirer, Dialhouse, Yodem, Sabretone and Epinx as buffers and BTS as broker. In two of the three cases PhoneC@nnected of France was BTS's EU customer. In the third case the EU customer was FAF International of Italy. The following table sets out the chain of transactions relating to May deal 32, each invoice relating to 3600 Nokia 8800 phones:

Step	Trader	Invoice No	Invoice Date	Price	Net Value	VAT	Total
-5	Eutex*	?	31/5/06	326.85	1,176,660	205,915.50	1,382,575.50
-4	Dialhouse**	?	31/5/06	327.00	1,177,200	206,010.00	1,383,210.00
-3	Yodem	191	31/5/06	327.35	1,178,460	206,230.50	1,384,690.50
-2	Sabretone	31050603	31/5/06	327.65	1,179,540	206,419.50	1,385,959.50
-1	Epinx	Ep-05	31/5/06	328.00	1,180,800	206,640.00	1,387,440.00
Broker	BTS	5013	31/5/06	331.00	1,191,600	-	1,191,600.00
+1	PhoneC@nnected						
	* Hijack ** Missing						

4. its June deals 16-23 which were said by HMRC to be contra-trading deals within Cell 10. Although described in the documentation as 16 deals, since the sales were dealt with by BTS on only 9 invoices, before us they were referred to as 9 deals. In every deal the EU supplier was either Kiara Trading International ("Kiara") or Hennar SA. Kiara sold the goods it acquired in its various deals to Epinx; Hennar sold its acquisitions to Kwality. Epinx made onward sales direct to BTS; Kwality made onward sales to Aram, which in turn sold on to BTS. BTS made 9 of its sales to PhoneC@nnected and the remaining 7 sales to FAF International. The managing partner of both Kiara and PhoneC@nnected was one Gilles Poelvoorde. The table of transactions for the chain of which June deal 18 formed part, all the invoices relating to 4000 Nokia 9300 phones, shows as follows:

Step	Trader	Invoice No	Invoice Date	Price	Net Value	VAT	Total
-3	Hennar	248	19/6/06	224.00	896,000	-	896,000.00
-2	Kwality*	475	22/6/06	225.50	902,000	157,850.00	1,059,850.00
-1	Aram	2206/03	22/6/06	226.50	906,000	158,550.00	1,064,550.00
Broker	BTS	5031	22/6/06	244.50	978.000	-	978,000.00
+1	FAF Int						
	*Contra-trader						

NTS

177. The two categories into which NTS's transactions fell were the following:

1. deals 1-4 which took place on 30 March 2006 and were said by HMRC to be in the First Touch contra-trading scheme. In each case the EU supplier was Pol Comm of Poland. It sold to First Touch itself. First Touch sold to NTS which in turn sold to Opal 53 of Germany before the goods were returned to Pol Comm. The table for NTS deal 1, all the invoices relating to 2000 Nokia 9500 phones, reads as follows:

Step	Trader	Invoice No	Invoice Date	Price	Net Value	VAT	Total
-2	Pol Comm	3003-7	30/3/06	297.00	594,000	-	594,000.00
-1	First Touch*	566	30/3/06	298.00	596,000	104,300,00	700,300.00
Broker	NTS	185	30/3/06	338.00	676,000	-	676,000.00
+ 1	Opal 53	DE614	03/4/06	338.50	677.000	-	677.000.00
+2	Pol Comm						
	*contra-trader						

2. deals 5-23 which were non-cell direct tax loss deals, the FCIB evidence showing them as being financed by Multimode. In 14 of those deals the original EU supplier was Multimode. In 17 of the deals the UK acquirer was Anfell, and in the remaining cases Midwest. Various buffers were then involved in the chains of transactions, some chains running to 8 buffers before NTS was supplied as broker. NTS had four EU customers: East Telecom of Estonia, Opal 53 of Germany, Sigma Sixty of Holland and CIDP of France. They made onward supplies to Pol Comm of Poland, and to East Telecom where that company was not the immediate EU customer. The example we have chosen to illustrate this group of transactions is the chain of which NTS deal 5 forms part, all the invoices dealing with 3400 Nokia 9300I phones. The table reads as follows:

Step	Trader	Invoice No	Invoice Date	Price	Net Value	VAT	Total
-8	Multimode	04/0013	13/4/06				
-7	PZP		13/4/06				
-6	Anfell*	ANT123	13/4/06	293.55	998,070	174,662.25	1,172,732.25
-5	Realtech	575	13/4/06	293.75	998,750	174,781.25	1,173,531.25
-4	R K Brothers	341	13/4/06	293.80	998,920	174,811.00	1,173,731.00
-3	Caz Distrib	1304-4	13/4/06	294.00	999,600	174,930.00	1,174,530.00

-2	Sunny Traders	51	13/4/06	294.50	1,001,300	175,227.50	1,176,527.50
-1	Scorpion	45	13/4/06	295.00	1,003,000	175,525.00	1,178,525.00
Broker	NTS	188	13/4/06	342.00	1,162,800	-	1,162,800
+ 1	East Telecom	80466	13/4/06	342.50	1,164,500	-	1,164,500
	*Defaulter						

13. THE CELL SCHEMES

178. We then turn to consider the various cell schemes. The deal chains identified by Mr Humphries were set out in diagrammatic form on deal sheets he and other officers of HMRC prepared.

179. As part of the overall scheme to defraud the Revenue, Mr Humphries identified what he claimed to be four contra-trading cells: Cell 5, Cell 1, Cell 10 and the "First Touch Scheme". He considered the overall scheme to include all of the acquisition and despatch transactions flowing through the contra-traders involved. He proceeded on the basis that those cells were composed of all the traders involved in the contra-traders' acquisition chains, and in their despatch chains, i.e. the sources of the tax loss. Where different cells were inter-linked, as he considered to be the case of two-tier contra-trading undertaken by Cells 5 and 1, or the linking of Cells 5 and 10, Mr Humphries opined that the traders conspired together. He claimed it obvious that a particular trader could have operated in more than one scheme. Looking at the FCIB evidence, i.e. going beyond the transaction information, Mr Humphries said that other companies, which did not appear in the transactions themselves, were parties to the overall scheme.

180. In relation to each cell, the deal sheets Mr Humphries produced showed so far as HMRC had been able to trace them the chains of sales of mobile phones made by EU traders through a series of UK buffer traders and broker traders on to a group of EU customers which were mostly the same as, or were connected to, the EU suppliers. In asserting that the Appellants were knowing parties in the alleged overall scheme to defraud, Mr Humphries took no account of the Appellants' due diligence on their counter parties.

181. By virtue of the Direction the deal sheets for all the chains of transactions with which we are concerned are agreed to be accepted by the Appellants, and thus their contents could not be disputed. Nor was there any dispute that each supplier had accounted for VAT on its sales to one of the Appellants. In the deal sheets, by enquiry of other officers and HMRC's own records, mainly those on computer, HMRC traced the chains of transactions back several steps from the broker concerned until they reached either a defaulting trader or a contra-trader.

182. The deal sheets showed the transactions between the various traders who had dealt with the goods before they were sold to the Appellants, and the Appellants' customers. In the majority of cases involving BTS, the company split the consignments it purchased before selling part of each to one customer, and the remainder to one or two others. In most of BTS's remaining cases there was a simple sequence of transactions, each trader buying a consignment of goods and selling it as

a whole to its EU customer. The four cases not falling within the two categories we have described consisted in BTS buying two consignments and combining them in a single sale. As far as NTS's transactions were concerned, each one consisted of a sequence of transactions in a consignment of goods which it sold unbroken to its EU customer.

183. The evidence of the assurance officers for the traders with which the Appellants dealt was largely accepted, so that we took oral evidence from but few of them. The evidence as a whole revealed that a number of the Appellants' counter parties had managed to establish a high turnover, in some cases running to millions of pounds a month, within a short time of setting up in business; and some had carried on, and been registered for VAT in respect of, quite different types of classes of business from mobile phone sales. Some trading companies, the Appellants included, had a single director, and but one or two employees. In some cases, HMRC were able to establish that third party payments had been made, that is payments to parties who were not part of an invoice chain.

184. All the transactions took place at speed between trading companies with little capital, in chains which bore a remarkable similarity to each other, and which never contained authorised agents, retailers or OEMs. Further, every chain revealed an apparent absence of any trading risk; customers were required to pay for stock purchased only on themselves being paid by their own customers.

185. In both the BTS and NTS transactions involving sales of unbroken consignments of phones, and in the consignments that BTS split prior to sale, if not within a single day then certainly within 2 days the consignments entered the UK, whilst there were traded by several UK dealers, and were then re-exported.

186. We were presented with ample evidence from which to infer in relation to the direct tax loss chains of transactions there was either fraudulent default or from which we could draw an inference of fraud. We infer that there was a tax loss in each such chain.

187. We accept HMRC's contention that, whilst in contra-trading a clean chain does not lead to a tax loss, it is designed to conceal a dirty chain, and make the offsetting of the input tax incurred by the contra-trader in that chain harder to detect and counter. The clean chains identified by Mr Humphries bore the same characteristics as the dirty chains; goods arriving in the UK early in the day, rapidly changing hands, and leaving by the end of it. The contra-traders sought to offset large output tax liabilities against closely matching input tax credits.

188. Mr Humphries reviewed the deal sheets of the identified contra-traders supplying BTS in April, May and June 2006. He did so using information prepared by other officers, supplied by other traders, and stored in the HMRC VAT electronic folder ("EF") system. In the process he examined various chains of transactions of EU suppliers, through UK traders to EU customers, noting similarities in the trading patterns of the contra-traders concerned, and those of their customers. He then compiled charts of the completed transaction chains on the deal sheets in EF which

showed the flow of goods from the EU suppliers through the contra-traders and any buffer traders involved to the various brokers and their EU customers.

189. Mr Humphries identified six contra-traders in the scheme he referred to as Cell 5. The majority of BTS's acquisitions led to those traders.

190. The remaining two contra-traders identified by Mr Humphries whose acquisitions led to BTS were Epinx and Kwality. To Mr Humphries those two companies appeared to be operating as part of a separate group of six contra-traders. The other four companies in that group were A-Z Mobile Accessories Ltd, Intertrade Worldwide Ltd, S&R International Ltd and Waterfire Ltd. Although the transactions of those other four companies did not lead to the broker deals of BTS, Mr Humphries included them in his evidence as they appeared to him to form part of a single overall scheme involving all six companies. Mr Humphries referred to those six companies as forming Cell 10.

191. In the case of NTS, Mr Humphries identified a single contra-trader, First Touch.

14. THE CELLS

Cell 5

192. Cell 5 was made up of non-tax loss chains and tax loss chains, and we proceed to consider it in that way.

a) Non-tax loss chains (clean chains)

193. In the clean chains Mr Humphries found that in the quarter ended 30 June 2006 goods were traded in a circle from a very small group of traders, through a number of companies, and back to the original small group of traders. He identified six contra-traders who operated within the scheme, Powerstrip, David Jacobs, Svenson Commodities, TCCS, Svenson Worldwide Limited ("Svenson Worldwide") and Selectwelcome Limited ("Selectwelcome"). They had 8 EU suppliers. The goods then passed through 29 buffer traders, including NTS, and 16 broker traders, including BTS, before arriving at a group of 23 EU customers which included the 8 EU suppliers. Three of the contra-traders, Svenson Commodities, Powerstrip and David Jacobs, also appeared as brokers in some of the deals. Further, Svenson Commodities also appeared as a buffer. Mr Humphries produced a diagrammatic overview of the scheme which appeared as Exhibit E3/1. That diagram appears as NH001 in Annex F to the CD Rom and, pursuant to the Direction, is admissible as evidence of the truth of its contents and is deemed to be agreed by BTS.

194. The diagram and analysis are based on further material also in evidence before us. Pursuant to the Direction, excel spreadsheets RM1 and RM2, which form part of Annex C to the CD Rom, are also admissible as evidence of the truth of their contents and are deemed to be agreed by BTS. Those spreadsheets summarise deal chains in terms of, inter alia, the identity of the broker, the customer and the acquirer. Whilst they have been updated by Mr Murphy, as set out in his witness statement WS1/71,

we accept that the updating has no material impact on the patterns identified by Mr Humphries.

195. In every case where transaction information was held by HMRC identifying the supplier of those EU suppliers (53.8%), it showed the suppliers were themselves supplied by the eventual EU customers of the goods, namely Parasail Distribution Spain SL ("Parasail") (Spain), or Comica Handelsondering BV ("Comica") (Holland) or other entities connected to those two companies in terms of trading and money movements, namely SM Systems, a BVI company, and Forex Handelgesellschaft GmbH ("Forex") (Germany). That evidence is contained in the statements of Mr Humphries beginning at WS1/1. Both Parasail and Comica were companies owned and managed by a German national, Adil Kamran.

196. In every case where transaction information was held by HMRC identifying the customer of the EU customers (67.4% of the total of the transactions), the EU customers made onward sales to Parasail, Comica and Negresco (Spain), another of Mr Kamran's companies, the goods thus having both originated and ended with companies run by him. Again the evidence is contained in Mr Humphries' statements.

197. Mr Humphries claimed that circularity of goods was thus demonstrated; the goods sold by Mr Kamran's companies returned to them having passed through 58 UK and EU companies, and Mr Kamran's companies purchased by them for higher prices shortly after they had sold them. Mr Humphries added that the FCIB evidence showed circularity of money flows, thus showing monetary contrivance as well as goods contrivance.

198. He prepared a series of charts showing details of the transactions carried out by the various companies referred to in the penultimate paragraph, together with a chart summarising the EU suppliers, UK contra-traders, buffer traders, broker traders and EU customers involved in their deal chains.

199. Mr Humphries identified 30 buffer traders in Cell 5, 10 of whom also appeared in deal chains as brokers.

200. On a chart exhibit NH023, Mr Humphries identified 19 defaulting traders in the buffer and broker deals of 4 of the alleged contra-traders. He claimed that 10 of the defaulters were common to all 4, and 8 of the remainder common to 2 or 3. That exhibit was selected by Mr Pickup for detailed cross-examination, the content whereof we shall shortly consider.

201. Mr Humphries separated the EU customers in those transaction chains into two main groups. With the exception of 5 deals, the group of customers used appeared to him to depend on the identity of the defaulter. Since one of those groups contained the same EU customers as those of the brokers who sourced goods from those contra-traders, he maintained that there was a link between the acquisition deals and the tax loss undertaken by the contra-traders.

202. There were 18 broker traders, 13 of whom appeared as either contra-traders or buffers in some of the deals. The UK brokers had many customers in common.

203. There were 23 EU customers overall – in Mr Humphries' judgment, a very small customer base for 18 different UK traders, and, as previously stated, 8 of the customers were also suppliers to the contra-traders in that series of transactions.

204. Mr Humphries traced 17 of Selectwelcome's 24 acquisition deals in May 2006 back beyond the immediate EU supplier, and 9 of them forward beyond the immediate EU customer. All of the deals showed the original supplier to be either Parasail or Comica. Those two companies also appeared as customers in the 9 deals traced forward.

205. He found the same pattern to exist in Selectwelcome's June 2006 acquisition transactions. Seventeen of 28 acquisitions were traced back beyond the immediate EU supplier to Parasail, Comica, or Forex. Twenty-four of the 28 acquisitions were traced forward beyond the immediate EU customer to Parasail, Comica or Forex.

206. Initially Mr Humphries considered it notable that in chains where further tracing had been carried out, goods originating with Forex went to Parasail or Comica, those originating with Comica went to Forex or Parasail, and those originating with Parasail went to Comica. Subsequently he found chains in which the goods returned to the trader from whom they originated.

207. Mr Humphries further traced 8 of David Jacobs acquisitions, and 8 of Svenson Commodities acquisitions forward to either Comica or Parasail. Two of Svenson Commodities transactions he traced back to Parasail. Although the transactions in question were few in number, Mr Humphries maintained that the pattern of trading they indicated extended to transaction chains other than those of Selectwelcome.

208. Mr Humphries examined HMRC's EF system for the companies Base Interactive and Intangible Media SL. Their files contained information supplied by the fiscal authorities in the relevant EU Member States under mutual assistance provisions. Five files contained transaction information further extending the pattern of supplies involving Parasail, Comica and Forex.

209. The 11 pages of transaction information held in the EF system for Adobcom Equipamentos Electronicos Unipessoal LDA ("Adobcom"), a Portuguese supplier in Cell 5, showed that in the period between 10 April 2006 and 30 June 2006 inclusive it made 146 sales to UK acquirers – 24 to David Jacobs, 42 to Powerstrip, 24 to Svenson Commodities, and 26 to TCCS. The goods in those transactions originated from Parasail in 78 deals, Comica in 33 deals, and Forex in 35 deals.

210. In the same period, Adobcom made 10 purchases from UK traders, 4 from Megantic Services, 4 from David Jacobs, 1 from Evenmore and 1 from Powerstrip. The goods involved in those transactions were sold to Parasail in 5 deals, to Comica in 4 deals, and to BRD Werburg und Handels GmbH ("BRD") in 1 deal.

211. Adobcom was not registered for VAT in Portugal until 28 March 2006; it was deregistered on 22 November 2007 on the basis that it was a "non-declaring conduit company."

212. The transaction information in the EF file for Hilton Moore Ltd ("Hilton Moore") showed that, in the period between 25 April 2006 and 30 June 2006 inclusive, that company made 127 purchases of goods, 113 of which were from companies identified as being within Cell 5.

213. In the 32 pages of information in the EF file for Opal 53 Gmbh ("Opal 53"), a German customer of BTS in Cell 5, Mr Humphries noted that in the period between 15 March 2006 and 30 June 2006 the record showed the company as having made 31 purchases from the UK traders Megantic Services, Base Interactive, Cellular Solutions, Fonecode and BTS. In 22 of the onward sales the goods were sold to Parasail; and in the remaining 9 deals to Comica.

214. In the same period, the records showed that where goods were purchased from suppliers within Cell 5, they were sold mainly to customers within the Cell; and where goods were purchased from suppliers outside Cell 5, they were sold to customers outside the Cell.

215. The 22 pages of information forming the EF file for IMD Trade Ltd ("IMD") showed that in the period to 30 June 2006 it made 21 purchases from Megantic Services, Tojen, Evenmore, David Jacobs and Base Interactive. The goods concerned were sold to BRD (2 deals), Parasail (8 deals), Comica (8 deals), and Forex (3 deals).

216. Transaction information for Compagnie Internationale De Paris ("CIDP") provided by the French authorities, as collated by officer Downes, showed 34 purchase and sale invoices. The 34 purchases were made from Megantic Services, BTS, Base Interactive, Evenmore and Tojen. The goods in those deals were all sold to BRD (98 deals), Comica (8 deals), Forex (6 deals) and Parasail (12 deals).

217. Mr Humphries maintained that the EF evidence enabled him to claim: "Taking the [Cell 5] … transactions into account, almost all the transactions which can be further traced involve Parasail, Comica and Forex. The remainder involved BRD which is known to buy from Parasail and Comica, and to sell to Parasail."

218. From the EF system for Parasail and Comica, Mr Humphries was able to confirm that they were Kamran companies. Mr Humphries also confirmed Negresco to be a further entity in the "Kamran empire". He explained that Negresco appeared in some of the payment chains relating to transactions in point in the appeals, but not in the transaction, i.e. invoice, chains.

219. In a report provided by the Spanish fiscal authorities under mutual assistance dated 16 March 2007, Parasail was said to have been acting as a "triangular operator", to have gone missing having not really existed as a normal Spanish trader, and to have been "used for fraud purposes by foreign people". Consequently, it was deregistered for "false trading" in September 2006. And, in a report prepared by the Dutch fiscal authorities dated 21 November 2007 and obtained by HMRC, they were informed that Comica had been deregistered in December 2006 "because the company was suspected to be involved with carousel fraud".

220. Mr Humphries maintained that there was evidence of a further link between the acquisition transactions of the contra-traders in Cell 5 and their tax loss transactions to be found in sales by Parasail to three Cypriot companies, Flash Tech, Destonia and Leriant Trading, and in sales by Comica to Destonia. Flash Tech appeared as the supplier to UK defaulter Stockmart Limited in Powerstrip's April 2006 deal 42; and Leriant Trading appeared as supplier to UK defaulters in 23 of Selectwelcome's June 2006 deals – 7 supplies to Birdwood Ltd (deals 3, 5, 6, 7, 9, 12 and 15); 15 supplies to Many Services Ltd (deals 49, 50, 52, 54, to 57, 60, 85 to 89, 91 and 92); and one supply to Heathrow Business Solutions Ltd (deal 104).

221. The evidence with which we have just dealt resulted in Mr Humphries claiming at paras 41 and 42 of his first witness statement:

> "41. Overall, the transactions involving Parasail, Comica and Forex must be contrived. They occur within a closed cell of traders which appear to be operating in concert. The goods originate within a very small group of EU suppliers, and end up with the same group of companies at the end of the transaction chains. Where both ends of the chains have been further traced and with one exception, [notwithstanding that goods remained within the same small group of suppliers] none of the companies involved received, as customers, goods which they had originally supplied as suppliers. This has happened no matter which combination of UK traders the goods passed through on the way.
>
> 42. This could not happen in the course of normal commercial trade, and I do not believe it would be possible unless the traders involved at each stage of the transaction chains had knowledge of the contrived scheme."

222. Subsequent to making his first statement, Mr Humphries found the penultimate sentence in para 41 to be wrong in that in some cases companies acting as customers did receive goods they had originally supplied.

223. Mr Humphries considered what he referred to as the Powerstrip two-tier contra-trading scheme of June 2006. He noted that in period 06/06 Powerstrip claimed input tax of £14.53 million on goods purchased in the UK and despatched, zero-rated, to its EU customers, and £12.41 million on goods sourced in chains involving defaulting traders. The output tax due from the company on goods it acquired from EU suppliers and sold to UK customers in the same period was £24.33 million. Powerstrip claimed the difference between the two tax figures, £2.61 million, as a VAT repayment. Mr Humphries observed that had the acquisition transactions not taken place there would have been no offset, and Powerstrip would have claimed the full £26.94 million input tax. He maintained that the whole of Powerstrip's repayment claim, made partly by the company itself and partly by the brokers it had supplied, could be traced to a similar amount of tax losses arising from defaulting traders in the chains of supply leading to the contra-traders – some £12.41 million in chains, leading directly to Powerstrip in the position of contra-trader 1, and some £14.53 million in chains leading to Export-Tech, Digicom, 385 North, Rioni and Pan Euro Ventures in the position of contra-trader 2.

b) Tax loss chains (dirty chains)

224. Mr Humphries' analysis also showed that certain broker transactions of the contra-traders Powerstrip, David Jacobs, Svenson Commodities, TCCS, Svenson Worldwide and Selectwelcome led directly back to tax losses. Their chains of transactions are summarised on the tab marked "Tax Loss Chains" on RM2 as updated by the evidence of officer Murphy. As we have said, the original RM2 is, pursuant to the Direction, admissible as evidence of the truth of its contents and deemed to be agreed by BTS.

225. Neither BTS nor NTS carried out deals within a contra-trading cell identified by Mr Humphries as Cell 1. However, it is HMRC's case that part of the tax loss in relation to Cell 5 transactions arose in Cell 1. Three of the Cell 5 contra-traders – David Jacobs, Svenson Commodities and Powerstrip – carried out broker deals that led back to 6 alleged contra-traders in Cell 1, which in turn carried out broker deals that traced back to tax losses. The operation of this element of the Cell 5 contra scheme, and Cell 1 in general, is summarised on diagram NH051 (E1/355), as updated at E3/4.

226. The six contra-traders identified by Mr Humphries as forming part of Cell 1 were Blackstar UK Ltd, Digikom Ltd, Export-Tech Ltd, Rioni Ltd, 385 North Ltd and Pan Euro Ventures Ltd. He referred to them as "2nd tier contras". He contended that those traders were part of a large group that also operated in a contrived manner similar to that involving the first group of six Cell 5 contra-traders. The remaining contra-traders in Cell 1 identified by Mr Humphries were Mark Corporation Ltd, H&M UK Trading Ltd and RWIR Ltd. The chains of transactions of the 2nd tier contras are summarised on the tab marked "No UK Tax Loss (Contra Chains)" on RM2, as agreed updated by the evidence of Mr Murphy. Again the original RM2 is, pursuant to the Direction, admissible as evidence of the truth of its contents and is deemed to be agreed by BTS.

227. Moreover the 2nd tier contras were part of a further overall alleged scheme to defraud the revenue, as appears from a diagrammatic overview of that scheme at E3/4. That diagram appears as NH003 of Annex F to the CD Rom and, once more, pursuant to the Direction, is admissible as evidence of the truth of its contents and is deemed to be agreed by BTS.

228. The transactions of the 2nd tier contras led directly back to tax losses. Their chains of transactions are summarised on Annex G to the CD Rom. Again, pursuant to the Direction, the contents of Annex G are admissible as evidence of their truth and are deemed to be agreed by BTS.

229. Mr Humphries found patterns in the tax loss chains, and claimed the destination of the goods in general to be connected to the identity of the defaulter. Breaking down the customers into groups pursuant to this pattern, he showed that one group contained the same EU customers as the customers of the brokers in the non-tax loss chains. He identified further connections between the transactions in the tax loss chains and those in the non-tax loss chains in that customers of Parasail and Comica were the EU suppliers in certain transactions in the tax loss chains.

230. Mr Humphries reviewed the deal sheets of all nine 2nd tier contras, the base documents having been prepared by other officers as part of HMRC's verification of suspected MTIC transactions and being stored as EF documents. As part of his review, he prepared charts showing the flow of goods in transaction chains involving acquisitions of goods from EU suppliers to 8 of the 9 traders. His charts also showed the flow of goods from the EU suppliers, through the contra-traders and buffers concerned to the broker traders and EU customers (exhibits NH030 to NH048). Exhibits NH049 and NH050 consisted of charts similar to those for the ninth contra-trader Mark Corporation Ltd prepared by officer Swindon, the assurance officer for that company.

231. From information provided to HMRC under mutual assistance and stored in the EF, and further information on the Latvian company Valdemara provided by officer Wyatt, Mr Humphries produced exhibit NH052, the first 62 pages of which showed links between many of the EU companies concerned; and on the 63rd page of that exhibit he summarised the information contained in the earlier pages. It showed one Joakim Peter Broberg was formerly a director of Total Telecom, a Spanish company, and Alexis Ludwig Leroy was an employee of that company. Those two individuals were directly involved in 6 of the EU companies.

232. There also appeared to be links between Mr Broberg and a further 4 of the EU companies, Avoset of Estonia, FAF of Italy, Scorpion of Portugal, and Prabud of Hungary. For instance, both Avoset and FAF were run by Tommi Neuvoneu, a Finnish national. Sebastian Davolos-Davila was directly involved with a further five of the EU companies, Nano Infinity, Con Animo, Microzero, Regent Sp and Zorba SRO.

233. The traders Mr Humphries considered to be linked were based in 9 different EU Member states, and controlled by three residents of Malaga, Spain. The traders appeared variously as EU suppliers and EU customers in both the acquisition transaction chains and the UK tax loss transaction chains which passed through the 9 contra-traders. Mr Humphries maintained that that provided a link between the two types of transaction entered into by the contra-traders.

234. From the evidence before him, Mr Humphries concluded that the whole series of transactions entered into by the 9 2nd tier contras had been contrived as an overall fraudulent scheme; the goods in them passed from a small group of EU traders via the 9 UK contra-traders and 33 UK broker traders to another small group of EU traders which had links to the first group. The acquisition transactions and tax loss transactions entered into by the contra-traders were also linked via those EU traders.

235. We were provided with evidence of tax losses in respect of each of the defaulters identified in the deal chains. All the tax loss deals are summarised on Annex K to the CD Rom. The identities of the defaulters, and evidence in relation to the tax losses, are shown on the schedule attached to Annex K as "Cell 5 defaulters". Pursuant to the Direction, the contents of Annex K are admissible as evidence of their truth and are deemed to be agreed by BTS. The Appellants accept that there is tax loss in relation to the defaulters, as summarised on the schedule.

Cell 10

236. Mr Humphries identified a second group of six contra-traders, which included Epinx. He referred to the group as Cell 10. He maintained that charts he had prepared showing the trading pattern with Cell 10 to be contrived. Cell 10 involved three separate sets of transactions.

237. HMRC identified Cell 10 as the major contra-trading cell affecting BTS June deals 16 to 23. At para 42.2 of the statement of case they say that Epinx and Kwality, the contra-traders, acted fraudulently. Para 42.2 continues:

> "Furthermore, although it is not necessary for [HMRC] to prove that these 9 deals form part of an overall scheme to defraud the revenue, it is averred that in fact the deals did form part of such a scheme, which was separate [from] Cell 5 and which was necessarily the product of contrivance and orchestration and which operated with the knowing participation of all involved, including BTS."

238. The deals carried out by BTS in June 2006 in Cell 10 were included by the company on just 9 invoices, and involved but two customers, PhoneC@nnected (France) and FAF International (Italy). The invoice trail produced by HMRC in each case led back to one of two contra-traders, Epinx or Kwality, in the case of Epinx directly, and at one remove via the buffer Aram in the case of Kwality. Further, there were only two EU suppliers to the contra-traders, namely Kiara and Hennar.

239. We were provided with evidence of tax losses in respect of each of the defaulters identified in the deal chains of Epinx and Kwality. The identities of the defaulters, and the witnesses in relation to the tax loss are shown on the schedule attached to the CD rom as "other contra scheme defaulters". Once more its contents are admissible as to its truth, and are deemed to be agreed by BTS.

240. Mr Humphries prepared a series of charts NH055 to NH068, showing the flow of goods from the EU supplier, through UK contra-traders and in some cases buffers to the UK brokers and their EU customers. The charts showed three distinct sets of transactions. He considered the charts to show trading patterns indicating contrivance.

a) Non-tax loss chains (clean chains)

Set 1

241. In the first set of transactions, the 6 contra-traders used the same 10 EU suppliers, nine of whom also appeared as EU customers of the brokers in the chain. There were 24 UK broker traders who had many EU customers in common. They used only 11 EU customers between them. Mr Humphries considered that a very small customer base for 24 different UK traders and, as just mentioned, 9 of the 11 customers were also suppliers in the series. Where the EU traders appeared as both customers and suppliers, none of them received as customers goods they had originally supplied. That fact was construed by HMRC as an attempt to avoid circularity in the transaction chains.

Set 2

242. The two contra-traders identified as being involved in the second set of transactions, Epinx and A-Z Mobile Accessories, used only 3 EU suppliers between them, two of whom also appeared as EU customers. The goods were sold to 22 UK brokers, including 7 who were also involved in the first set of transactions referred to above. The UK brokers then sold the goods concerned to a different group of 6 EU customers, 2 of whom, Kom Team and St Charles Consulting, were also EU suppliers, and another two of whom, 2 Trade BUBA and CZ International, were linked via directors who shared a common address. (The last mentioned piece of information emerged from mutual assistance provided by the Belgian and Czech fiscal authorities respectively). The information on the EF file for 2 Trade BUBA also showed that both directors of that company had been arrested by the Belgian authorities in connection with the issue of false invoices for mobile phones in a total sum exceeding 1 billion euros. All goods originating with Kom Team found their way to Evolution or CEMSA, regardless of which UK broker supplied them. All goods originating with Nordic Telecom ended up with Kom Team, and all goods originating with St Charles Consulting ended up with the linked traders 2 Trade BUBA and CZ International. Neither Kom Team nor St Charles Consulting received as customer's goods they had originally supplied. Again it appeared to Mr Humphries that efforts had been made by the traders concerned to avoid circularity in the transaction chains.

Set 3

243. The third set of transactions identified by Mr Humphries involved but a single EU supplier, a single UK contra-trader, A-Z Mobile Accessories, a single UK broker trader and a single EU customer. Although Mr Humphries accepted that it was impossible to establish a pattern in the circumstances, he observed that since it was notable that as goods originating with Modular BV were not sold to any of the EU customers in the other two sets of transactions, there appeared to be a third set.

b) Tax loss chains (dirty chains)

244. Mr Humphries examined the transactions of all 6 contra-traders in Cell 10 in which they purchased goods in the UK and sold them to EU customers in their broker transactions. Having analysed the transactions, he found that of the 12 EU customers 8 appeared as both customers and suppliers in the first set of acquisition transactions with which we have just dealt, and two appeared as both customers and suppliers in the second set. As a result, Mr Humphries maintained that there was a firm link between the acquisition transactions and the broker transactions undertaken by the 6 contra-traders. He further considered the destinations of the goods in all the 22 contra-traders transactions to be determined by their origin, adding that it was notable that all the UK broker traders selling to the EU had distinct sets of EU customers and their use depended on the identities of the suppliers. Further, when they purchased goods originating with certain defaulters they sold them to one of six companies within a small group of EU traders, namely to J Corp Aps, EC Trading Aps, D Jensen, DGB Sarl, Fone Link SL and Servicios Operativos Surcom.

245. When they purchased goods originating with certain defaulters, or with the EU suppliers to the first group of 6 contra-traders ("Contra 1"), they all sold them to a second group of EU customers.

246. When they purchased goods originating with the EU suppliers to the second group of 9 contra-traders ("Contra 2"), they all sold them to a third group of EU customers.

247. When they purchased goods originating with the third group of 6 contra-traders, they all sold them to further groups of EU customers, depending on the origin of the goods.

248. BTS was involved in two of those contra-trader groups, and its sales followed the separate pattern for each group. All the goods originating from the first group it sold to Sigma Sixty, Pol Comm, Planetmania, CIDP, Intangible Media, or Opal 53. All the goods originating from the second group it sold to FAF or PhoneC@nnected.

249. Mr Humphries concluded:

> "Overall, each series of transactions shows a distinct pattern with the EU destination of the goods being dependent on their origin. In each separate series, the goods pass from a distinct, very small group of EU suppliers, to a distinct, very small group of EU customers – the first group often being linked to the second, or even containing the same companies. The correct destinations are maintained even after the goods have passed through a large number of different UK traders in various combinations, with the goods effectively remaining under the same control throughout.
>
> It would not be possible for this to occur in the course of normal commercial trade. The transactions are clearly contrived as overall fraudulent schemes. I believe that these schemes could not operate successfully unless the EU and UK traders involved at each stage of the transaction chains had knowledge of them."

250. Mr Humphries identified the single feature indicating that a transaction fell within Cell 10 as the fact that the monetary carousel identified started with Global Financial Services Ltd, proceeded through Eutex Ltd as the hijacked trader, Yodem and Epinx and ended with Global

First Touch Scheme

251. In the course of his review of the deal sheets setting out the transaction chains of First Touch, Mr Humphries identified similarities in that company's transactions with those of 11 other contra-traders. All of them appeared to him to be operating in a single, contrived, fraudulent scheme.

252. Mr Humphries compiled charts from the completed transaction chains he found on the deal sheets in EF. They showed the flow of goods acquired from EU suppliers by all 12 contra-traders, through the contra-traders, and any buffer traders involved, to the various broker traders and their EU customers.

253. The other 11 contra-traders involved were Davenport Global Ltd, DebTechno, FK Media Services Ltd, Julecom Ltd, Limelight Solutions Ltd, Scorpion, Skywell UK Ltd, Web IT Systems Ltd, Whitestream Ltd, Wildberry Ltd, and NTS itself. Mr Humphries considered the transactions of all twelve traders to be very similar and to comprise a single contrived overall scheme. He prepared a chart for each trader (exhibits NH001 to NH013), and a further one summarising the EU suppliers, UK contra-traders, UK broker traders, and the EU customers involved in all the transactions (NH014).

254. Mr Humphries concluded that the trading patterns indicated that the overall series of transactions was contrived. The factors he identified for so concluding were:

i) The 12 contra-traders had common EU suppliers, using only 3 suppliers between them. In every transaction HMRC had been able fully to trace the same 3 traders found at the beginning of the chains were the eventual customers of the goods.

ii) Seven of the contra-traders, Davenport Global, Deb Techno, First Touch, Julecom, NTS, Whitesteam, and Wildberry also acted as buffers (see NH014). To Mr Humphries it did not appear logical for those traders to undertake contra and buffer transactions when they already had an EU client base providing them with the opportunity to make far higher profits.

iii) Two companies, X stream and 3D Computer Systems, were buffer traders that also featured as brokers in some of the deals (see NH014). Again their transactions appeared illogical to Mr Humphries. To illustrate the illogicality Mr Humphries extracted from First Touch's deal sheet for May 2006 the margins it obtained on transactions (NH014A). It showed margins on buffer transactions of between £1.50 to £2.50 and those on broker deals of between £17 and £50.

iv) In his chart at NH015 Mr Humphries identified 9 defaulting traders and 5 EU suppliers which featured in the transactions of two or more traders.

v) The 6 EU customers in the transaction chains (summarised on exhibit NH016) also featured in the acquisition transactions summarised on NH014, providing a link between the acquisition transactions and the tax loss broker transactions entered into by the 12 contra-traders.

vi) There was no commercial reason for the goods in the acquisition transactions to be physically imported into the UK; the contra-traders all had existing EU customers, many of them being the same companies which bought the gods from the brokers in those transactions. The contra-traders could have sold the goods with direct delivery to the EU customer; the only apparent reason to bring the goods into the UK was to create a tax charge and subsequent VAT repayment claim.

vii) The UK brokers had EU customers in common; there were only 5 immediate EU customers – a very small customer base for 11 UK brokers.

255. Mr Humphries examined the EF files for the 5 customers. They contained information provided by the fiscal authorities in the relevant EU Member states under mutual assistance provisions (NH017 pages 1 to 73). The information showed that:

i) CIDP (France) rendered no tax returns to the French fiscal authority and produced no transport documents for the goods in which it purportedly traded. Its transaction listing showed all goods purchased from UK brokers were sold either to Ascomp Aps of Denmark or to East Telecom of Estonia, both of which were original EU suppliers to the UK contra-traders (NH017)

ii) Opal 53 (Germany) was suspected of VAT fraud by the German authorities. Its transaction listing also showed that all goods purchased from UK brokers in the scheme were sold to Ascomp or East Telecom.

iii) Forex was a missing trader in Germany. It made no VAT returns in periods 04/06 and 07/06 and its director was the subject of an international arrest warrant. Its transaction listing showed that all the goods it purchased from Atomic, a UK broker in the First Touch Scheme, were sold to East Telecom.

iv) Sigma Sixty was under investigation in Holland. The transaction details provided by the fiscal authority in that country showed that all the goods purchased from UK brokers in the First Touch scheme were sold to Ascomp, East Telecom or Pol Comm SP of Poland, all three of which were original suppliers of the goods to the UK contra-traders

v) There was no transaction information in the EF of Lavina Trading, and Mr Humphries thus found it impossible to determine the ultimate destination of the goods in the three transactions in which it was a customer.

256. Overall, in every transaction he could trace, Mr Humphries found all the goods supplied to the UK contra-traders by Ascomp, East Telecom and Pol Comm returned to those companies. The goods sold to Ascomp originated with East Telecom or Pol Comm. There were also four deals in which goods originated with Pol Comm and were returned, by the broker deals of NTS, to that same company.

257. With the exception of the last four mentioned deals, it appeared to Mr Humphries that efforts had been made by the traders involved to avoid circularity in the transaction chains.

258. Mr Humphries noted that the margins obtained by the 4 EU traders were remarkably consistent. With the exception of two sales by Forex at £1 margin and a single sale by Opal 53 involving no profit whatsoever, all goods were sold at a 50p margin regardless of considerations of type, quantity or value. To Mr Humphries that consisted of further evidence of contrivance, and indicated that the four traders were operating under the same direction.

259. He also examined the EF files of the three EU suppliers who became eventual customers. They showed that the director of East Telecom was linked to fraud,

Ascomp had been deregistered in Denmark not having traded in that country, and Pol Comm had been deregistered in Poland as a missing trader, having had no business establishment in the country and having declared no intra-community trade. The information further showed that the directors of Ascomp and Pol Comm were both resident in Glasgow, Scotland.

260. On a single spreadsheet, exhibit NH019, Mr Humphries disclosed that, as a group, Ascomp, East Telecom and Pol Comm paid an additional £4.6million to repurchase goods they had originally sold to UK contra-traders. In the four transactions passing through BTS, Pol Comm repurchased the same goods it had originally supplied to First Touch at an additional cost of over £247,000 – a fact Mr Humphries considered would not have happened in the course of genuine commercial trade.

261. Sales by CIDP, Opal 53, Forex and Sigma Sixty to Ascomp and East Telecom included goods in both the acquisition and the tax loss deals entered into by the contra-traders, providing yet a further link in Mr Humphries' opinion between the two types of transaction.

262. Mr Humphries concluded that the transactions in the First Touch Scheme were clearly contrived for the purposes of fraud, and were highly organised. In his opinion the overall pattern could not have occurred in the course of genuine commercial trade. The Scheme clearly required that the goods be directed to certain destinations in order for it to operate successfully. It was inconceivable that those controlling the scheme would have left any element to chance. The traders involved at each stage of the transaction chains must have had sufficient knowledge of the scheme to direct their sales accordingly.

15. CLOSED CELLS.

263. In the 91 sale transactions carried out by BTS in the appeal period, it dealt with only 8 customers. And in NTS's deals in March and April 2006 it dealt with only 2 customers.

264. Further, NTS dealt with only 3 suppliers, one, First Touch itself in its First Touch transactions, and two, Scorpion and Deb Techno, in the 19 direct tax loss deals which pointed to Multimode as the financier.

265. In BTS's 9 deals in Cell 10 it dealt with only two suppliers, Epinx and Aram, the former being considered a contra-trader by HMRC and the latter a buffer interposed between NTS and another contra-trader Kwality.

266. The deal sheets show that all the transactions with which we are concerned occurred within the closed cells identified by HMRC.

267. When brokers purchased goods originating with the EU suppliers to the contra-traders in Cell 5, they always sold to EU customers in that Cell, and never to anyone else. The same situation prevailed in relation to the other cells or schemes.

268. In each separate cell transaction, the goods emerged from a distinct, very small group of EU suppliers and passed to a similar group of EU customers, the latter frequently being linked to the former, or even containing the same companies. That happened irrespective of the number of intermediate hands through which goods passed, indicating to HMRC that they remained under the same control throughout.

269. The Appellants' deals followed the pattern for whichever group of contra-traders they were dealing in. They sold all goods originating in Cell 5 transactions to EU customers in that cell; all those originating in Cell 10 were sold to EU customers in that cell; and all those originating in the First Touch scheme to customers in that scheme.

16. MR PICKUP'S CHALLENGES TO MR HUMPHRIES' EVIDENCE

270. Mr Pickup challenged Mr Humphries' evidence in a number of respects. We propose to deal with the challenges under four separate headings:

1) whether Mr Humphries correctly removed Scorpion as a contra-trader from Cell 5;

2) whether amendments required to Mr Humphries' chart NH023 invalidated his evidence in relation to Cell 5;

3) whether certain trading patterns of the alleged contra-traders in Cell 5 indicated that they were not contra-trading; and

4) whether the size of the overall scheme was "plausible".

271. We propose to deal with challenges (1) and (2) together at this point in our decision. We do so by reference to what Mr Pickup identified as serious errors in Mr Humphries' evidence. We shall then deal with challenge (3) followed by (4) a little later, but should note at this stage that, in relation to challenge (4) we shall separate the item into two parts: (a) a general one, and (b) the "split deals".

272. In respect of each contra-trader alleged to be part of the overall scheme to defraud the revenue, Mr Humphries exhibited to his first witness statement one, and sometimes more than one, flowchart showing the flow of goods in that trader's acquisition chains. He maintained the trading patterns revealed by the charts to indicate the overall series of transactions they covered to have been contrived.

17. MR PICKUP'S CHALLENGES TO ASPECTS (1) AND (2) OF MR HUMPHRIES' EVIDENCE

273. Following service of Mr Humphries' evidence, those representing the Appellants requested, and were additionally provided with, copies of the documents underpinning the analysis. We were told that the copies so provided exceeded 1200 in number. Mr Humphries was, however, unable to provide the deal sheets he had originally considered as he had not retained a copy of them, and the information they

contained had later been updated or amended on HMRC's EF system. Consequently, such deal sheets as were provided to the Appellants were the then current versions of them.

274. Mr Pickup cross-examined Mr Humphries over four days with particular reference to the flow charts exhibited to his first and fourth witness statements (the latter statement made in 2011 updating the former made in 2008) seeking reasons for the changes he had made, and identifying numerous errors found in the charts. Mr Humphries admitted having made the changes to the documents, explaining his reasons for doing so as including their updating to reflect additional information coming into HMRC's possession and correcting errors and mistakes, some of which he acknowledged as having arisen from his misreading deal sheets.

275. Mr Humphries accepted that some of the evidence he had given to the tribunal in *Regent Commodities Ltd v Commissioners of Revenue and Customs* [2010] UKFTT 68(TC) (in which Mr Pickup appeared for Regent), where the cells in point were the same as those in the present case albeit under different names, was inaccurate. But he maintained that it made no difference to the overall scheme.

276. It was quite plain from the cross-examination of Mr Humphries that the additional documents provided by HMRC had been analysed by those representing the Appellants in minute detail. Every discrepancy found in the analysis, including many in transaction chains that had nothing whatsoever to do with the Appellants, was used quite properly by Mr Pickup to discredit Mr Humphries' evidence as to the existence of the various cells of traders, and the identification of their constituent members.

277. In relation to the first of the "errors" he identified, Mr Pickup focused particularly on the involvement of Scorpion Connections Ltd ("Scorpion") in Cell 5. Scorpion was a supplier to NTS in 11 transactions, but featured in but one of BTS's Cell 5 transactions, as a buffer. Mr Humphries initially considered Scorpion to be a contra-trader in Cell 5 but later decided to exclude it.

278. In his fourth witness statement of 29 September 2011 (WS1/32), Mr Humphries explained that he had originally included Scorpion in Cell 5 "because its acquisition transaction chains included some of the same EU traders as those of the other six contra-traders". He continued, "However, I no longer consider Scorpion to be part of the Cell 5 scheme [other than as a buffer], because none of the onward sales of those EU customers involve Comica or Parasail." (The words in square brackets are required to correct the statement following Mr Humphries' cross-examination). He accepted having made "a significant oversight" in originally including Scorpion in Cell 5, but claimed his change of mind to have been due to his being unable to trace forward Scorpion's transactions to Comica, Parasail or Forex for its transactions "go circular and then through a company called Multimode Marketing." Mr Humphries added that although the scheme into which he considered Scorpion should be put "invoices the same traders, [it] has a different pattern altogether."

279. In another witness statement, in this case prepared for the NTS appeal (WS1/55), Mr Humphries addressed the question of the First Touch Scheme involving

First Touch itself and 11 other contra-traders, one of which was said to be Scorpion. He said that that scheme was nothing to do with Comica, Parasail, or Forex, but that the transactions in it followed a particular pattern whichever contra-trader was involved. Mr Humphries believed that to be the scheme to which Scorpion should have been allocated initially.

280. Mr Pickup claimed Mr Humphries' evidence to indicate that: Scorpion was a member of Cell 5 whenever it undertook buffer transactions which could ultimately be traced to either Comica or Parasail; it was a member of the First Touch scheme whenever it acquired goods from either Ascomp, East Telecom or Pol Comm (two of which were also Cell 5 traders) or despatched goods to one of five traders (four of which were also in Cell 5); and it was involved as a buffer in a wholly separate scheme in which NTS acted as broker in direct tax loss chains (NTS deals 5-10, 13, 19 and 21-23). In each type of transaction, although its counter-parties were often the same, Scorpion was apparently being controlled by a different entity, for a different purpose and for the benefit of a different third party.

281. In order to scrutinise Mr Humphries' reasoning for removing Scorpion as a Cell 5 contra-trader, Mr Pickup cross-examined Mr Humphries about that company's acquisition and broker deals. In relation to the acquisition deals, Mr Pickup focused on deals carried out by Scorpion in April and June 2006, and in relation to the broker deals on those carried out in April 2006. Since in both cases the cross-examination lead to transactions outside the scope of the evidence presented to us, it proved inconclusive. Mr Pickup invited us to construe that as demonstrating that Mr Humphries was uncertain as to whether Scorpion should be removed from Cell 5.

282. Having initially asserted that the presence of Multimode was an indicator of a wholly different money flow from that found in Cell 5, Mr Humphries eventually conceded that it was also a significant party within transaction chains that fell within Cell 5. He did so against a background of the evidence of Mr Birchfield at exhibit PB1, a flow chart analysing the money flows involving the participants in Cell 5, showing Multimode as being an EU participant in the Cell 5 money flows.

283. Mr Humphries summarised his removal of Scorpion from Cell 5 as a contra-trader in the following way:

> "Scorpion is a knowing participant in a scheme which involves purchases from Ascomp [of Denmark], East Telecom [of Estonia] and Pol Comm [of Poland], and [the goods in] which end up with Ascomp, East Telecom and Pol Comm. The goods all start and end in the same places. It is nothing to do with Comica, Parasail or Forex [the base members of Cell 5] but some of the same traders appear in both schemes. The different schemes concern different final destinations and are perhaps controlled by different people: it's to do with the money."

284. The second and, in Mr Pickup's submission, "most serious" error in Mr Humphries' preparation and presentation of his charts related to the content of his exhibit NH023 (E1/47), a summary of "Defaulters in Contras' broker deals". That chart contained an analysis of the chains of transactions of four of the six contra-

traders in Cell 5 identified by Mr Humphries. In relation to the chart, in his first witness statement (WS1/4), Mr Humphries said:

> "18. I have not made a detailed examination of the chains containing defaulting traders, but I have identified 19 defaulting traders in the broker deals of 4 of the contra-traders. Ten of them are common to 2 or 3. The EU customers in these transaction chains fall broadly into two main groups. With the exception of 5 mobile phone deals, the group of customers used appears to depend on the identity of the defaulter. One of these groups contains the same EU customers as those of the brokers which source goods from these contra-traders. This provides a link between the acquisition deals and the tax loss deals undertaken by the contras. I have prepared a chart summarising this which I produce as NH023".

285. In cross-examination, Mr Humphries accepted that the chart was incorrect; rather than the defaulting traders being identified in the broker deals of the four contra-traders, they were to be found both in their buffer and broker deals. He claimed the error made no difference; his analysis remained valid whether goods were exported by a contra-trader or another broker. But he accepted that the change in his evidence reduced its strength.

286. Mr Humphries also accepted that the first of the three central assertions in para 18 of his statement - that there were 19 defaulters in the four contra-traders' deal chains whose transactions he had considered, and that there was commonality of defaulters, i.e. ten were common to all four traders, and eight to two or three - was incorrect. Only one defaulter was common to all four contra-traders; three were common to three of them; four were common to two of them; seven to only one; and four were not found in any of their transaction chains.

287. Mr Humphries further accepted that his second assertion - that the defaulters fell into two groups and, with five exceptions, the group used depended on the identity of the defaulter - was incorrect. Mr Pickup showed in cross-examination that there were exceptions to that claim. He contended that errors in it undermined Mr Humphries' identification of the groups, and suggested he had pre-determined which companies should be included in them.

288. In the original chart NH023 Mr Humphries indicated the identity of the defaulter to determine the destination of the goods, but when amended and brought up to date he accepted that the factor determining the identity of the EU customer seemingly changed to that of the broker (contra-trader).

289. As to Mr Humphries' third assertion - that one of the groups contained the same traders who were customers of the brokers in the contra-traders' acquisition chains - there was no dispute that the group identified with defaulters 8-18 identified on NH023 was composed of traders which were also EU customers in the contra-traders' acquisition chains, save for Nano Infinity (which appeared in the group identified with defaulters 8-18 on NH023, but not Mr Humphries' updated Cell 5 overview at NH4/015). The significance of that point to Mr Pickup was that almost all of the transactions which led to those traders were dispatches by Selectwelcome, and not by

the other contra-traders; the identity of the EU customer was principally determined by the identity of the UK broker.

290. Finally on exhibit NH023, Mr Pickup questioned Mr Humphries' decision to look only at the four contra-traders he chose rather than all six he initially identified. Mr Humphries explained that he had chosen "some of the biggest ones". Mr Pickup raised various questions relating to the transactions of the two contra-traders not selected by Mr Humphries, TCCS and Svenson Worldwide, to show that their transactions revealed some EU customers not disclosed on NH023 and some new defaulters. In response, Mr Humphries accepted that TCCS was "out of sync" with the pattern identified in NH023, and that there were some EU customers and new defaulters not included in the chart.

291. In conclusion, Mr Humphries maintained that the basic pattern shown in exhibit NH023 remained good, while accepting that some transactions referred to by Mr Pickup fell outside it.

292. Having admitted to having misread the deal sheets in the preparation of his flowcharts, and corrected his summary at NH023 as relating to both brokers and buffers, Mr Humphries accepted as correct a "counter-schedule" prepared on behalf of the Appellants.

Discussion

293. Mr Pickup accepted that the analysis conducted by Mr Humphries as to the overall scheme to defraud suggested that there may have been contrivance or artificial trading patterns between certain traders. The Appellants conceded, with the benefit of hindsight, that they may have been duped by participants in the fraud who were involved in their chains of supply. However, Mr Humphries' analysis told the tribunal nothing about the state of mind of the Appellants: it was limited in scope, selective, inconsistent, unreliable, misleading, in areas implausible and based upon a substantial degree of judgment and discretion. It could not be relied upon to determine the issue of knowledge. Further, the role of the contra-traders in the alleged cells, when considered in the light of HMRC's evidence, made no sense; nor did the role ascribed to the Appellants. If they were, as HMRC suggested, knowing participants in the fraud, why would they have exposed themselves to the risk of relying on a reclaim? Why would they not have contra-traded, thereby obtaining the money from an unwitting trader by way of output tax rather an input tax reclaim from HMRC?

294. Mr Pickup submitted that in view of the admitted errors and mistakes in Mr Humphries' work, we should carefully reflect on them in deciding whether Mr Humphries was a reliable analyst and witness, and what conclusions could safely be drawn from his analysis. On innumerable occasions, he had misread the deal sheets or made mistakes with significant consequences for his conclusions. He prepared schedules and charts in a simplified and incomplete manner, omitting important details in order to advance a point rather than to assist the tribunal with the complete picture of the evidence. His chart NH023 was presented in an entirely misleading fashion both here and before the tribunal in *Regent*, and his corrections to that chart,

on his own admission, significantly undermined his conclusions. His evidence should be approached with care.

295. We do not accept that Mr Humphries deliberately set out to deceive the tribunal. His charts were detailed and designed to deal with many hundreds of cell transactions. We do not find it surprising that he chose not to deal with everything with which he could have dealt. Had he done so the volume of documentation with which we were provided, already vast, would probably have increased three or four fold. That some charts produced were so full and contained printing so small that we literally had to use a magnifying glass to read them perhaps illustrates the extent of their content.

296. As we shall show when we come to deal with the FCIB evidence, Multimode appeared as the money provider in all but one of NTS's deals in the first scheme referred to by Mr Humphries i.e. that involving NTS's purchases from and the return of the goods to Ascomp, East Telecom and Pol Comm; Amira, the financier of Comica, Parasail and Forex, the base members of Cell 5, appeared in none of them. For the reasons given by Mr Humphries, we accept that Scorpion should never have been included in Cell 5, except as a buffer. Mr Humphries' initial decision to include it as a contra-trader was wrong. However, we can see no reason to find that Scorpion's exclusion (other than as a buffer) makes any difference to Cell 5; the scheme fundamentals remain intact.

297. The overall effect of Mr Pickup's cross-examination, not only in relation to exhibit NH023 but also in relation to a number of Mr Humphries' other charts and documents, served to correct errors which Mr Humphries had made, to fill gaps in his analysis, and to add companies to the charts that should have been included but for one reason or another had been omitted. But most importantly the cross-examination resulted in our being presented with Mr Humphries' charts and documents in their complete and correct form. All were confirmed to be based on the deal sheets before us. None of the deal sheets was challenged, nor as a result of the Direction, could they be.

298. Mr Pickup ensured that the picture we had of Cell 5 (and the other cells) was as accurate and up to date as possible; he put right flaws in the evidence of Mr Humphries. Paradoxically, whilst the cross-examination might have weakened a number of individual aspects of Mr Humphries' evidence – aspects which did not affect the Appellants' deals - cumulatively it strengthened the core of it.

299. In the light of Mr Humphries' errors, mistakes and omissions as to his charts and other documents, we have taken even more than usual care to consider his evidence. Having done so, and importantly taken full account of the related FCIB evidence available to us, we express ourselves satisfied that his conclusion as to the operation of Cell 5 is the correct one: Comica and Parasail were the companies at the start and end of each transaction chain, and the transactions were financed by the Amira Group. We are also satisfied that Mr Humphries' basic assertions in relation to the operation of the other cells and schemes before us are correct.

300. We accept that Mr Humphries' analysis did not extend to all the deals a given trader might have entered into, or reveal all available details of its deals. That there were further matters he might have considered does not deprive his evidence of force.

18. MR PICKUP'S CHALLENGE TO ASPECT (3) OF MR HUMPHRIES' EVIDENCE.

301. We then move to deal with Mr Pickup's claim that the traders identified by Mr Humphries as contra-traders did not act as such. The claim was made against the background of the unchallenged witness statement of Mr Stone, HMRC's principal specialist officer in the field of MTIC fraud. In it he described contra-trading as a counter measure introduced by fraudsters in response to the activities of HMRC to combat MTIC fraud. He suggested that the aim of a contra-trader was to submit VAT returns for nil net tax, or to make limited reclaims. Even if a contra-trader were not aiming specifically for a nil VAT return, his aim was to submit a VAT return that would not attract the attention of HMRC.

302. At the end of period 06/06 most of the contra-traders involved in the cells Mr Humphries' identified made substantial input tax reclaims, reclaims that HMRC would certainly have subjected to extended verification. Mr Humphries claimed that process would have shown each contra-trader to have undertaken a vast number of 'dirty' broker deals that traced back to defaulting traders, and a tax loss which had been off-set by distinct acquisition deals. In turn, that would have exposed the true nature of the so-called "clean" chains and, in particular, identified the broker or exporter in those chains as a potential participant in the wider fraud.

303. For period 06/06 Mr Humphries produced figures for Cells 1 and 5 as follows:

NH5/012 Cell 1 Tax Summary

Contra-trader	Contra's Net Tax
385 North	-£1,817,113.00
Blackstar	-£3,890,000.00
Digikom	-£573,378.00
Export Tech	-£861,429.00
Pan Euro Ventures	-£1,964,588.00
Rioni	-£2,445,782.00
Total	-£11,552,290.00

NH5/013 Cell 5 Tax Summary

Contra-trader	Contras' Net Tax
David Jacobs	-£3,913,085.00
Powerstrip	-£2,611,293.00
Selectwelcome	£25,240.00
Svenson Commodities	-£8,820,907.00
Svenson Worldwide	£69,509.00
TC Catering Supplies	£35,874.00
Total	-£15,214,662.00

Thus in period 06/06 a number of the contra-traders submitted multi-million pound repayment returns. When challenged as to whether the returns indicated that the

traders concerned did not act as contra-traders, Mr Humphries said that they did so act; the controlling minds concerned in the frauds "were not very good at their job".

304. To Mr Pickup the fact that those traders' input tax repayment claims did not fit HMRC's standard contra-trader plan cast doubt on the accuracy of the schemes devised by Mr Humphries, or at least the reliance that could safely be placed upon his evidence in our determination of the Appellants' knowing participation in them.

305. Mr Pickup submitted that the "starkest weakness" in Mr Humphries' thesis was that Svenson Commodities, as an alleged contra-trader in Cell 5, ended the 06/06 quarter making a repayment return in the sum of £8,820,907; that amount would inevitably have brought the return to the attention of HMRC and ensured that it would have been subject to extended verification.

306. Mr Pickup contended that examination of Svenson Commodities' trading history in the 06/06 period suggested that its behaviour was inconsistent with its having been a contra-trader, as characterised by HMRC's witnesses. By 15 June 2006 it had completed all of the acquisition deals it undertook in 06/06, receiving total output tax of £18,138,010.63. By the same date it had undertaken despatch transactions attracting input tax of £16,185,831. It undertook no transactions between 15 June and 30 June 2006, so that on the final day of period 06/06 the company would have had a liability to HMRC of £1,952,179.47. Mr Pickup observed that the rational thing for a contra-trader to have done in that situation would have been to undertake despatch transactions to generate an input tax reclaim to off-set against its liability to HMRC, thus reducing its exposure to VAT at the end of the period. What Svenson Commodities did was to undertake nearly £70 million worth of despatch transactions on the final day of the period, despatching goods acquired by Cell 1 contra-traders in 26 transactions. On those transactions it paid input tax of £10,558,887.50. The result was that, instead of a £1.9m liability to HMRC, Svenson Commodities had a £8.6m repayment claim. Mr Humphries could offer no explanation for Svenson Commodities' behaviour.

307. In that light, and since other contra-traders had behaved in a manner similar to Svenson Commodities, Mr Pickup submitted that the supposed contra-traders in Mr Humphries' analysis had not behaved as one would have expected them to have behaved; their behaviour had no obvious rationale, and must cast doubts on HMRC's case as to the essential structure of the contrived schemes and, in particular, with Mr Humphries' contention that all traders concerned were knowing participants in them

308. Svenson Commodities, Powerstrip and David Jacobs were all denied their 06/06 input tax repayment claims, and appealed the denials to the tribunal. Subsequently, in 2011 all three companies withdrew their appeals

309. In his unchallenged statement, made on 6 October 2008, Mr Stone dealt at paras 121-127 with "variations in the level of wholesale phone trading" saying that "operational indicators during 2005 and the first half of 2006 suggested that there was a great increase in trading in goods that were commonly the subject of MTIC fraud, with no apparent commercial or economic explanation for that increase". At the beginning of 2005 turnover on the grey market in mobile phones was in the region of

£250 million per month. Following release of the Advocate-General's opinion in *Optigen* on 16 February 2005, monthly turnover increased greatly until in the final quarter of 2005 it reached over £1,250 million. On 12 January 2006 the ECJ gave judgment in *Optigen*, and the UK government announced its intention to introduce the reverse charge on the importation of mobile phones and CPUs. On 14 March 2006, the Advocate-General gave his opinion in *Kittel*, and on 1 May HMRC introduced a major expansion of their extended verification programme. The grey market turnover in phones continued to increase and in May 2006 reached almost £4,400 million.

310. On 14 February 2006 Vantis plc, a company advising on accounting, tax and business to the "grey market" in inter alia mobile phones and advertising on websites widely used by mobile phone traders on the "grey market", published an article on its website concerning the introduction of the reverse charge on mobile phones and computer chips. The article stated that "the Government announced on 26 January 2006 that it has applied to the European Commission to remove VAT from supply chains involving mobile phones and other specified goods used as part of MTIC frauds". The article continued, "There is likely to be an initial rush to trading by those behind fraudulent businesses over the coming months seeking to take advantage of the VAT system before this legislation comes into force".

311. In Business brief 10/06 HMRC gave advance notice of their intention to introduce the reverse charge on mobile phone transactions by 1 October 2006. In the event, implementation of the charge was delayed as a result of the UK having to obtain a derogation from the Sixth Directive, and it was not introduced until 1 June 2007.

Discussion

312. Mr Birchfield, Mr Humphries and Mr Davies on behalf of HMRC conceded that the concept of contra-trading did not necessarily involve the knowing participation of the broker in the clean chain. Mr Pickup submitted that trader was not necessarily pivotal, as suggested by HMRC. Contra-trading fraud could work, in different forms, depending on the participants involved. The broker might be an innocent dupe or equally might be a knowing participant. Deciding which of those roles the Appellants held was a matter of fact for the tribunal to determine.

313. HMRC preferred the concept of contra-trading in which the broker in the clean chain was "pivotal." Their policy of targeting brokers by denying reclaims rather than pursuing contra-traders and defaulting traders drove them to rely on such a concept. However, as Mr Birchfield agreed, their preferred concept fell down because of its reliance on the success of the reclaim from HMRC. The alternative concept which Mr Pickup urged us to accept, where the contra-trader procured his reclaim from an unwitting third party trader rather than seeking it from HMRC, was a much more credible concept and considerably more attractive to anyone organising a fraud.

314. The concept of contra-trading was not known to any of the witnesses before May 2006. It was not known to Mr Tomlinson and Mr Edmonds before May 2007 when the denial letters were sent, and was not explained to the former until even later. To Mr Pickup that was yet a further factor suggesting that the connection with a

fraudulent tax loss by way of offsetting could not have been known by Mr Tomlinson in April, May or June 06, unless he was a participant in the fraudulent scheme. That further confirmed that the issue for decision was whether HMRC had proved that Mr Tomlinson was a knowing participant, i.e. the case brought by HMRC was one of actual knowledge or nothing.

315. Mr Pickup submitted that Svenson Commodities and the other companies said by Mr Humphries to be contra-traders in Cell 5 and Cell 1 did not act as such; behaving rationally they would have undertaken despatch transactions to generate input tax reclaims only sufficient to offset against their liabilities, and reduce them to minimal amounts.

316. We accept that the situation Mr Pickup described seemingly prevailed until June 2006. However, as Mr Stone disclosed, the value of wholesale exports plummeted from £3,163 million in June 2006 to a mere £758 million in July 2006 – a drop of almost 75% - to be followed by further huge decreases in the immediately following two months. By December 2006 monthly exports had fallen to £61 million. As Mr Stone further said in his unchallenged statement, there was no apparent commercial or economic explanation for the increase in turnover in 2005 and early 2006. The distinct change in the behaviour of the contra-traders from June 2006 onwards points to their having recognised, perhaps in the knowledge of the Vantis article, that the judgment of the ECJ in *Kittel*, due for delivery a few days after the end of the period 06/06, would almost certainly provide HMRC with the powers they required to enable them to deal with MTIC fraud. The MTIC opportunity to obtain large profits at no risk would effectively be at an end: they might as well make input tax repayment claims as large as they could arrange. Notwithstanding that the behaviour of the companies concerned at the end of period 06/06 was not that until then to be expected of contra-traders, since we accept that there was no apparent commercial or economic explanation for the huge increase in turnover in the grey wholesale market in mobile phones, and since the "clean chains" identified by officers Humphries and Murphy bore the same characteristics as the "dirty chains" – of goods rapidly changing hands in the UK, arriving in the country at the beginning of the day and leaving by the end of it - in our judgment, the traders identified by HMRC as contra-traders acted as such.

19. ADDITIONAL EVIDENCE OF THE CONTRA-TRADERS' KNOWLEDGE

317. An essential element in HMRC's case for disallowing the Appellants' input tax repayment claims in relation to their transactions with contra-traders is that the contra-traders used their clean chains as a dishonest means of covering up the tax evasion involved in their associated dirty chains (see *Megtian* at para 20). It is therefore necessary for HMRC to establish that the contra-traders knew that the transactions in which they participated at the foot of dirty chains were connected with fraud.

318. In that connection, HMRC adduced evidence which they claim to show that the contra-traders' deals were contrived, to provide further support for their claim that there was a connection between the Appellants' denied deals and fraudulent defaults,

and to prove that the operations of the contra-traders were themselves fraudulent. In that evidence, with which we shall now deal, the officers for the eight contra-traders concerned set out the features of those traders' activities – features similar to those found in the Appellants' own deal chains – which HMRC contend imply fraud. HMRC's case is that each of the contra-traders was aware that its broker deals were connected with fraud, either because there was a fraudulent default in a chain of its transactions, or by connection with a fraudulent default via another contra-trader.

319. In relation to each contra-trader, we list first its assurance officer and the relevant deals of the Appellants. We make no apology for including to a limited extent information also found in the section of our decision devoted to the Appellants' due diligence on the contra-traders.

a) Digital Satellite 2000 Ltd ("Powerstrip") (Alan John Ruler WS7/532)
[BTS deals April 10, May 7, 20-22, 35-37, 40-42]

320. Powerstrip was incorporated on 20 September 2000, and was registered for VAT from 6 August 2001. Its director on registration was Mohammed Yousef . He held 99 of the 100 issued £1 ordinary shares, and Tahir Yousat, the company secretary held the remaining share. Mohammed Yousef resigned on 21 March 2006 when Umar Haq became the director. Mr Haq remained in post until Powerstrip went into members' voluntary liquidation on 19 April 2007. The company moved premises several times between August 2001 and April 2006, but throughout operated from a base in a relatively small area of Manchester.

321. In its Form VAT 1, Powerstrip's trading activity was declared as "Design and Installation of satellite systems". However, from October 2005 onwards it traded in mobile phones, CPUs and some other electrical items. It acted as a UK acquirer, as a buffer, and as a broker. From the types of trading Powerstrip entered into, coupled with information gleaned during extended verification of its returns, Mr Ruler considered it to be a contra-trader.

322. All Powerstrip's deals were back to back, and the goods in which it dealt entered the UK and left within a very short time. Its goods were always held by a freight forwarder, and never by itself. None of the company's deal chains could be traced from a manufacturer or authorised distributor, or to a retailer, and no trader within a deal chain ever made a loss.

323. From his examination of the records, Mr Ruler revealed Powerstrip's declared turnover as:

Y/e 31/7/2003	£72,000
Y/e 31/7/2004	£81,000
Y/e 31/7/2005	£37,000
Y/e 31/7/2006	£604,960,185

324. In so far as Powerstrip's VAT returns were concerned, those for 2004 and 2005, with one exception, were below the VAT registration threshold. The exception was

the return for period 12/05 which showed sales of £44,642,558. The return for period 03/06 showed sales of £182,116,541.

325. Powerstrip's return for period 06/06 showed net sales of £367,201,086, total output tax (including acquisition tax) of £59,277,988.05, total input tax (including acquisition tax) of £61,927,365.29, and a net repayment claimed of £2,649,377.24.

326. Declared turnover in the three months ended on 30 September 2006 was £33,928,548. (We note that that figure includes sales made in the year to 31 July 2006). In the following three months, i.e. to 31 December 2006, Powerstrip declared sales of £40, followed by no sales whatsoever in the first three months of 2007.

327. Mr Ruler considered the incredible growth in Powerstrip's turnover from October 2005 to 31 July 2006, followed by what appeared to be a complete cessation of trading, to form "a remarkable set of circumstances". He so concluded against a background of Powerstrip never having had any employees, its business being conducted from an office suite consisting of two or three rooms, there being no injection of capital to fund the increase in its purchases, and Experian having advised traders dealing with it not to exceed a credit limit of £500 without a director's guarantee. Mr Ruler added, "Based on my extensive experience in dealing with traders involved [in] MTIC activity, this huge increase and sudden decrease in turnover is by no means unique to Powerstrip, and in my view is wholly typical of an MTIC trader."

328. In dealing with Powerstrip's awareness of MTIC fraud, Mr Ruler disclosed that on 21 September 2005 HMRC Redhill informed the company by letter that the then current tax loss estimated by HMRC through MTIC trading was between £1.06 billion and £1.73 billion. The letter explained that the safest way for traders to protect their input tax claims was by verifying VAT numbers before conducting deals, exhibit AJR12.

329. Mr Yousef was interviewed by HMRC in September 2005. He informed them that he had been looking at the IPT website for potential contacts, and mentioned that he had found Svenson Commodities and David Jacobs.

330. During period 03/06 HMRC sent Powerstrip four deregistration veto letters, i.e. letters informing the trader that companies with which it had either been trading or had indicated an intention to trade had been deregistered for VAT. In the following period, 06/06, they sent it a further 22 such letters.

331. On 22 June 2006 Powerstrip was informed by letter (exhibit AJR16) that 24 transactions in which it had been involved in periods 12/05 and 03/06 had resulted in tax losses totalling £2.8 million.

332. Mr Ruler made a number of comments on Powerstrip's due diligence. He noted that it had no evidence of checks made on suppliers and customers, it did not enter into written contracts, and it did not receive goods in which it was dealing or, indeed, ever saw or examined them. To demonstrate his claim that the whole scheme of Powerstrip's trading was contrived, Mr Ruler pointed to consistent behaviour in its

trading patterns which ignored differences in products, quantities, suppliers and customers. In April 2006 Powerstrip was a UK acquirer in the BTS April deal 10 chain of transactions. Eight companies appearing in BTS's 9 other deal chains in that month also appeared in Powerstrip's deal chains. Two EU suppliers to Powerstrip, Mighty Mobile and Mountainrix, appeared in the same capacity in 5 of the 10 BTS chains in that month, and also appeared as suppliers in 18 of Powerstrip's 46 acquisition chains. C&B Trading appeared as a defaulter in four of BTS's deal chains, and in four of Powerstrip's buffer deal chains. Further, in April 2006 Svenson Commodities, as a UK supplier to NTS in 4 deals, also bought goods from Powerstrip in 5 transactions and sold goods to it in a further three transactions.

333. In May 2006 Powerstrip acted as UK acquirer in 10 of BTS's deals. The following companies that took part in BTS's other 35 deals in May 2006 also appeared in Powerstrip's deal chains: TCCS (4 deals), Yalegate (5 deals), Selectwelcome (5 deals), Evenmore (13 deals), Regent Commodities (3 deals), Pol Comm (2 deals), and Planetmania (8 deals). The two EU suppliers Mighty Mobile and Adobcom appeared in 37 of BTS's 45 deal chains, and also appeared in 35 of Powerstrip's 47 acquisition deal chains. In Powerstrip's 41 tax loss broker chains there were only three defaulters: Stockmart (18 deals), XS Enterprises (16 deals) and Prompt Info (7 deals). Svenson Commodities again appeared in Powerstrip's transaction chains, on 5 occasions acting as contra-trader to BTS, and as customer on 3 occasions. The spreadsheets showing Powerstrip's suppliers and customers in April and May 2006 are to be found at exhibit AJR 19, and Powerstrip's deal packs are included at exhibit AJR 26.

334. Mr Ruler established that the total tax losses attributable to Powerstrip's deals in April and May 2006 totalled £12,416,566.66 (exhibit AJR6). He noted that in Powerstrip's April 2006 transactions the margins it obtained in mobile phone sales were between £14 and £36 per handset in broker sales, whereas in buffer sales they were between 75p and £1.65 per handset. In Powerstrip's CPU broker sales in May 2006 the margins were between £10.25 and £12 per unit, and all the deals led back to tax losses; and in its mobile phone broker deals its margins were between £10 and £69 per handset, whereas in its buffer sales they were between 50p and £1.70 (see exhibit AJR 19 as showing the consistency of the achieved margins).

335. In all of Powerstrip's deals the goods were bought and sold within 48 hours, and were imported into the UK and exported therefrom within a very few days. Every supplier in every chain of transactions was able to buy and sell the exact quantity, make and model of goods required. None of Powerstrip's deal chains traced from a manufacturer or authorised distributor, or to a retailer; and none of the traders in any deal chain made a loss.

336. Despite HMRC having made several requests to inspect the CMRs for goods Powerstrip purchased from EU customers and said to be despatched from the UK – a matter of 104 deals in period 06/06 – none was ever produced.

337. From his analysis of Powerstrip's trading records and the verification of its suppliers, Mr Ruler established tax losses in period 06/06 as follows:

April 2006	£2,875,215.00
May 2006	£5,652,333.66
June 2006	£3,889,018.00

338. Those losses occurred as the result of Powerstrip's trading activities. Seventy-seven of 149 deals involving sales to EU customers and purchases from a UK supplier traced direct to tax losses. Sixty-five of the remaining 72 deals in period 06/06 traced back to an EU acquisition with no apparent UK tax loss. In those deals HMRC claimed that contra 2 traders were involved further to hide the tax losses. Mr Ruler was unable fully to verify Powerstrip's remaining 7 deals due to one company, Nobel Wireless Ltd, having failed to provide its records to HMRC.

339. After Powerstrip went into voluntary liquidation – a fact that HMRC considered unusual in itself since the company was said to owe its creditors in excess of £50 million – HMRC were approached by two creditors seeking recovery of output tax said to have been paid on purchases they had made from Powerstrip for goods with which they were never supplied. Mr Ruler was unable to understand how creditors could have existed since if, as Powerstrip claimed, it first found a customer and only paid for goods when it had itself been paid. Subsequently, the liquidator of Powerstrip provided HMRC with a list of its creditors. On inspecting it they found the creditors to be traders who claimed to have supplied MTIC goods to Powerstrip to a value of over £48.8 million, but had not been paid. Thus HMRC found themselves exposed to bad debt relief claims notionally exceeding £7 million for transactions which may or may not have been carried out.

340. From an Experian report produced by Mr Ruler (exhibit AJR2), Powerstrip was shown as a high risk company with a suggested credit limit of £500, and a recommendation that any credit granted above that figure be accompanied by a director's guarantee. Mr Ruler considered that factor should have warned the company's prospective customers of the financial risks they would be taking were they to trade with it; those trading with it chose either not to make credit checks or ignored their results and thus must have been sure that they would receive goods they had paid for, or be paid for supplies made. To Mr Ruler those matters exhibited contrivance, and a certainty that there would be no problems with deals running into millions of pounds carried out by a relatively new trader.

341. Mr Ruler identified three other factors which he claimed clearly to point to Powerstrip's knowledge of fraud. First, the company did not need capital to purchase goods; money was paid to Powerstrip by its customers which was then paid to its suppliers after deduction of profit. Secondly, Powerstrip did not require credit from its suppliers because they did not release goods until they had received payment for them. Thirdly, the deals which led to bad debt relief being claimed from HMRC (see the penultimate paragraph) all formed part of a single pattern: the goods were sold by Powerstrip to customers in the EU in zero-rated sales so that it could not have reclaimed VAT previously paid under the bad debt relief provisions.

***b) Selectwelcome Ltd (Nigel Huw Clarridge* WS7/494)**
[BTS deals May 15-19, June 1-2, 5-8, 13-15, 25-26, 29-30, 40-41]

342. Selectwelcome was registered for VAT on 4 February 1990, and from the date of its registration operated a convenience store in Swansea. It was registered as a retail greengrocer.

343. On 11 January 2006, as a result of a trader having sought verification of Selectwelcome's registration number at HMRC Redhill, or the company itself having sought verification of another trader, it was sent a letter by HMRC containing advice about MTIC fraud and requesting that it make any verification requests to Redhill.

344. Mr Mahmood Ahmed, a director of Selectwelcome, approached HMRC on 27 January 2006 asking whether the company's registration details could be changed to show it as an export company and allowing it to submit monthly returns. He was asked to submit the request in writing.

345. As a result of receiving the written request, HMRC arranged to visit Selectwelcome on 16 February 2006. The visiting officer met two of the company's directors, Mr Ahmed and Mr Ayaz Rasool. The officer was told that Selectwelcome had established a separate part of its business to deal with non-grocery transactions, specifically the sale of air time, CPUs and mobile phones to overseas customers. The two directors admitted having little knowledge of trading in those commodities, but said that a friend had advised them that such sales could be very profitable. Mr Ahmed added that the company had £3,000 in the bank, and would fund activities by initially selling airtime and gradually building up profits.

346. In March 2006 Selectwelcome began trading in mobile phones in a small way, and its involvement in the market continued until July 2006.

347. In the year ending 31 December 2005, Selectwelcome declared turnover of £461,448. For the period 03/06 it declared turnover of £8,163,049, and for that of 06/06, £224,014,062.

348. Selectwelcome's return for 06/06 contained the following information:

Output tax	£24,508,344.38
EU acquisitions	Nil
Total output tax	£24,508,344.38
Input tax	£24,579,265.90
Repayment claim	£70,921.62
Net sales	£224,014,062.00
Net purchases	£224,004,839.00
EC supplies	£83,948,520.00
EC acquisitions	£83,532,073.00

The return was subjected to extended verification

349. In the process of verifying Selectwelcome's transactions in period 06/06, Mr Clarridge established that it completed 190 transactions consisting of 72 acquirer transactions, 52 buffer transactions, and 66 broker transactions.

350. In the 72 acquisition transactions Selectwelcome purchased phones VAT-free from 5 EU suppliers, namely Adobcom, Mighty Mobile SL, Forex, BRD, and Pol Comm. The goods were sold via buffers to 9 brokers including BTS. The UK brokers sold the goods to 18 EU customers, including four of the five EU suppliers.

351. In relation to the 52 buffer transactions, using internal HMRC databases Mr Clarridge found that a missing, hijacked or otherwise defaulting trader existed at the foot of 38 of the UK supply chains. As the 38 companies concerned had failed to meet their output tax liability, HMRC suffered tax losses which they sought to recover by means of assessments. Mr Clarridge further established that in every case Selectwelcome's customer then sold the goods to one of 14 EU customers and one non-EU customer. Of those customers four were companies with which Selectwelcome had traded directly in the appeal period. Mr Clarridge produced spreadsheets showing the full supply chain listing of the 52 transactions (Exhibits NHC7 to NHC14, NHC18 to NHC40, NHC70, NHC71, NHC82 to NHC91, NHC101 to NHC106, NHC119, NHC120 and NHC137). Input tax on the 52 buffer deals totalled £9,854,730.42 and output tax thereon £9,863,197,45. In relation to the tax loss chains, Selectwelcome incurred input tax of £7,859,208.21 and charged output tax of £7,865,852.75. It appeared to HMRC that there were 8 clean buffer chains in April 2006. When Mr Clarridge made his witness statement, which became his evidence in chief, he had been unable to classify the remaining 6 transactions due to an absence of transaction documentation.

352. As far as Selectwelcome's 66 broker deals were concerned, 63 of them took place in May and June 2006 with supplies being made to 5 EU customers. The remaining three deals, in April 2006, all resulted in supplies made to a company in Dubai. Selectwelcome incurred input tax of £14,676,301.33 on the deals. Of the 63 broker deals Mr Clarridge established that in 52 of them a missing, hijacked or defaulting trader existed at the foot of the transaction chain resulting in tax losses of £12,280,777.35. He confirmed the losses by establishing each full supply chain concerned using internal HMRC databases for the purpose. The defaulting traders identified by Mr Clarridge were Birdwood Ltd, Stock Mart Ltd, Many Services UK Ltd, Advertising Slough Ltd and RS Sales Agency Ltd. Each was assessed to the tax due from it. None of the assessments has been challenged; none has been paid. Mr Clarridge indicated that HMRC were pursuing the position in relation to the remaining 14 transactions.

353. From all 190 deals of Selectwelcome, Mr Clarridge concluded that, after expenses paid by the companies concerned, on a total output tax base of £24,495,599.44, repayment of £35,432,31 was due.

354. Mr Clarridge found a number of unusual features in Selectwelcome's trading practices. HMRC could not obtain details of any money injected into the company to fund its trading resulting in them concluding that the subsequent number and value of its transactions, bearing in mind that it had only one employee, was not credible.

Selectwelcome and all the other traders in its deal chains banked with the FCIB, a bank to which he knew other tribunals had referred as aiding money launderers. In most of its deals Selectwelcome did not pay its suppliers until it had itself been paid, resulting in the enterprise effectively being risk free. Further, payment was made some time after deals were completed on a back-to-back basis, i.e. payment was made to the supplier immediately after Selectwelcome was paid by its customer. HMRC could find no evidence of goods purchased by Selectwelcome ever being insured, or of the company ever having recorded IMEI numbers. Many of the phones the company purchased were invoiced as of "European specification", and thus unsuited without adaptation for use in the UK. During a visit to Selectwelcome an officer of HMRC was informed that it did not undertake credit checks or verify that goods were owned by their supplier. That in April, May and June 2006 Selectwelcome sold over £220 million worth of mobile phones and other electronic equipment in 190 separate deals without having undertaken what HMRC considered to be meaningful due diligence checks indicated to Mr Clarridge that its transactions were uncommercial.

355. Further, four of the five EU customers to which Selectwelcome sold goods in its 66 broker deals in the period had been de-registered by the authorities in their respective countries by the end of February 2007. To HMRC that demonstrated a lack of credibility in the deals, and a clear association of the various companies with MTIC fraud.

356. Other features commonly associated with MTIC fraud found by Mr Clarridge, and said by him to suggest orchestration, were that Selectwelcome never entered into written contracts with its suppliers and customers, that the EU suppliers and customers at each end of its transaction chains were companies with which it had traded directly in the same accounting period, that all its deals were back-to-back, and they involved low volume high value items. To those matters, Mr Clarridge further added the facts that in two acquirer transactions in May 2006 the deals had been split at some point in the chain and a proportion of the goods had been repurchased by the original supplier, and in none of Selectwelcome's transaction chains did an end user appear.

357. Mr Clarridge concluded that the VAT repayment claim of approximately £14.67 million for period 06/06 that would normally have arisen from Selectwelcome's 66 broker deals had been artificially reduced to a figure of some £35,000, and that had been done by its introducing the £14.632 million tax charged on the sales of goods to the 9 UK brokers in its 72 acquisition deals. BTS was one of the 9 brokers concerned, and £1,837,430.02 of the repayment claim with which we are dealing represented the input tax it incurred in 10 separate deals in which Selectwelcome was the UK acquirer. Mr Clarridge took the view that Selectwelcome had "deliberately offset an element of its VAT repayment claims, i.e. £14,676,301.33 to the 9 UK broker traders, each of which later submitted its own claim for a VAT repayment covering the periods 04/06 or 05/06 or 06/06 as part of a contrived scheme to defraud HMRC".

c) David Jacobs UK Ltd (Richard Hywel Davies WS7/292)
[BTS deals May 5, 9-14, 30-31, 38-39, 43-45]

358. David Jacobs was incorporated on 2 March 2004, and registered for VAT from 2 February 2005 with a trade classification of "Business consultancy". It submitted returns on a quarterly basis, its quarters ending in March, June, September and December.

359. Mohammed Asqher Iqbal was appointed its director on 10 March 2004. He resigned on 24 June 2005, but remained its single shareholder. He was also a director of Svenson Commodities until 19 January 2004, forming a link between that company and David Jacobs. Naveed Aslam was appointed director of David Jacobs on 23 May 2005.

360. HMRC identified David Jacobs as a possible trader in MTIC products when two UK VAT registered companies sought validation of its registration details on 28 June 2005. The following day HMRC sent a letter to the company explaining the verification process and enclosed Notice 726.

361. On 7 July 2005 officer Richard Saxon paid an unannounced visit to David Jacobs and informed its director Mr Aslam of HMRC's concerns about MTIC fraud. Mr Aslam, whose business background was in the retail clothing business, admitted having some knowledge of MTIC fraud. The visit report (exhibit RHD7) mentioned that David Jacobs was looking to trade in electronic goods and that the "company profile" sent to its prospective customers and suppliers described it as involved in "monitor/TV recycling." A further visit was carried out on 14 July 2005 by when David Jacobs had carried out its first deal in MTIC products. The only due diligence the company had carried out on its supplier in that deal was to make a Redhill check.

362. Mr Saxon arranged to meet Mr Aslam on 11 August 2005, but the latter cancelled the meeting claiming to be very busy carrying out due diligence checks on prospective counter parties. Mr Saxon did however met Mr Aslam on 19 October 2005 when it was revealed that David Jacobs banked with Barclays and the FCIB, and carried out all trading in MTIC products through its FCIB account. Mr Aslam also claimed that all the deals the company had carried out to that date were UK trader to UK trader in mobile phones.

363. In VAT period 07/05 HMRC found that in four tax loss deals David Jacobs' customer was Svenson Commodities. They found a further 6 tax loss deals in period 10/05.

364. David Jacobs' turnover increased exponentially from early 2005 onwards as follows:

VAT period	Net Sales	Net purchases	Net VAT reclaim
04/05	£94	£420	£37.51
07/05	£5,589,025	£5,581,976	£1,656.15
10/05	£35,186,346	£34,800,892	£477,227.77
12/05	£42,720,104	£41,913,364	£844,856.76

03/06	£225,121,678	£222,690,661	£813,676.61
06/06	£392,900,659	£380,700,890	£3,962,942.39
09/06	£37,418,273	£37,364,410	£34,208.97
12/06	£37,755	£70,940	£4,203.99
03/07	£0.00	£26,398	£3,817.95

365. At Mr Saxon's meetings with Mr Aslam, the latter was asked to produce David Jacobs' due diligence documentation on its suppliers and customers. He was also asked to do so in five letters and in a number of faxes and telephone calls. Every request was ignored resulting in HMRC concluding that the company carried out no due diligence. Similar requests for the production of CMRs met with the same response, leading HMRC to question whether the goods concerned existed at all.

366. HMRC obtained information from EU revenue authorities under the mutual assistance arrangements showing that seven EU companies with which David Jacobs had dealt had been deregistered, some were defaulters, others were simply conduit companies. Forex was one conduit company. HMRC also found that UK nationals were running all but one of the seven companies. In HMRC's opinion, much of the information they obtained could have been discovered by David Jacobs had it carried out the reasonable due diligence required; it did not carry out due diligence as it had no need to do so.

367. In the Experian report on David Jacobs obtained by the Appellants, (as we have mentioned), it was described as a "maximum risk company". Yet it was able to find trading partners. In those circumstances HMRC concluded that those trading with the company also carried out no diligence on it or, if they did, proceeded to ignore the results.

368. HMRC identified 40 despatch deals carried out by David Jacobs in period 06/06, the UK acquiring trader in each case being one of 8 contra-traders in David Jacobs' deal chains. Those chains had no immediate tax losses; but losses were found in the direct tax loss transactions of the contra-traders when they acted as brokers.

369. In period 06/06 David Jacobs trading led to direct tax losses totalling £15,563,708.25. Mr Davies allocated that entire sum to meet input tax repayment demands made by 10 of 13 identified broker traders. However, the claims for input tax received from David Jacobs' 13 broker traders totalled £25,514,572.45 – a figure that could not be met in full from the company's direct tax losses. Mr Davies therefore used the direct tax losses identified in David Jacobs contra-trader deals for the remaining three brokers. He then applied the difference between the two figures of £9,951,864.20 to the remaining brokers.

370. Mr Davies denied BTS's input tax repayment claims on the basis that it knew or should have known that its transactions were connected with fraud; its deal transactions traced back to contra-traders of which David Jacobs was one. Although those deals appeared not to trace back to a UK tax loss, HMRC's investigations showed that David Jacobs offset its transactions with BTS.

371. Of David Jacobs' own broker transactions, 97 traced back to a direct tax loss. It also entered into 40 despatch deals with no apparent loss, contra deals that traced to one of 8 contra-traders.

372. £1,772,522.51 input tax was denied to BTS in respect of its deals involving David Jacobs.

d) Svenson Commodities Ltd (Christopher Alexander Williams WS7/1)
[BTS deals Apr 6-9, May 6, 23-24, 28-29]

373. Svenson Commodities was incorporated on 13 January 2003. It was registered for VAT on 3 February 2003, its trade category being "Wholesale of computer/communication devices and accessories." It was placed on quarterly returns. The company had a founding director with David Jacobs in Mohammed Asqhar Iqbal.

374. On 27 April 2004 officer Blake visited the company. His visit report stated that its main business activity was "sale and purchase of mobile phones", and its director Abdul Salam Koser. In correspondence in July 2004 Svenson Commodities requested permission to make monthly returns saying that it could only enter into planned export deals once it could make such returns. Its request was refused.

375. Svenson Commodities' sales growth was said by Mr Williams to be "extraordinary". From the company's VAT returns, he extracted the following information:

Return	Sales	VAT due (i.e. claimed)	Exhibit
03/03	£15,000	£2,624	CW29
06/03	£14,000	£2,423	CW30
09/03	£14,500	£2,528	CW31
12/03	£10,614	£897	CW32
03/04	£7,419,796	£3,536	CW33
06/04	£3,796,478	£4,318	CW34
09/04	£5,473,065	£1,632	CW35
12/04	£6,524,315	£98,927	CW36
03/05	£23,724,833	£205,698	CW37
06/05	£31,520,962	£452,002	CW38
09/05	£51,213,861	£1,063,681	CW39
12/05	£81,678,196	£1,836,208	CW40
03/06	£215,609,488	£4,561,158	CW41
06/06	£404,534,611	£8,727,373	CW42

376. On 12 January 2006 HMRC informed Svenson Commodities by letter that a supply chain in which it had acted as a buffer had traced to tax losses of £264,957.

377. In April 2006 Svenson Commodities conducted acquirer deals of greater value than broker deals it also carried out. In doing so, it initially placed itself in a payment position at the end of period 06/06. In May 2006 it conducted broker deals that

served to convert its potential payment position at the quarter end to one of repayment. And in June 2006 it conducted acquirer deals to the value of £16 million, but followed them on 30 June 2006 with 26 broker deals valued at over £60 million.

378. Given the proportion of its broker deals that were connected to a further contra chain, HMRC considered that to be a highly irregular form of trading and to have been necessary to ensure that the contra-traders in their own dirty chains could conduct sufficient acquirer deals before the end of the period to disguise and offset their own fraudulent repayment claims. The result was that the company's resulting repayment claim was, although still very substantial, much smaller than it would otherwise have been. HMRC regarded that overall trading behaviour to be most irregular and to point clearly to contrivance.

379. In period 06/06 Svenson Commodities also conducted 126 buffer deals, 73 of which HMRC traced to a tax loss. In its acquirer deals it was supplied by three different EU companies which appeared to HMRC to have been involved in fraud. One of those companies was Mighty Mobile, a company said by the Spanish authorities to be a property company whose offices had long been closed.

380. The goods included in the 26 broker deals Svenson Commodities undertook on 30 June 2006 were not released in accordance with its normal practice, i.e. within 2 weeks of the invoice being raised, but were retained for some 1 to 2 months. The company attributed the delay in release to the closing of its bank accounts with the FCIB, yet it was not until 15 August 2006 that FCIB informed its clients their accounts should be closed by 15 September 2006. As ordinarily Svenson Commodities' customers would have released payment by mid-July, HMRC considered the explanation offered unacceptable.

381. A supplier and customer questionnaire were all that Svenson Commodities regularly obtained by way of due diligence on its counter parties: it undertook few credit checks and obtained no trade references or bank documents. Such credit checks as it did undertake were often performed after deals had been completed.

382. To Mr Williams the level and details of its due diligence could not have provided the company with adequate assurance that it was not involved in MTIC fraud before deals were carried out. It suggested that Svenson Commodities "went through the motions of due diligence with the objective of demonstrating compliance with HMRC examples". The checks actually carried out fell far short of those suggested in Notice 726.

383. The company requested inspection reports on goods only when it exported them. The reports were thus too late to serve a normal commercial purpose.

384. Mr Williams provided the following "non-exhaustive list of factors which … indicate(d) that Svenson Commodities knew its transactions were connected with fraud: back-to-back deals, no losses, no commercial risk, no added value, no written terms and conditions, no evidence of shipping terms or costs, and its turnover figures did not resemble those of a legitimate business."

e) TC Catering Supplies Ltd (TCCS) (Wayne Anthony Conroy WS7/247)
[BTS deals May 8, 25-27, June 3-4, 9-12, 27-28, 31-39]

385. Mr Conroy was entrusted with the task of reviewing certain of the records and tracing the deal chains of TCCS in the three months ended on 30 June 3006. He was provided with the deal packs for the transactions collected by officers Joanne Ewan and Thomas Lane. Those officers informed Mr Conroy that TCCS had carried out no trading in MTIC goods before May 2006. However, in the remaining two months of that quarter the officers reported that it had been involved in wholesale back-to-back transactions in mobile phones, CPUs and other electrical items as an acquirer, a buffer, and a broker.

386. From the evidence presented to him, Mr Conroy considered TCCS to be involved in contra-trading.

387. TCCS submitted its VAT return for period 06/06 (Exhibit WC1) showing the following:

Total Net Sales	£258,420,612.00
Total Net Purchases	£256,863,661.00
Net EU supplies	£104,309,524,00
Net EU Purchases	£102,687,975.00
Total Output Tax (including acquisition tax)	£27,328,179.82
Total Input Tax (including acquisition tax)	£27,318,412.40
Net Tax Due	£9,767.42
The MTIC deals that were included with the above figures were:	
Total Net Sales	£257,810,925.00
Total Net Purchases	£255,890,813.75
Net EU supplies	£104,309,524,00
Net EU Purchases	£102,687,975.00

Acquisition transactions

388. In May 2006 TCCS made 50 sales, and in June 2006 158 sales. On 17 occasions in May 2006 and 64 occasions in June 2006, the company acted as UK acquirer, selling goods purchased to a UK customer. On a further 22 occasions in May 2006 and 15 occasions in June 2006 it acted as a buffer. And on the remaining 90 occasions (11 in May 2006 and 79 in June 2006), it acted as a broker.

389. Mr Conroy analysed the TCCS deal chains in which BTS appeared as broker in May and June 2006 (exhibit WC2). The analysis showed that in 4 deals in May 2006 (originating from 2 TCCS acquisition deals which were split) where BTS acted as broker (i.e. TCCS May deals No 13 and 41) there were two UK traders between TCCS and BTS; on each occasion TCCS sold to Yalegate which sold to NTS before the latter sold to BTS. The EU supplier in deal 13 was Forex of Germany and in deal 41 Adobcom of Portugal. The EU customer at the end of the former chain was Planetmania of Portugal and the 3 EU customers at the end of the latter chain

Planetmania, CIDP of France and Opal 53 of Germany. The deal chains were produced as exhibit WC3.

390. In the 16 deals in June 2006 (originating from 9 TCCS acquisition deals) BTS acted as broker. In 8 of the 9 TCCS deals there were two UK traders between TCCS and BTS and in the remaining one there were 3 UK traders between the two companies. In 8 of the 9 TCCS deals the EU supplier to it was Mighty Mobile of Spain and in the one other deal Adobcom of Portugal. There were 4 EU customers at the end of those deal chains i.e. Intangible Media of Spain, Planetmania of Portugal, Opal 53 of Germany and Sigma Sixty of Holland (see exhibit WC4).

Broker Transactions

391. There were 90 deals where TCCS purchased from a UK supplier and sold to an EU customer in broker transactions. In 87 of those deals a defaulting or contra-trader existed at the foot of each of the UK supply chains. That was confirmed by Mr Conroy establishing the full supply chain. He established the full chains by tracing the supplier from the traders' deal packs. He then checked HMRC's computer system to trace other trader records from the supplier's supplier. Where that information was not available, Mr Conroy sought information from the relevant HMRC officer and continued along the chain until he arrived at a defaulting trader and could go no further.

392. As each defaulting trader had failed to discharge its output tax liability to HMRC, they suffered tax losses. In order to recover the unpaid tax, HMRC made assessments for the appropriate amounts of output tax. Mr Conroy issued tax loss letters to TCCS in respect of the tax loss deals (exhibit WC5).

393. He produced copies of the deal chains for all the TCCS deals resulting in tax losses, along with the supporting documentation for each step in those deal chains, (exhibited within Files E42 to 54).

394. From his analysis of TCCS's trading records and his verification of its supply chains, Mr Conroy established tax losses totalling £17,372,409.94 for the 87 deal chains he had finalised, and confirmed that they had occurred as a direct result of its trading activity in May and June 2006.

f) Epinx Ltd (Ian Clifford White WS7/185)

[BTS deals May 32-34, June 16, 19-21 and 23]

395. Epinx effectively took over the business of Pinx Ltd, which became insolvent in February 2005, both companies having Paula Susan White as director. Epinx registered for VAT with effect from 10 April 2005, but made its first taxable supply on 1 March 2005. The company was sent a letter about MTIC fraud shortly after the latter date. The letter was followed by a visit by MTIC officers on 27 June 2005. In Form VAT 1 Epinx estimated its annual turnover would be £700,000, and said that it did not anticipate making sales to and purchases from companies in the EU.

396. On 21 July 2005 Epinx submitted a repayment return for period 06/05 (exhibit ICW6) in the sum of £82,243.60. Its outputs declared in the period exceeded £1 million. HMRC initiated enquiries into the return and found that the repayment claim it was based on the zero-rating of two sales to a Spanish customer. Epinx's return for 09/05 was also a repayment one (exhibit ICW7), but in the much reduced sum of £1,611.78. The return showed turnover exceeding £3.3 million – an increase of 230% on period 06/05. The return for period 12/05, exhibit ICW8, sought repayment of £8,448.88 based on turnover in excess of £23 million – a further increase in turnover, on this occasion of 596% on the previous period. HMRC dealt with the 09/05 and 12/05 returns without enquiry. In contrast to the three immediately preceding periods, the return for period 03/06 was a payment one of £7,670.15 (exhibit ICW9). Turnover in that period was shown as £77.7 million – an increase of more than £54 million (235%) on the immediately preceding period. In period 03/06 Epinx carried out 32 broker deals and 39 acquisition deals. Had it not carried out the latter, its return for the period would have shown it to have been entitled to a repayment of some £5.815 million

397. On 9 March 2006 Epinx made application both for a change of trade class to "wholesale of electrical items", and for permission to make monthly returns. HMRC refused the latter as the company failed to provide evidence of its being in a regular repayment position.

398. Epinx's return for period 06/06 (exhibit ICW10) reverted to the repayment pattern established earlier. It sought £18,999.15 based on turnover exceeding £212.4 million, or an increase in turnover of 172% over the immediately preceding period.

399. In period 06/06 Epinx completed 232 deals. Forty-five of them were broker deals, of which HMRC traced 43 back to defaulting traders. A further 70 were acquirer deals, the goods in all of which were despatched from the UK by a number of broker traders, including BTS. The remaining 117 were buffer deals, 116 of which were traced back by Mr White to defaulting traders.

400. Mr White found a number of features which indicated to him that Epinx's business and pattern of trading were inconsistent with normal commercial practice and were artificially contrived. He did so against a background of all the company's fully verified deals in which it had acted as acquirer from the EU tracing back to broker traders who had despatched them abroad. In every fully verified deal chain in which Epinx acted as the broker, the chain had been traced to a defaulting trader.

401. Mr White considered Epinx's turnover in its first 15 months of trading, of over £316 million "incredible". The company had little capital and no significant financial backing or experience in its trade sector. Epinx and all its suppliers and customers had accounts with the FCIB. Epinx's director withdrew £780,000 from the company's FCIB account shortly before the authorities froze accounts with the bank in October 2006. It entered into no written contracts with its customers or suppliers claiming that to have been unnecessary since it offered no credit facilities, nor did it insure any goods in which it traded. In its highly competitive trading environment, Epinx made a profit in every one of the 316 deals it undertook between January and June 2006. The company never inspected goods in which it dealt, but relied on its

freight forwarders to make inspections. The form of a large number of Epinx's deal chains was remarkably consistent, the same traders appearing in the same order – see exhibit ICW24 as an example showing goods passing from Eutex Ltd to Dialhouse Electronics Ltd, to Yodem Ltd, to Sabretone Electronics Ltd to Epinx – an order that was repeated in all 14 of Epinx's deal chains in May 2006. Epinx was never left with stock it could not sell, and every deal was structured so that it did not have to pay for supplies until it had been paid by its customer

402. In a number of broker deals, Epinx was supplied by FAF. The Italian authorities concluded that FAF was a "fictitious company" and the transactions it purportedly conducted were false. Epinx carried out no Redhill checks on FAF, nor did it make any credit or other checks on it.

403. Epinx made contact with its suppliers and customers using the websites IPT and ICB - sites used by wholesalers of mobile phones and CPUs which no manufacturers, authorised distributors or retailers used.

404. The company undertook minimal due diligence on its suppliers and customers. Its due diligence consisted of obtaining an introduction pack, making a check of a customer on the EU Europa website, and an occasional site visit. (In contrast with Redhill checks, which not only confirmed the validity of a VAT registration number searched but also ensured that it related to the trader searched, the Europa site simply confirmed that a registration number searched existed). The documentation Epinx provided to HMRC was mainly undated and unsigned. Epinx made no credit or other checks on the companies with which it dealt, despite its being specifically asked to do so by HMRC in correspondence, and made no Redhill checks on companies with which it intended to deal.

405. Mr White concluded that Epinx and BTS were operating in an overall scheme to defraud the revenue. The former's transactions did not take place under ordinary trading conditions; it acted as a contra-trader in the overall scheme which was designed to disguise its actual tax loss transactions by off-setting them against transactions with other broker traders.

406. He maintained that the overall scheme could not have worked without the participation in it of all the traders in the transaction chains. He further opined that, based on the evidence before him, the actions of Epinx as a contra-trader were instrumental to the working of the scheme to defraud the revenue, and it must have known that its transactions were fraudulent. Nine primary factors led to Mr White so concluding:

i) the director of Epinx had previous knowledge of MTIC fraud based on correspondence and visits from HMRC;
ii) the deals completed were not commercial transactions carried out at arm's length;
iii) the deals were contrived in nature, with identical chains in many instances and all parties making small profits;
iv) Epinx failed to provide any evidence of the contracts in which it claimed to have entered and of insurance;
v) parties to all contracts used accounts with the FCIB;

vi) every one of Epinx's broker deals that had been fully verified had been traced to a defaulting trader. Further, Epinx appeared as a buffer in 117 deal chains that originated with a defaulting trader;

vii) all of the deals were back-to-back, all consignments being sold in their entirety. Epinx was never left with unsold stock, nor had it ever taken possession of stock or personally inspected stock dealt in;

viii) Epinx achieved extraordinary levels of turnover in the first 6 months of 2006. Following HMRC's expansion of its extended verification programme in May 2006, its trading ceased; and

ix) the due diligence carried out by Epinx was totally inadequate to protect it from fraud.

g) Kwality Trading International plc (Ian Michael Simmons WS7/119)

[BTS June deals 17, 18, 22 and 24]

407. Kwality was incorporated on 24 June 2002. Its original name was AG Com Holdings Ltd. It was registered for VAT from 2 October 2002.

408. In its Form VAT 1, signed by George Sauva, the director until 20 February 2003, its business activity was stated to be "Commodities, transaction, commission", the date of the first taxable supply disclosed as 1 January 2002 (before the company was formed), and its annual turnover estimated to be £400,000. The EU trade section of Form VAT 1 was not completed.

409. Other directors of the company, with the dates on which they took office and ceased to hold office, were as follows:

Spencer Sharpe (24/6/02 – 2/07 – when the company was wound up)
Giles McIver (15/6/06 – 2/07)
Ms Sandra Sharpe (10/3/03 – 15/6/06)

410. Kwality declared no outputs until period 07/05. In that period it declared outputs of some £5 million, followed by some £17 million in period 10/05. Outputs dropped back to the 07/05 figure in period 01/06. They then increased dramatically to over £60 million in period 04/06, and to some £75 million in period 07/06, plummeting to nil in period 10/06. Mr Simmons considered that Kwality began contra-trading towards the end of 2005.

411. On 19 April 2005 three officers of HMRC visited Kwality and spoke to Spencer Sharpe. The officers reported that the company was distributing Dunlop watches, but that "the mini scooter side was not doing very well". At the time of the visit Kwality had carried out a small number of transactions in mobile phones, having sourced them from retailers. The visit was followed on 15 June 2005 by an assessment to VAT of £69,125 plus interest to deal with an invoice Kwality had failed to declare.

412. By fax of 18 August 2005, the accountant for Kwality requested that the company be allowed to make monthly returns as it was entitled to a very large refund of VAT. The request was denied on 19 September 2005.

413. In interview on 17 July 2006 Spencer Sharpe informed HMRC that the start up capital for Kwality consisted of a £60,000 personal loan he made to the company.

414. When Kwality registered for VAT security for supplies was required from it due to its director's previous involvement in a number of failed companies. The sum specified was £4,120.67.

415. Kwality failed to declare any acquisition tax in periods 04/06 and 07/06 despite acquiring goods to the value of over £60 million in the two periods. The company offset its output tax liability arising from the acquisition transactions against the input tax liability created by the export/despatch transactions, resulting in its having a very small tax liability.

416. Kwality's VAT returns for periods 04/06 and 07/06 contained the following information:

	04/06	07/06
Output Tax	£5,261,399.40	£6,512,363.09
Input Tax	£5,258,770.82	£6,510,942.72
Net Tax	£2,628.48	£1,693.37
Outputs	£61,665,759.00	£75,471,940.00
Inputs	£61,189,609.00	£75,347,989.00
EC Supplies	£24,114,520.00	£30,877,798.00
EC Acquisition	£29,165,010.00	£31,152,240.00

417. The returns for 04/06 and 07/06 were both subjected to extended verification. Sixty three of the 64 broker transactions entered into by Kwality in that period were traced to direct tax losses, but due to a lack of EU paperwork HMRC were unable to trace the remaining one to a tax loss.

418. In addition to the 64 broker transactions, Kwality entered into 110 acquisition transactions. Of those 110 transactions, HMRC traced 6 to BTS (BTS deals 17 (split deal), 18, 22 (split deal) and 24), which brokered them to companies in the EU. Of the remaining 104 transactions, HMRC traced a further 59 to other brokers who exported them. At the time Mr Simmons made his statement, on 14 February 2011, HMRC were continuing to make enquiries into the other 45 transactions, but he expressed himself confident that, given the previous trading of Kwality, they were likely to be traced to brokers who exported the goods.

419. Two officers visited Kwality on 17 July 2006 when they met Mr Sharpe. In interview, he disclosed, inter alia, that he did not know whether the company had entered into written contracts with its suppliers and customers, whether its counter parties were well established or not, how the release of stock was controlled, who arranged transport of goods bought and sold, what the purpose of inspections was, and whether Kwality obtained inspection reports.

420. Over the two accounting periods concerned, 103 of the 110 (93%) of Kwality's acquisition transactions took place between 31 January 2006 and 30 May 2006, while

42 of the 64 (63%) of the broker transactions took place in June 2006, indicating to HMRC that the transactions were contrived.

421. Of the output tax of £5,261,399.40 declared by Kwality for period 04/06, £1,505,482.38 was denied by HMRC against broker traders who exported the goods from the UK to the EU. The balance was said in large part to be the subject of ongoing enquiries by HMRC. Of the output tax of £6,512,636.09 declared for period 07/06 £6,218,208.91 was denied by HMRC against broker traders who made tax repayment claims and exported goods from the UK. In 55 of 63 transactions traced back to a UK acquirer where Kwality later despatched goods from the UK, HMRC found that Kwality made 50% or more of the profit generated within the supply chain, indeed in some cases it made more than 80% of the profit generated. The remainder of the profit was split between the remaining traders in the chain, of whom there were generally at least 5.

422. In period 04/06 Kwality carried out 27 transactions involving a UK supplier. In every such case, HMRC traced the supply chain back to a defaulting or hijacked trader resulting in a tax loss exceeding £5 million. And in period 07/06 Kwality carried out a further 237 such transactions. In all but one of them HMRC traced the supply chain back to a defaulting or hijacked trader resulting in a tax loss exceeding £6.15 million.

423. Where Kwality exported goods in period 04/06 the tax losses incurred in the supply chains concerned exceeded £5 million, and the input tax denied to the brokers in the acquisition chains exceeded £1.5 million. That resulted in tax losses in Kwality's supply chains exceeding the denied input tax against the brokers by approaching £3.6 million. The corresponding figures for period 07/06 were

Tax losses in Kwality's removal transactions	£6,153,343.03
Input tax denied against brokers	£6,128,208.91

424. HMRC found differences in prices Kwality paid for phones which they considered required explanation. For instance, in a transaction Kwality entered into on 20 June 2006 (no 449), it paid £269.50 per handset for 5000 Nokia 9300i phones. In transaction 458 it paid £243 per handset for 4000 handsets of the same make and model of phone on 12 June 2006. That constituted a 10.91% difference in the two prices. As that situation was repeated many times over in Kwality's transaction chains, HMRC questioned why Kwality did not demand lower prices for greater volumes of stock. HMRC found a remarkable consistency in mark-ups achieved by the buffers in Kwality's broker chains. In more than 25% of Kwality's 64 broker transactions, each buffer made 10p regardless of where it appeared in a transaction chain. None of Kwality's transaction chains ever led to a manufacturer or retailer. In many other ways, Kwality's transactions bore all the hallmarks HMRC considered indicative of MTIC transactions.

425. The membership of Kwality's supply chains showed a remarkable degree of consistency. Several supply chains contained exactly the same members in the same order; other chains contained the same members but in a different order. HMRC

considered the chances of such coincidences occurring in a genuine market between traders dealing at arm's length to be "very remote."

426. On 19 July 2004 two HMRC officers visited Kwality's premises but were unable to make contact with anyone. Another two officers paid a visit on 20 July 2005 and met Mr Sharpe, who was told about the risks involved in wholesaling mobile phones and advised to document due diligence checks carried out.

427. Those factors were considered by HMRC to indicate that Kwality had knowledge that its transactions were connected with fraud. Other indicators they took into account in arriving at that conclusion were the fact that the majority of its purchases and sales were carried out on the same day, were back-to-back, involved no losses in its transaction chains, added no value to the supply chain, and the company did not enter into written contracts and seemingly did not insure goods.

428. Mr Simmons expressed himself satisfied that Kwality's transactions on 22 and 26 June 2006 (in which it indirectly supplied BTS) were part of a deliberate scheme to defraud HMRC, and that the company was fully aware of and knowingly entered into transactions that were associated with MTIC fraud. He concluded that Kwality was provided with enough information about MTIC fraud to have been aware of it, and that there were sufficient objective factors to have alerted a reasonable and conscientious business to the fact that transactions it was entering into were connected to MTIC fraud. The factors he so identified were:

(i) Kwality's trading patterns showed that it entered into acquisition and broker transactions designed artificially to offset its VAT liability and to disguise substantial fraudulent tax losses from HMRC. BTS, and all the other broker traders who exported goods imported by Kwality, were a necessary part of the overall scheme to defraud the revenue;

(ii) the goods were bought and sold in large wholesale quantities, and the vast majority of transactions entered into were back-to-back;

(iii) almost without exception, Kwality was able to source a particular number of phones from one of only a handful of suppliers and find a customer for exactly the same quantity and description of goods at a price that gave it a very consistent profit on the same day as they were sourced;

(iv) in the vast majority of transactions Kwality received payment from its customers before payment was required by its suppliers, creating a risk free environment for the company;

(v) the bank account operated by Kwality in the relevant periods was an FCIB account. All payments were made to suppliers through their own FCIB accounts; and all receipts were paid into its own FCIB account;

(vi) Kwality failed to provide any evidence of due diligence checks carried out on its suppliers and customers;

Kwality also failed to provide any evidence of written contracts with its suppliers' customers, freight forwarders or transport companies.

h) C&B Trading (UK) Ltd (Graham Taylor WS9/114)
[BTS April deals 2-5]

429. Four deals into which BTS entered into in April 2006 originated with C&B. They were recorded as purchases made from C&B within the spreadsheets of purchases and sales made by V2 (UK) Ltd (exhibit GT58) and Bluestar Communications Ltd (exhibit GT59). The VAT due from C&B on the sales was included in an assessment of £59,047,843.54 of 7 July 2006 (exhibit GT43). That assessment has not been paid, nor has it been appealed.

430. C&B was incorporated on 30 January 2001 as C&B Car Care Ltd. It applied to be registered for VAT on 17 April 2003 declaring its main business activity as car valeting, and estimating annual turnover of £80,000. Its Form VAT 1 contained a declaration by director Delroy Chambers that the company would not buy goods from or sell goods to traders in other EU Member States, and that it did not expect to receive regular repayments from HMRC. C&B was registered for VAT with effect from 1 May 2003, and was put on a quarterly tax stagger ending in July and quarterly thereafter.

431. The company changed its name to C&B Trading (UK) Ltd on 24 August 2005, Mr Chambers in a letter of the same date to HMRC informing them that the company had changed its trading activity but not disclosing the new one.

432. C&B opened a sterling bank account with the FCIB on 19 September 2005, some six months before the company started trading in MTIC goods.

433. On 5 September 2005 HMRC received a letter requesting the company be placed on monthly returns. It was followed by a further similar request from Ms Sarah Dunn, who was later found to be the ultimate owner of C&B and its only shareholder. On 21 September 2005 HMRC refused the request.

434. C&B was selected for a VAT assurance visit on 9 November 2005. HMRC made several attempts to contact Ms Dunn between that date and 5 December 2005, but all were unsuccessful. On 11 January 2006 HMRC wrote to C&B saying that an officer would visit its principal place of business on 26 January 2006 to inspect its records and verify its VAT returns. The visit was not carried out due to C&B's lack of co-operation with them.

435. On 24 February 2006 HMRC received a letter from C&B advising them that it had changed its trading activity to the sale of chemicals and alloy wheels, and that it had also changed its trading address.

436. HMRC were notified by letter that Mr Chambers and the company secretary had resigned on 20 February 2006, and that the new director was Mr D Heath and the company secretary Mr B Mooney.

437. C&B's VAT return for period 01/06 was a "nil" return (exhibit GT25).

438. By letter received by HMRC on or about 16 March 2006 signed by Mr Heath, they were informed that the company had again changed its trading activity, on this occasion to that of the purchase and sale of chemicals, car components, alloy wheels etc, and requesting that its trade classification be changed to "general trading".

439. In a telephone call to HMRC's National Advice Centre on 10 April 2006, Highbeam Ltd sought to verify C&B's VAT registration number. The note of the call referred to C&B as being a supplier of mobile phones to Highbeam

440. On 11 April 2006 HMRC's Redhill centre sent C&B a letter informing it of problems in its trade sector and requesting that it verify customers and suppliers with that centre (exhibit GT 34). A copy of Notice 726 was enclosed with the letter.

441. Mr Taylor and another officer paid an unannounced visit to C&B on 26 April 2006, HMRC having received information from a warehouse company, Paul's Freight, that a Swiss company, Integralphone GmbH, ("Integralphone") was releasing goods to C&B and it, in turn, was releasing them to Highbeam in the UK. Evidence subsequently obtained by HMRC from Paul's Freight showed that P G Hightech of Cyprus was supplying goods to Integralphone. They were sold on to C&B and then to Highbeam.

442. Mr Taylor and his colleague were unable to gain access to C&B's premises on visiting them on 26 April 2006. Mr Taylor telephoned the company and was told by Mr Mooney, the company secretary, that they were "too busy" and could not see him that day. Mr Taylor asked what goods C&B was trading in, and was told mobile phones, purchasing them from a Czech company and selling them in the UK.

443. A meeting with C&B was then arranged by Mr Taylor for 28 April 2006. Mr Mooney telephoned HMRC on 27 April 2006 and left a message for Mr Taylor that he was unable to meet him on 28 April 2006, but agreed to do so on 2 May 2006.

444. On 28 April 2006 Mr Taylor faxed to C&B what is known as a Regulation 25 letter and a duplicate return for period 04/06 (exhibit GT39). (Regulation 25 of the VAT General Regulations 1995 empowers HMRC to vary the length of any particular accounting period where they consider it necessary to do so). The letter brought forward the due date for its 04/06 return to 2 May 2006. The letter was not appealed.

445. A further letter was sent to C&B on 28 April 2006 advising that its VAT registration was to be cancelled with effect from 1 May 2006 (exhibit GT40). That was done on the basis that C&B had been a willing participant in trade on which it appeared to have no intention of accounting for the VAT charged on invoices it raised.

446. Mr Taylor and officer Saxon visited C&B's premises on 2 May 2006 but were unable to contact anyone connected with the company.

447. From information obtained by various officers of HMRC contained in the purchase records of other traders they established that C&B had made a considerable number of UK sales in period 04/06.

448. C&B failed to make a VAT return for period 04/06.

449. As a result, on 7 July 2006 HMRC made a VAT assessment against C&B in the sum of £59,047,843.54 (exhibit GT43). They made a further assessment on 14 November 2006 in the sum of £23,022,219 (exhibit GT44). In each case the assessment was based on known VAT amounts due from the company, copies of the calculations and spreadsheets relating to them being produced as exhibit GT54. Neither assessment has been appealed or paid.

450. Details of the sales made by C&B were obtained from five known customers and were set out in exhibits GT55-59.

451. The assessment of 14 November 2006 was subsequently reduced to £22,614,728.

452. Four further assessments were later made against C&B (exhibits GT60-63), and again have neither been appealed nor paid.

453. Mr Taylor expressed himself satisfied on the balance of probabilities that C&B had acted as a UK acquirer of goods from other EU Member states and that the goods were used in MTIC chains. He so reasoned because:

i) in addition to the information provided by phone by Mr Mooney in April 2006 that C&B was acquiring goods from a Czech company (exhibit GT36), HMRC obtained release notes relating to deals in 2006 (referred to in exhibit GT35) of goods being allocated directly to Highbeam by Integralphone. Looked at in isolation, the release notes indicated that Highbeam was purchasing goods direct from overseas suppliers;

ii) the FCIB statements (exhibited by Mr Taylor as GT65 and based on the evidence of officer Peter Dean) showed that C&B routinely made substantial payments to overseas companies, chiefly Integralphone, and paid the majority of the proceeds of its sales (including the VAT it collected from the UK customers) to that company. Consequently, its actions resulted in its being unable to pay the VAT due from it;

iii) he had been unable to trace C&B's transaction chains back beyond the company, or to trace any other UK company supplying C&B;

iv) C&B went into compulsory liquidation on 10 January 2007.

454. Mr Taylor concluded that the business activity and trade class allocated to C&B were disclosed solely to enable it to obtain a VAT registration certificate. They ensured that the intentions of the directors of the company remained hidden from HMRC, and enabled it to enter MTIC deals without challenge by them. C&B acted as a defaulting trader in acquiring goods from traders based outside the UK and made or purported to make taxable supplies to other UK VAT registered entities but failed to render a VAT return for period 04/06 and so did not disclose those sales to HMRC. The result was the tax loss of £84,368,677.22, which remains unpaid.

i) First Touch Communications Ltd ("First Touch") (Lynda Sally Baker WS13/1)

(NTS deals 2-5)

455. A contra-trading cell identified by HMRC as affecting the four transactions NTS conducted in April 2006 was the "First Touch scheme". The scheme is dealt with in the consolidated statement of case as follows:

> "78. In respect of the remaining 4 deals in the VAT period 04/06 [NTS deals 2-5] … [HMRC] have traced the chain of transactions via a contra-trader, First Touch which acted fraudulently, to fraudulent tax losses. The 4 transaction chains featured the same participants in the same order and, in each case, there was a circular flow of goods, the original supplier Pol Comm… purchasing the goods back a few days later for a price higher than that for which it had sold the goods."

Thus, HMRC claim that the First Touch scheme also involved circularity, with NTS as part of the circle.

456. Ms Baker's evidence showed that First Touch was incorporated on 17 May 2002, and was registered for VAT from 16 October 2002 under the trade classification of "telecommunications." There was a link between Scorpion and First Touch in that Scorpion's director had previously been a director of First Touch.

457. Although the two companies operated from the same premises and dealt in the same commodities, in periods 03/06 and 04/06 Scorpion and First Touch did not deal with each other. However, they and NTS shared some of the same customers in Opal 53, Sigma Sixty and CIDP. NTS and Scorpion also shared the same suppliers in Deb Techno, Svenson Commodities and Pol Comm. Further, tax losses were to be found in defaulters in both First Touch's and NTS's transaction chains.

458. First Touch was said to have originally been financed by a family loan of £100,000. An Experian report including the company's accounts to 31 May 2004 showed it as having no capital assets, and did not include a family loan (exhibit LSB1 pp 572-584).

459. Records uplifted from First Touch in August 2006 showed it to have been lent £490,000 in January 2005 by Oman Trading LLC of Dubai. First Touch obtained that loan at a time a sum of £640,250 belonging to it was the subject of a freezing order. The case in which that order was made went to the Court of Appeal where in February 2005 Waller LJ refused to vary the order. His decision was not appealed. In the judgment the Lord Justice considered First Touch to be a knowing participator in MTIC fraud, and carried out a detailed analysis of the working of the fraud.

460. First Touch declared turnover as follows:

Year to 31 May 2004	£21,707,158
Year to 31 May 2005	£80,347,510
Year to 31 May 2006	£169,551,864

461. In period 03/06 First Touch carried out 14 deals, 10 of which were broker deals that traced back to defaulters resulting in tax losses totalling £1,512,971. First Touch claimed repayment of input tax of £1,523,952.50 against those 10 deals, which claim was reduced by the output tax of £293,037.50 declared on four contra deals to NTS. The overall loss to HMRC from First Touch's claim and the unpaid defaulter losses in period 03/06 amounted to some £2.7 million ignoring the net tax accounted for by the buffers in the various chains. Ms Baker noted that in the 4 contra deals to NTS the supply chains were identical, and took the form recorded at para 78 of the statement of case (see deal sheets at pp 12-15 exhibit LSB2). In each case there was a circular flow of goods, the original supplier Pol Comm repurchasing the goods a few days after selling them at a higher price. A copy of the deal sheets in respect of the contra-trading chains was annexed to the statement of case, and the tax losses for First Touch were shown in the deal sheets within Annex K of the CD rom, and were thus deemed to be agreed by the Appellants.

462. Ms Baker claimed First Touch was involved in contra-trading in periods 03/06, 04/06 and 05/06, having just 3 customers for all the broker deals it carried out – Sigma Sixty, CIPD and Opal 53. Those three customers also appeared in NTS deals in period 04/06.

463. In period 04/06 First Touch carried out 39 deals between 20 and 28 April 2006, of which 36 were broker deals and 3 acquisition deals (exhibit. LSB2/31-69). For period 04/06 First Touch submitted a repayment claim of £4,033,805.76. Neither the repayment claim for period 03/06 nor that for period 04/06 was met by HMRC

464. The company's 06/06 return indicated that it had carried out no trading. Consequently, it was deregistered with effect from 15 August 2006 (exhibit LSB1/ 101). By 23 August 2006 the deal chains for First touch's 04/06 transactions had been established by HMRC. They showed 20 of its 39 deals traced back to a defaulter; and by 30 October 2006 a further 4 deals had similarly been traced back to a defaulter.

465. As we explained earlier, on 30 March 2006 First Touch acquired goods which it sold to NTS in four deals. The total value of those purchases was £1,668,300 on which it declared acquisition tax of £291,952. The acquisition tax was subsequently reclaimed in its entirety as input tax. In all four deals, the goods which had originated with Pol Comm were returned to that company 3 days later. That showed a "lack of commercial sense" and that the deals were "contrived in order to offset tax losses in other chains."

466. On 26 April 2006 First Touch carried out a further three deals in most respects identical to those set out in the last preceding paragraph.

467. In April 2006 First Touch carried out 36 broker deals, exporting goods to just 4 EU customers. Its sales invoices showed the value of those deals to be £29,307,150, but their EU sales value declared in its VAT return was only £28,657,150. Twenty-eight of the 36 sales were traced back to defaulting traders by HMRC, the tax loss arising amounting to £3,328,378.41. The remaining 8 deals were traced back to other contra-traders.

468. Ms Baker observed that the supply chains in 03/06 of First Touch lacked any commercial rationale, and most (containing up to 6 buffers) were too long to be commercially viable. All the deals in individual chains took place on the same day, and no chain could be traced to a manufacturer, authorised distributor or end user. None of the traders within the chains ever took possession of the goods, which whilst in the UK remained with two freight forwarders. The goods were traded on a back-to-back basis, and no trader made any loss. There were no formal contracts. First Touch failed to record IMEI numbers.

469. Anfell was a defaulter in 16 transactions between First Touch and NTS, the tax losses wherein totalled £2,235,820, and a further 16 transactions entered into by First Touch resulted in losses of £1,870,904.

470. In her witness statement Ms Baker dealt with HMRC's evidence as to First Touch's knowledge or means of knowledge that its transactions were connected with VAT fraud. First, she observed that in a report prepared at the time the company commenced trading HMRC made a note that it had been sent a copy of their MTIC monitoring letter on 11 November 2002. A post-registration visit was carried out on 20 November 2002, and the resulting report indicated that First Touch was dealing only with UK suppliers and customers, and was acting only as a buffer. On 23 April 2003 a further visit was made and it was found that the company had been making third party payments Although HMRC could not say for certain that Notice 726 had been served on First Touch, its director Mr Jaji and company secretary Mr Samra were aware of its contents, a copy of the Notice having been served on First Touch's associated company Scorpion. On 6 March 2006 First Touch was sent a letter informing it that its supply chains contained defaulting traders in 08/05 and 09/05 resulting in a loss of revenue of £146,800 – a further indicator in Ms Baker's opinion that at the time of its transactions First Touch had knowledge that it was involved in transaction chains in which tax losses were being made.

471. Of First Touch's due diligence, we need report but an observation of Mr Teji to officer Bowyer made during the meeting of 23 November 2006 (exhibit LSB1/108-113), "I think due diligence is a waste of time".

472. Other factors Ms Baker took into account in concluding that First Touch knew that its trading was connected with the fraudulent evasion of VAT were that it purchased and sold goods on the same day, there appeared to be no problem in the immediate sourcing of goods, it never made losses on its deals, it added no value to its deals, it did not enter into written contracts, its sales invoices referred to standard terms and conditions of trade on its non-existent website, and it failed to provide evidence that its goods were insured.

473. For the 4 First Touch deals of 30 March 2006 with NTS, Pol Comm was the EU supplier and Opal 53 was the EU customer. In period 04/06 Pol Comm was the EU supplier at the commencement of 6 deals carried out by First Touch. Three of the deals were broker deals, and the EU customer in two of them was Opal 53, and in the third CIDP. The other three deals were contra deals in which First Touch acquired goods direct from Pol Comm.

474. In period 05/06 Pol Comm was the EU supplier in a further 6 of First Touch's deals, and Sigma Sixty was the EU customer in 3 of the deals, CIDP was the EU customer in 2 of the deals and Opal 53 was the EU customer in the remaining one.

475. The deal chains of both First Touch and NTS for periods 03/06 and 04/06 showed "overwhelming similarities" because the same defaulters and buffers appeared in the same positions within the transaction chains. Thirteen of the NTS deals in point in the appeal traced back to the defaulter Anfell, as did 17 of First Touch's in period 04/06. No less than 15 buffer traders appeared in both the deal chains of NTS and First Touch in periods 03/06 and 04/06.

20. CONCLUSION ON ADDITIONAL EVIDENCE OF THE CONTRA-TRADERS' KNOWLEDGE

476. On the basis of the evidence so adduced as to the 8 contra-traders' knowledge, we are satisfied that each one deliberately and fraudulently offset some or all of the input tax repayment claims it would otherwise have had to make by conducting acquirer deals as well as broker deals. In acting so, we find that each contra-trader was aware of the connection of its broker deals to fraud. However, we accept that those responsible for the defaults in the contra-traders' supply chains, and whether the defaults involved for example a missing trader as opposed to a hijacked VAT number, may not have been known to the contra-traders. But we observe that it is unnecessary for a contra-trader to have that knowledge in respect of its broker chains for it knowingly to conduct its deals so as to disguise those connections.

THE ANSWERS TO QUESTIONS 1 AND 2

477. HMRC traced each one of the Appellants' "contra-trading" transactions back to a trader they identified as a contra-trader. As we have said, they allege each contra-trader to have knowingly offset its input tax repayment claims in broker chains against its output tax liability on its acquisition deals in which goods it imported were then brokered to EU companies. Mr Humphries claimed that it followed that the Appellants' repayment claims were linked to tax losses by virtue of the contra-traders offsetting exercises: by virtue of those exercises the Appellants' deals were connected to every broker deal conducted by the contra-trader in the relevant period. He further contended that the evidence established a connection with a large number of broker chains, which HMRC traced back to fraudulent defaults; it was the offsetting process that provided the connection.

478. On the basis of the evidence adduced as to the transactions of all eight contra-traders, since in the light of the judgment in *Blue Sphere* the connection via a contra-trader between the clean and dirty chains is established by the simple fact of the offsetting of the input tax against the output tax of the contra-trader, we are satisfied that there were fraudulent VAT losses in the contra-traders' deal chains. We are further satisfied that the Appellants' transactions, the subject of their appeals, were connected with the fraudulent evasion of VAT.

ADDITIONAL QUESTION: HAVE HMRC PROVED THAT THE CONTRA-TRADERS WERE PARTIES TO CONSPIRACIES INVOLVING THE DEFAULTERS IN THEIR TRANSACTION CHAINS?

479. HMRC's case is that each of the contra-traders knew that its broker deals (i.e. those in dirty chains) were connected with fraud, either by virtue of there being fraudulent defaults in chains of transactions, or by connection with fraudulent defaults via other contra-traders; each contra-trader deliberately and fraudulently offset some or all of what otherwise would have been its input tax claims arising from acquirer deals as well as its broker deals. In acting in that way the contra-traders knew of the connection of their broker deals to fraud; if they had not known, they would not have needed to perform the fraudulent balancing offsets.

480. HMRC further claim that the evidence of transactions above and below those of each contra-trader in its transaction chains establishes clearly that there was a scheme in which that trader played a particular role. We accept that to be the case. It follows that each contra-trader clearly knew that its broker deals were connected with fraud. That is so notwithstanding that the identities of those responsible for the default, and its nature, may not have been known to the contra-trader. The contra-trader would have to have known, at the time it was conducting its broker and acquirer deals, that each of the former was connected to a fraudulent default, otherwise it would not have been in a position to choose to perform offset deals.

481. In reliance on Mr Humphries' and Mr Murphy's evidence, that of the assurance officers for the other contra-traders and the contents of the documents to which they referred, we conclude that the schemes in which the contra-traders were involved were fraudulent in nature and that each contra-trader, as a participant therein, clearly knew of that nature. We hold that each was involved in conspiracies with the various defaulters in its dirty chains.

482. In so concluding, we have taken no account of whether a contra-trader was either assessed to tax, or had a decision letter. We are required to determine whether the contra-traders knew they were involved in conspiracies with the various defaulters; the test does not require us to consider whether traders have been assessed to tax or received decision letters. And, in relation to the evidence of those officers for the contra-traders who stated that they did not know whether the individual companies for which they were responsible were so involved, we observe that we have evidence covering the overall picture, whereas they had only the information relating only to the individual companies with which they dealt.

21. MR PICKUP'S CHALLENGE TO ASPECT (4) OF MR HUMPHRIES' EVIDENCE:

A) BTS SPLIT DEALS

483. An aspect of the behaviour of individual traders, including BTS, that in Mr Pickup's submission did not appear consistent with Mr Humphries' evidence as to the existence of an overall contrived scheme was the splitting of a deal or the breaking of a consignment received from a supplier before onward sale to a number of EU

customers. If those transactions were part of an overall contrived scheme, he maintained that it made no sense for a broker to split the deal as it would have made managing the scheme considerably more difficult without any real advantage.

484. Sixty-three (of a total of 75) of BTS's broker transactions said by HMRC to be in Cell 5 were "split deals".

485. We shall deal with the question of whether size of the overall scheme made the cell claims of Mr Humphries "implausible" a little later, but consider it necessary to introduce the matter in the present context. Mr Humphries accepted that between 1 April 2006 and 30 June 2006 the six Cell 5 contra-traders he identified carried out 440 separate acquisition transactions and the consignments were split at the time of despatch to the EU into 885 separate broker transactions. To Mr Pickup the controlling minds organising Cell 5 would have had difficulty keeping track and control of 440 transactions. But to ensure that 885 separate transactions all proceeded according to their design, he submitted would have been virtually impossible: it was difficult to conceive why those controlling minds would have complicated their task in such a way for no apparent benefit. There was very real detriment to the organisers given the added complexity of controlling and managing 885 transactions instead of 440.

486. Mr Humphries was asked whether he thought it would have been unusual, if BTS were participating in a fraud, for it to split its deals. He replied "not necessarily, no", adding that it helped "to hide the fraud because if everybody was selling to the same trader that would make it obvious from their own records that there were goods going to the one place".

487. We have carried out our own analysis of the "split deals" using only information contained in BTS's own documents, and make a number of surprising findings of fact from it. (We use the deal references in the tribunal papers followed by those contained in the Appellants' exhibit bundles).

488. By way of introduction to the analysis, we should observe that every transaction in an individual chain took place on the same date, and NTS was the supplier i.e. buffer, to BTS in every chain. NTS so acted consistently with the standard form found in MTIC fraud transactions, i.e. it took a nominal profit or commission, and disposed of all the goods in each purchase the same day as it acquired them in back-to-back deals.

489. NTS was itself supplied in the single deals leading to the split deals by the contra-traders Svenson Commodities (7 direct deals + 2 as buffer), Powerstrip (5 deals), and David Jacobs (9 deals). In the remaining deals NTS was supplied by various other buffers, but in every case the invoice trail led back to one of the contra-traders in Cell 5 identified by Mr Humphries.

490. In its 63 deals, BTS made sales to only 6 customers: Pol Comm in Poland, Sigma Sixty in Germany, CIDP in France, Intangible Media in Spain, Planetmania in Portugal, and Opal 53 also in Germany. Those traders used but 5 freight forwarders:

Freight Connection in Holland, Pro Logic in France, Euresco in Holland, Intersprint in Belgium, and Heinrich Sneider in Germany.

491. We have included the aggregate percentage profits obtained by NTS and BTS per split deal in Cell 5 to show that all fell within the narrow range 1.8% to 2.6%. We shall further consider the profit percentages when we come to deal with the mark-up percentages obtained by the Appellants a little later.

492. For analysis purposes, we have restored each split sale to the original purchase from which it was derived to create a group of two or three sale transactions. The exercise produces the following results.

493. May deals 9, 10, 11 (15, 16 and 17) (E160B/221-241)

Date: 26 May 2006
Phones sold in transaction to broker: 6500 Sony Ericsson W810i
EU supplier: Adobcom
UK acquirer: David Jacobs
Buffer: NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Pol Comm	£226	2000	Freight Connection	29.5.06	21.6.06	2.1%
2	Sigma Sixty	£226	2000	Freight Connection	29.5.06	21.6.06	
3	CIDP	£226	2500	Freight Connection	29.5.06	21.6.06	

494. May deals 12, 13, 14 (18, 19 and 20) (E160B/277-333)

Date: 26 May 2006
Phones sold in transaction to broker: 8000 Nokia N91
EU supplier: Mighty Mobile
UK acquirer: David Jacobs
Buffer: NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Intangible Media	£340	3000	Pro Logic	29.5.06	21.6.06	2.4%
2	Planetmania	£340	3000	Pro Logic	29.5.06	21.6.06	
3	CIDP	£340	2000	Pro Logic	29.5.06	21.6.06	

495. May deals 23, 24 (21 and 22) (E160B/334-369)

Date: 30 May 2006
Phones sold in transaction to broker: 4000 Sony Ericsson W810i
EU supplier: Mighty Mobile
UK acquirer: Svenson Commodities
Buffer 1:Yalegate Ltd
Buffer 2. NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Planetmania	£218	2000	Freight Connections	30.5.06	21.6.06	2.0%
2	Intangible Media	£218	2000	Freight Connections	31.5.06	21.6.06	

496. May deals 38, 39 (23 and 24) (E160B/370-395)

Date: 31 May 2006
Phones sold in transaction to broker: 5000 Nokia 8800
EU supplier: Adobcom
UK acquirer: David Jacobs
Buffer 1: Team Mobile Ltd
Buffer 2. NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	CIDP	£361	2000	Freight Connections	1 06.06	26.6.06	2.5%
2	Planetmania	£361	3000	Freight Connections	Not provided	22.6.06	

497. May deals 43,44,45 (25, 26 and 27) (E160B/386-434)

Date: 31 May 2006
Phones sold in transaction to broker: 7000 Nokia N91
EU supplier: Adobcom
UK acquirer: David Jacobs
Buffer 1: Team Mobile ltd
Buffer 2: NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Planetmania	£339	2500	Freight Connections	Not provided	27 6.06	2.3%
2	Intangible Media	£339	2500	Freight Connections	Not provided	27.6.06	
3	Pol Comm	£339	2000	Freight Connections	Not provided	27.6.06	

498. May deals 15, 16 (28 and 29) (E160B/436-469)

Date: 26 May 2006
Phones sold in transaction to broker: 5000 Nokia 8800
EU supplier: Mighty Mobile
UK acquirer: Selectwelcome
Buffer 1: Yalegate Ltd
Buffer 2: NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Planetmania	£359	3000	Pro Logic	11.6.06	21.6.06	2.4%
2	Intangible Media	£359	2000	Pro Logic	11.6.06	21.6.06	

499. May deals 17, 18, 19 (30, 31 and 32) (E160B/470-526)

Date: 26 May 2006
Phones sold in transaction to broker: 8000 Nokia N70
EU supplier: Adobcom
UK acquirer: Selectwelcome
Buffer 1: Regent Commodities Ltd
Buffer 2: NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Planetmania	£186	2000	Pro Logic	5.6.06	22.6.06	2.3%
2	Sigma Sixty	£186	2500	Pro Logic	5.6.06	22.6.06	
3	Intangible Media	£186	3500	Pro Logic	5.6.06	22.6.06	

500. May deals 20, 21, 22 (34, 35 and 36) (E160C/11-63)

Date: 30 May 2006
Phones sold in transaction to broker: 7250 Nokia 9500
EU supplier: Adobcom
UK acquirer: Powerstrip
Buffer: NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Planetmania	£289	3000	Pro Logic	31.5.06	9.6.06	2.5%
2	Intangible Media	£289	2250	Pro Logic	31.5.06	9.6.06	
3	Sigma Sixty	£289	2000	Pro Logic	31.5.06	9.6.06	

501. May deals 35, 36, 37 (37, 38 and 39) (E160C/64-106)

Date: 31 May 2006
Phones sold in transaction to broker: 7500 Nokia N80
EU supplier: Mighty Mobile
UK acquirer: Powerstrip
Buffer: Evenmore Ltd
Buffer 2: NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Planetmania	£253	3500	Freight Connections	Not provided	26.6.06	2.4%
2	CIPD	£253	2000	Freight Connections	31.5.06	26.6.06	
3	Pol Comm	£253	2000	Freight Connections	Not provided	26.6.06	

502. May deals 40, 41, 42 (40, 41 and 42) (E160C/107-147)

Date: 31 May 2006
Phones sold in transaction to broker: 10,000 Nokia 9300
EU supplier: Adobcom
UK acquirer: Powerstrip
Buffer 1: Yalegate Ltd
Buffer 2: NTS

Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Pol Comm	£292	2500	Freight Connections	Not provided	26.6.06	2.6%
2	Planetmania	£292	4000	Freight Connections	Not provided	26.6.06	
3	Intangible Media	£292	3500	Freight Connections	Not provided	26.6.06	

503. May deals 23,24 (44 and 45) (E160C/164-208)

Date: 30 May 2006
Phones sold in transaction to broker: 6500 Sony Ericsson W900i
EU supplier: Mighty Mobile
UK acquirer: Svenson Commodities
Buffer1: Yalegate Ltd
Buffer 2: NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & N % profit
1	CIDP	£282	3500	Freight Connections	31.5.06	7.6.06	2.0%
2	Planetmania	£282	3000	Freight Connections	31.5.06	7.6.06	

504. May deals 28, 29 (46 and 47) (E160C/209-248)

Date: 30 May 2006
Phones sold in transaction to broker: 4000 Nokia 8801
EU supplier: Adobcom
UK acquirer: Svenson Commodities
Buffer: NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	CIDP	£350	2000	Freight Connections	31.5.06	27.6.06	2.3%
2	Opal 53	£350	2000	Freight Connections	31.5.06	27.6.06	

505. May deals 25, 26 , 27 (49, 50 and 51) (E160C/264-320)

Date: 30 May 2006
Phones sold in transaction to broker: 6500 Nokia N90
EU supplier: Adobcom
UK acquirer: TCCS
Buffer 1: Yalegate Ltd
Buffer 2: NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Planetmania	£264	3500	Pro Logic	31.5.06	27.6.06	2.0%
2	CIDP	£264	1500	Pro Logic	31.5.06	27.6.06	
2	Opal 53	£264	1500	Pro Logic	31.5.06	27.6.06	

506. June deals 1, 2 (62 and 63) (E160C/428-450)

Date: 22 June 2006
Phones sold in transaction to broker: 4000 Nokia N90
EU supplier: Adobcom
UK acquirer: Selectwelcome
Buffer 1: Crotek Ltd
Buffer 2: NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Intangible Media	£269	2000	Pro Logic	Not provided	28.7.06	2.0%
2	Planetmania	£269	2000	Pro Logic	Not provided	27.7.06	

507. June deals 5, 6 (64 and 65) (E160C/451-467)

Date: 22 June 2006
Phones sold in transaction to broker: 3500 Sony Ericsson W900i
EU supplier: Mighty Mobile
UK acquirer: TCCS
Buffer1: Megantic Services Ltd
Buffer 2: NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Intangible Media	£168	2000	Euresco	Not provided	28.6.06	2.0%
2	Opal 53	£169	1500	Euresco	Not provided	28.6.06	

N.B. Uniquely the sale price of the handsets differed in these two sales. As the difference in price was nominal, we treat it as resulting from a minor mistake by one of the parties which was overlooked.

508. June deals 8, 9 (66 and 67) (E160D/1-24)

Date: 22 June 2006
Phones sold in transaction to broker: 4500 Nokia 9300i
EU supplier: Adobcom
UK acquirer: Selectwelcome
Buffer 1: Svenson Commodities
Buffer 2: NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Opal 53	£235	2000	Euresco	22.6.06	01.8.06	2.1%
2	Intangible Media	£235	2500	Euresco	22.6.06	Not provided	

509. June deals 14,15 (69 and 70) (E160D/39-66)

Date: 22 June 2006
Phones sold in transaction to broker: 3500 Nokia N80
EU supplier:Adobcom
UK acquirer: Selectwelcome
Buffer1: Yalegate Ltd
Buffer 2: NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Planetmania	£295	2000	Intersprint	25.6.06	01.8.06	2.2%
2	Intangible Media	£295	1500	Intersprint	25.6.06	28.7.06	

510. June deals 25, 26 (71 and 72) (E160D/67-96)

Date: 27 June 2006

Phones sold in transaction to broker: 3500 Nokia N71
EU supplier: Mighty Mobile
UK acquirer: Selectwelcome
Buffer 1: Crotek Ltd
Buffer 2: NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Planetmania	£280	2000	Pro Logic	28.6.06	6.7.06	2.2%
2	Intangible Media	£280	1500	Pro Logic	28.6.06	6.7.06	

511. June deals 29, 30 (73 and 74) (E160D/97 -120)

Date: 27 June 2006
Phones sold in transaction to broker: 2300 black Nokia 8800
EU supplier: Mighty Mobile
UK acquirer: Selectwelcome
Buffer 1: Crotek Ltd
Buffer 2: NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Intangible Media	£453	1300	Intersprint	Not provided	01.8.06	2.3%
2	Sigma Sixty	£453	1000	Intersprint	Not provided	28.7.06	

512. June deals 40, 41 (75 and 76) (E160D/121-149)

Date: 27 June 2006
Phones sold in transaction to broker: 3500 Nokia 9500
EU supplier: Adobcom
UK acquirer: Selectwelcome
Buffer 1: Powerstrip
Buffer 2: NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit

1	Sigma Sixty	£291	1750	Euresco	28.6.06	05.7.06	1.8%
2	Intangible Media	£291	1750	Euresco	28.6.06	05.7.06	

513. June deals 3, 4 (77 and 78) (E160D/150-170)

Date: 22 June 2006
Phones sold in transaction to broker: 5000 Nokia 9500
EU supplier: Mighty Mobile
UK acquirer: TCCS
Buffer 1: Tracker Trading ltd
Buffer 2: NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Opal 53	£288.50	2000	Pro Logic	Not provided	05.7.06	2.3%
2	Planetmania	£288.50	3000	Pro Logic	Not provided	05.7.06	

514. June deals 11, 12 (81 and 82) (E160D/197-221)

Date: 22 June 2006
Phones sold in transaction to broker: 3500 Sony Ericsson 9500i
EU supplier: Mighty Mobile
UK acquirer: TCCS
Buffer 1: Megantic Services Ltd
Buffer 2: NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Planetmania	£301	2000	Euresco	Not provided	19.7.06	2.0%
2	Opal 53	£301	1500	Euresco	Not provided	19.7.06	

515. June deals 27, 28 (83 and 84) (E160D/222-249)

Date: 27 June 2006
Phones sold in transaction to broker: 5000 Nokia N91
EU supplier: Mighty Mobile
UK acquirer: TCCS
Buffer 1: Powerstrip
Buffer 2: NTS

Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Opal 53	£284.50	2000	Intersprint	Not provided	28.7.06	2.0%
2	Planetmania	£284.50	3000	Intersprint	Not provided	31.7.06	

516. June deals 31, 32, 33 (85, 86 and 87) (E160D/250-282)

Date: 27 June 2006
Phones sold in transaction to broker: 6000 Nokia N90
EU supplier: Mighty Mobile
UK acquirer: TCCS
Buffer 1: Yalegate Ltd
Buffer 2: NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Intangible Media	£269.50	2500	Intersprint	Not provided	Not provided	2.1%
2	Planetmania	£269.50	2500	Intersprint	Not provided	Not provided	
3	Sigma Sixty	£269.50	1000	Intersprint	Not provided	28.7.06	

517. June deals 29, 30 (88 and 89) (E160D/283-304)

Date: 27 June 2006
Phones sold in transaction to broker: 3000 silver Nokia 8800
EU supplier: Mighty Mobile
UK acquirer: Selectwelcome
Buffer 1: Crotek Ltd
Buffer 2: NTS
Broker: BTS

BTS sales:

	Customer	Price per hand set	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Intangible Media	£324	1250	Heinrich Sneider	Not provided	28.7.06	2.3%
2	Planetmania	£324	1750	Heinrich Sneider	Not provided	1.8.06	

518. June deals 36, 37 (90 and 91) (E160D/305-334)

Date: 27 June 2006
Phones sold in transaction to broker: 4500 Nokia N80
EU supplier: Mighty Mobile
UK acquirer: TCCS
Buffer 1: Crotek Ltd
Buffer 2: Svenson Commodities
Buffer 3: NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Planetmania	£283	2250	Euresco	28.6.06	4.7.06	2.0%
2	Intangible Media	£283	2250	Euresco	28.6.06	4.7.06	

519. June deals 38, 39 (92 and 93) (E160D/335-362)

Date: 27 June 2006
Phones sold in transaction to broker: 4850 Nokia 9300i
EU supplier: Adobcom
UK acquirer: TCCS
Buffer 1: Tracker Trading Ltd
Buffer 2: NTS
Broker: BTS

BTS sales:

	Customer	Price per handset	No. sold	Customers freight forwarder	Date of CMR	Date payment made	BTS & NTS % profit
1	Intangible Media	£233.50	2500	Euresco	28.6.06	4.7.06	2.2%
2	Planetmania	£233.50	2350	Euresco	28.6.06	4.7.06	

520. As we shall show when we come to deal with the FCIB evidence, in every case where BTS split consignments of phones it purchased, the original consignments were restored to the relevant circular money flow either by BTS's own customer or at one step removed therefrom.

521. The matter of negotiation of purchase and sale prices of phones was raised with Mr Tomlinson in cross-examination. He emphatically denied having been told at

what prices to buy and at what to sell, claiming to have negotiated purchase and sale prices at arm's length in every transaction. Mr Pickup took up the matter in re-examination, and his exchange with Mr Tomlinson ran as follows:

> P. Did anybody at any time, Mr Tomlinson, tell you what price to pay and what price to sell for in respect of any of your transactions?
>
> T. No, nobody.
>
> P. It has been suggested to you that you were controlled –
>
> T. No, I wasn't
>
> P. – by another, that you were, in effect, a puppet?
>
> T. No, I wasn't
>
> P. If anybody had suggested to you that you should buy a certain stock at such a price and sell to a particular customer at such a price, what would you have done?
>
> T. Run a mile
>
> P. Why?
>
> T. Because it's not within my business to do what someone else directs. I do my own trades. I negotiate my own prices and I buy and sell from an open market and deal with people that I've customarily dealt with. No one dictates what I do and what I don't do.

Discussion

522. In *Megtian*, in dealing with circumstantial evidence, but in an observation equally applicable in the present context, Briggs J said at [24]:

> "In my judgment, the primary facts found by the tribunal relevant to *@tomic's* [the contra-trader] 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. This was dealt with by Lewison J in *Arif v Revenue and Customs Commrs* [2006] EWHC 1262 (Ch) at para 22. He said:
>
> 'There is one other general comment that is appropriate at this stage. It relates to the evaluation of circumstantial evidence. Pollock CB famously likened circumstantial evidence to strands in a cord, one of which might be quite insufficient to sustain the weight, but three stranded together might be quite sufficient (*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, leads to that conclusion.'"

523. Within each individual group of "split deals" we have created for analysis purposes, except what we consider to have been the minor error deals of June 5 and 6, the price BTS obtained per handset from its customers was the same irrespective of the quantity dealt in; the date the goods were despatched abroad was the same; the EU freight forwarder used was the same; and, with a handful of exceptions, which in our judgment are all accounted for in the FCIB evidence, all payments were made on the same date. Further, the aggregate percentage profits obtained by BTS and NTS in all the split deals fell within the narrow range established by HMRC for Cell 5. Those are hard facts, drawn from BTS's own deal documentation: they cannot be disputed. In our judgment, the facts provide the clearest possible evidence of orchestration and contrivance.

524. No evidence was adduced to corroborate Mr Tomlinson's claim to have negotiated purchase and sale prices for the split deals. Coupled with the facts set out in the last preceding paragraph we consider that absence of evidence to give the lie in the clearest possible way to his claim to have negotiated individual purchase and sale prices within a highly volatile market. We infer that BTS was told when and from whom to buy, when and to whom to sell, in each case at what price, and acted on the instructions given to it. We also infer that Mr Tomlinson knew from his own documentation that the "split deals" were not genuine commercial sales. It follows that we further infer that he is dishonest.

525. Far from supporting Mr Pickup's claim that the "splitting" of deals was inconsistent with Mr Humphries' contention that traders operated in schemes, in our judgment the analysis we have carried out proves just the opposite.

526. From the present tribunal's own experience of MTIC fraud, we can say that in most MTIC cases there is usually little or no direct documentary evidence of a connection with fraud. In the present case BTS's own documents relating to its split deals provide that evidence in abundance.

527. We note that the 63 split deals represent over 55% of all the deals concerned in the appeal.

Single deals in Cell 5

528. BTS carried out 12 single deals in Cell 5 additional to the 63 "split deals". All the customers were the same as those supplied in the "split deals": Sigma Sixty (6 deals), Pol Comm (1 deal), PhoneC@nnect (1 deal), Planetmania (2 deals) and Intangible Media (2 deals) and in each case NTS was the final buffer in the chain. Details of the single deals are as follows:

1. April deal 6 (Deal 6) (E160B/99-108)

EU supplier: Mighty Mobile. UK acquirer: Svenson Commodities.

Date	Number of phones	Product	Customer	EU Freight Forwarder	NTS & BTS % profit
28 April 06	2100	Nokia 8801	Sigma Sixty	Freight Connections	4.3%

2. April deal 7 (Deal 7) (E160B/109-118

EU supplier: Mighty Mobile. UK acquirer: Svenson Commodities.

Date	Number	Product	Customer	Freight Forwarder	NTS & BTS % profit
28 April 06	2000	Nokia N70	Sigma Sixty	Freight Connections	4.3%

3. April deal 8 (Deal 8) (E160B/119-128)

EU supplier: Mighty Mobile. UK acquirer: Svenson Commodities.

Date	Number	Product	Customer	Freight Forwarder	NTS & BTS % profit
28 April 06	2000	Sony Ericsson W900i	Sigma Sixty	Freight Connections	4.1%

4. April deal 9 (Deal 9) E1260B/129-138)

EU supplier: Mighty Mobile. UK acquirer: Svenson Commodities.

Date	Number	Product	Customer	Freight Forwarder	NTS & BTS % profit
28 April 06	3000	Nokia 7380	Sigma Sixty	Freight Connections	4.4%

5. April deal 10 (Deal 10) (E160B/139-152)

EU supplier: Mountainrix. UK acquirer: Powerstrip

Date	Number	Product	Customer	Freight Forwarder	NTS & BTS % profit
28 April 06	3750	Nokia N91	Pol Comm	Aventer Logistic SL (Spain)	2.3%

6. May deal 5 (Deal 11) (E160B/153-172)

EU supplier: Mighty Mobile. UK acquirer: David Jacobs

Date	Number	Product	Customer	Freight Forwarder	NTS & BTS % profit
31 May 06	3600	Nokia 8800	PhoneC@nnect	Boston Freight	2.4%

7. May deal 6 (Deal 43) (E160C/149-165)

EU supplier: Mighty Mobile. UK acquirer: Svenson Commodities.

Date	Number	Product	Customer	Freight Forwarder	NTS & BTS % profit
24 May 06	5000	Sony Ericsson W810	Sigma Sixty	Cargo Logo (Austria)	2.7%

8. May deal 17 (Deal 33) (E160C/1-10)

EU supplier: Adobcom. UK acquirer: Selectwelcome First UK buffer: Regent Commodities Ltd.

Date	Number	Product	Customer	Freight Forwarder	NTS & BTS % profit
24 May 06	3000	Nokia N70	Sigma Sixty	Cargo Logo (Austria)	2.3%

9. May deal 8 (Deal 48) (E160C/166-209)

EU supplier: Forex. UK acquirer: TCCS. First UK buffer: Yalegate Ltd

Date	Number	Product	Customer	Freight Forwarder	NTS & BTS % profit
25 May 06	4750	Nokia N91	Planetmania	Cargo Logo	2.5%

10. June deal 9 (Deal 79) (E160D/171-183)

EU supplier: Mighty Mobile. UK acquirer: TCCS First UK buffer: Tracker Trading Ltd

Date	Number	Product	Customer	Freight Forwarder	NTS & BTS % profit
22 June 06	2500	Nokia 8800 (black)	Intangible Media	Euresco BV	2.1%

11. June deal 10 (Deal 80) (E160D/184-196)

EU supplier: Mighty Mobile. UK acquirer: TCCS. First UK buffer: Scorpion.

Date	Number	Product	Customer	Freight Forwarder	NTS & BTS % profit
22 June 06	2500	Nokia N71	Planetmania	Euresco BV	2.0%

12. June deal 13 (Deal 68) (E160D/25-28)

EU supplier: Mighty Mobile. UK acquirer: Selectwelcome. First UK buffer: Evenmore Ltd

Date	Number	Product	Customer	Freight Forwarder	NTS & BTS % profit
22 June 06	2500	Nokia 7380	Intangible Media	Intersprint Logistics (Belgium)	2.1%

Discussion

529. As all 12 single sales in Cell 5 were made to the same customers BTS supplied in its 63 split deals and represented but 16% of its Cell 5 deals, and again in each one the aggregate percentage profits obtained by BTS and NTS fell within the narrow range established for Cell 5, albeit that the range was slightly wider than that in the split deals, we consider ourselves justified in treating them identically to the split deals. Thus we draw the same inferences in relation to them as we do in relation to the split deals. That some of the freight forwarders used in the single deals were not involved in the split deals, we consider to be irrelevant.

530. We again infer that BTS was told when and from whom to buy, when and to whom to sell, in each case at what price and acted on instructions given to it; in our judgment, Mr Tomlinson knew from his own documentation that the deals were not genuine commercial sales.

B) THE SIZE OF THE OVERALL SCHEME

531. In his various witness statements and exhibits, Mr Humphries gave evidence as to the size of the overall scheme he had identified, producing overview charts of the cells showing the number of traders said to be involved in the scheme. The Cell 5 overview showed 60 traders. The Cell 10 overview showed 61 traders. The off-shoots of Cell 10 showed a further 36 traders. The Cell 1 overview showed a further 58 traders and the "First Touch Scheme" another 12. Thus the total number of traders shown on the charts was 227. No charts were produced showing the buffers in Cell 1, any of the traders that appeared in the defaulting chains, i.e. the opposite side of the offset scheme, or any of the companies that appeared in the FCIB analysis but not in the transaction chains. Further traders were omitted from HMRC's overviews.

532. Mr Pickup maintained that on a proper analysis of the deal sheets the total number of traders involved in the overall scheme was 377. To that number must be added all the money companies that appeared in HMRC's FCIB analysis but not on the transaction chains. Thus the total number of companies involved was likely to be nearer 400 in total. It was a substantial operation.

533. The background to HMRC's case was that every trader in the transaction chains of the alleged contra-traders (both acquisition and despatch) was a knowing

participant in the fraud. Each trader was directed by a controlling mind or minds as to from whom to buy, to whom to sell, how much to buy for and how much to sell for, when to undertake the trades, when to log in to the FCIB server and when to transfer the funds.

Discussion

534. Mr Pickup submitted that it would have been remarkable if someone, or even a group of people, had controlled 400 separate trading entities to that level of detail, ensuring that each transaction followed a set pattern. On HMRC's case the controlling minds were not only responsible for directing the trade, they must also have calculated the tax positions for the 38 contra-traders across the cells, including the inter-linking based on the suggested 'two-tier' contra-trading. If that were not complicated enough, HMRC further alleged that the controlling minds chose to split almost all of the deals at the point of despatch, thereby doubling the number of transactions. Such a proposition did not withstand sensible scrutiny: it was wholly implausible

535. We accept that the overall scheme appeared to be a large one but whether all the companies said to form part were involved in few or many transactions in it, we cannot say. It is clear that the number who played a part in the chains involving the Appellants were very few. However, the evidence adduced by HMRC - in this connection including that provided in relation to the money flows through the FCIB (dealt with later) – demonstrated the clear fraudulent nature of the scheme and particularly that part in which the contra-traders operated. In our judgment, the contra-traders identified in the schemes produced by HMRC did not engage in any legitimate trading in the period in question. Every transaction they carried out in the period was infected by the fraudulent scheme or schemes in which they knowingly participated. In a scheme involving the very large sums of money with which we are dealing, and which resulted in profits of the magnitude disclosed, organisation on the scale revealed was clearly well worth the effort; the overall scheme was the size HMRC claimed.

22. THE FCIB EVIDENCE

536. In opening, Mr Cunningham put HMRC's case as to the money flows in the Appellants' transaction chains as follows:

> "I intend to show you that not only was the movement of goods controlled and orchestrated; so also was the movement of money, including Mr. Tomlinson's money. Again we say, and this touches on knowledge, that he could not have been and was not an innocent victim in relation to the movement of money, but must have been a knowing participant in the orchestrated movement of money."

537. In 2004 and 2005 the UK Treasury effectively asked the UK high street banks to close the trading accounts of those traders operating in the wholesale grey market in mobile phones and CPUs as many of them were involved in MTIC fraud. The banks acted on the Treasury's request. The result was that traders in MTIC products were forced to open trading accounts with other banks. In the event most, including

every trader in every chain of transactions with which we are concerned, chose to use the First Curacao International Bank NV ("the FCIB") in the Dutch Antilles.

538. HMRC claim that the FCIB was appealing to MTIC traders because it offered first class banking services supported by sophisticated bank software and a reliable 24 hour service. MTIC companies were able to pay monies to and from each other without their payments being visible to law enforcement agencies, including HMRC. Further, monies could easily be transferred from the FCIB to other bank accounts outside HMRC's jurisdiction, e.g. to Dubai, without being traceable. The FCIB was closed down by the Dutch authorities in October 2006.

539. BTS and NTS each opened a sterling account with the FCIB late in 2004, Mr Tomlinson saying that they did so as a result of the pressure put on them by the UK high street banks. All the other accounts with the FCIB to which we were referred were also sterling accounts.

540. At E12/344 is the form of application FCIB required NTS to complete to open an account. It is dated 8 October 2004 and signed by Mr Tomlinson. It includes a section headed " Special VAT Certification". In the form, at E12/351, the applicant was required to confirm that it had been engaged in the computer equipment business for more than one year, and that it had "and will continue to comply with the provisions of …. S.77A of the Value Added Tax Act 1994." Mr Tomlinson found nothing odd in being asked by a bank in the Dutch Antilles to comply with a specific section of the UK Value Added Tax Act, and was unable to recognise it as having, to use Mr Cunningham's expression, "MTIC written all over it." Nor did he find anything odd in also being required to confirm "We have taken and will continue to take those due diligence steps as set forth in section 8" of Notice 726. Mr Tomlinson completed an identical application form for BTS, also on 8 October 2004. (E12A/329). We shall return to the contents of that form when later dealing with Mr Tomlinson's honesty.

541. Contrary to a submission by Mr Pickup that the proper inference to be drawn from the references to UK tax legislation in the bank's application form was that the FCIB was anxious to avoid accepting customers involved in MTIC fraud, we find that the inclusion of those references in an application to open an account with a foreign bank was so unusual as to put any prospective customer on notice that the bank was well aware of the problem of MTIC fraud. The FCIB material alone should, in our judgment, have given rise to suspicion on the part of the Appellants as to the bona fides of the FCIB.

542. HMRC, by Mr Birchfield, claim that the money flows in the present appeals were an integral part of the overall scheme to defraud them. They say that there was a remarkable consistency in the way funds were circulated through a limited number of accounts, and that consistency was apparent to them as early as 2008. It was provided by the Dutch FCIB server, i.e. before 27 September 2010 from when HMRC were able to use in civil proceedings the transaction narratives or the payment timings and IP addresses contained on the Paris FCIB server.

543. Miss Parikh examined the FCIB evidence showing the monetary movements relevant to the Appellants' transactions chains, and Mr Birchfield provided an overview of the results of her analysis. HMRC rely on the FCIB evidence as showing contrivance and control by certain significant players and circularity in the money movements between entities, some of whom were traders and others were financiers or money providers. In cross-examination, Mr Birchfield claimed the overall picture showed patterns emerging which resulted in him concluding that the trade was contrived, and was controlled by the significant players. In relation to BTS's split deals he added: "The money seems to start from either one account or a limited number of accounts through if you like in a diamond shape: it spreads out as it comes down to the middle and then it comes back together at the bottom."

544. Having initially asserted that the transaction chains had to be controlled from top to bottom, Mr Birchfield conceded that it was possible, although unlikely, for one trader in a scheme to have been a duped part of it for a limited number of transactions. He agreed that if there was to be a dupe in the chains, the place to put that trader would have been as the broker in the clean chain.

545. As we shall show, in dealing with individual transactions carried out by the Appellants, the funds applied to them were transferred from, and then back to, the same traders (or connected traders). That showed circularity. The funds were provided by linked British Virgin Islands ("BVI") companies through EU hubs, EU customers, UK brokers and through UK transaction chains and then back to the BVI companies and/or EU hubs. For example, the four BVI companies Amira, Solutions Beyond, SM Systems and Mighty Mobiles fed into to the EU hubs Comica (Holland), BRD (Germany), Negresco (Spain) and Cayenne Trading (Luxembourg). The EU hubs then transferred the funds to the EU customers of the UK brokers. Those customers included Mighty Mobile, BRD, Forex, Comica and Parasail. The EU customers transferred the money to their suppliers who included David Jacobs, Powerstrip, Svenson Worldwide, Svenson Commodities, Megantic Services and Fonecode. The money then flowed through the UK acquirers, contra-traders and defaulters before being returned either to one of the BVI companies, or to one of the large EU trading hubs for re-circulation.

546. In relation to the Appellants' Cell 5 deals, Mr Birchfield referred to FCIB accounts for two companies in the BVI owned by one Imran Memon. Those companies were Amira Group and SM Systems. The main introducer of funds was the Amira Group. Mr Birchfield observed that the narrative on the FCIB statements for funds introduced by the Amira Group was "Investment loan", and in many cases where the funds were shown to circulate and return to Amira the transaction narrative on the bank statements read either "funds returned" or "payment for invoices". He added, "As funds often circulate round an entire circuit of the carousel within a matter of few hours, these must be some of the shortest 'Investment Loans' ever seen". Other key accounts in the Cell 5 deals identified by Mr Birchfield were those of Negresco and Comica, those companies, it will be recalled, being owned and run by Adil Kamran, one being based in Spain, the other in Holland. Negresco had a sub-account in the name of Parasail, the latter name rather than the former being used in trading documents for transactions in the invoice chains.

547. Mr Birchfield produced an overall scheme chart, exhibit PB3 (E8/22), for the Appellants' payment flows in which he showed the FCIB analyses for both companies. The chart revealed that where NTS acted as a buffer to BTS in transactions the money flows differed from those in which NTS acted as broker. The money conduit traders in the BTS broker chains were the Cell 5 companies Comica, Negresco (through its sub-account in the name of Parasail), Amira and Global Financial Services. In the NTS broker chains the money conduit traders were Multimode, Ascom and Pol Comm. The two different types of money flow never crossed from one scheme to the other, except that the EU customer CIDP appeared as a customer of both BTS and NTS.

548. Whilst the BTS chains were predominantly contra-trading chains, those of NTS were mainly direct tax loss chains. The UK buffer traders in the BTS chains were completely different entities from those found in the NTS chains.

549. Mr Birchfield concluded that the FCIB analyses produced by officers of HMRC showed the Appellants' transactions to be contrived; to be designed to ensure that the funds flowed within circles restricted to traders introduced to them by the money conduit traders. He claimed that that could not have happened in the course of normal commercial trading; all the participants had to know from whom to buy and to whom to sell to keep the money flows separate.

550. The analyses to which Mr Birchfield referred were carried out by officers Smita Parikh and Elaine Emery, the latter's participation being restricted to an analysis of NTS's involvement in the First Touch contra trading scheme.

551. In our consideration of the analyses which follows, we remind ourselves that every trader in every chain of transactions with which we are dealing banked with the FCIB, and all payments were made by intra-bank transfer in sterling

BTS deals

552. As we explained earlier, BTS carried out 75 Cell 5 contra deals in the three accounting periods 04/06, 05/06 and 06/06. Miss Parikh selected at random and analysed the FCIB material relating to 17 of the deal chains concerned. The deals she chose were: April deals 2, 3, 4, May deals 5, 7, 8, 15 and 16, 23 and 24, 33, 38 and 39, and June deals 1 and 2, 16, 18, 38 and 39, 40 and 41. She concluded that all 17 chains were circular with funds either returning direct to the account from which they were introduced, or to an account controlled by the same individual. Six circuits began and ended with the Amira Group in the BVI, and a further seven started or ended with either Negresco in Spain and/or Comica in Holland. The remaining four circuits began and ended with Global Financial Services in Hong Kong. (Although Global had a mailing address in Hong Kong, it too was registered in the BVI). Her analysis was unchallenged in 10 cases. Included in those 10 cases were 6 purchase transactions that BTS split on sale into 12 transactions, namely May deals 15 and 16, deals 23 and 24, deals 38 and 39, June deals 1 and 2, deals 38 and 39, and deals 40 and 41. We shall deal with her evidence relating to the split deals remaining when we have dealt with the challenges mounted by Mr Pickup. His challenges related to the following deals.

April deal 2 (Chart E12A/53)

553. The money flow for this deal, as identified by Miss Parikh, started with Comica in Holland and passed through BRD (second EU customer), Planetmania (first EU customer), BTS (broker), NTS, Electrex (Midlands), Adworks UK.com, Platinum Mobiles, Bluestar Communications (buffers), C&B (defaulter), Integralphone (UK importer) and back to Comica.

554. Mr Pickup questioned Miss Parikh's identification of the payment by Comica to BRD on the basis that the funds used to make the payment did not appear to have emanated from Integralphone, but rather were provided to Comica by the financier Amira, and the provision of the funds did not appear on her chart. Miss Parikh accepted the correctness of the claim, as do we. However, we find that it does not affect the circular pattern of the money flow.

555. In a further challenge to Miss Parikh's claim to have found a circular money flow, Mr Pickup questioned the correctness of the narrative on the relevant FCIB bank statements, and the timing of the payments. As to the former, except where it is perfectly plain, and since the narrative content is entirely dependent on the person making the intra-bank transfer and may have been carefully or casually made, we do not necessarily regard it as conclusive as to the identification of any particular payment.

556. In his evidence Mr Birchfield explained that the FCIB issued transaction numbers sequentially, and said that there were five stages in a payment sequence from "order create" to "payment create", through "payment made" to "order last time". He added that what the bank statements showed was the order in which the payments were in fact made. His evidence in that behalf was helpful in dealing with certain payments which appeared to have been made out of sequence. On the basis of that evidence, as tested in cross-examination, we find the documentary evidence as to timing using only the EB (electronic banking) references on the bank statements cannot be relied on accurately to indicate the order in which payments were made. We are satisfied that the money flow for the deal was circular.

April deal 3 (Chart E12A/ 68)

557. The challenge in this case was restricted to a claim by Mr Pickup that the funds Comica, in the same position as it was in April deal 2, paid to BRD, its supplier, were not those identified on the FCIB statement as having been paid to Comica by its customer Integralphone. Even though we accept the correctness of Mr Pickup's claim, that does not alter Miss Parikh's conclusion that there was a circular money flow;

May deal 5 (E12A/120)

558. Officer David Young charted the payments in BTS May deal 5, and showed that the money flow was in two parts: one on 5 June 2006 and the other on 6 June 2006. The deal started with a payment by David Jacobs in the UK to Mighty Mobiles, a BVI company based in Spain, and continued as follows:

David Jacobs to Mighty Mobile (BVI)	12.33 on 5/6/06
Mighty Mobile to Comica (NL)	12.45 on 5/6/06
Comica to SM Systems (BVI)	13.00 on 5/6/06

SM systems to Amira Group (BVI)	13.06 on 5/6/06
Amira Group to Negresco (Spain)	13.33 on 5/6/06
Negresco to Forex (Germany)	15.45 on 6/6/06
Forex to Planetmania	16.03 on 6/6/06
Planetmania to BTS (UK)	16.45 on 6/6/06
BTS to NTS (UK)	17.00 on 6/6/06
NTS to David Jacobs (UK)	18.24 on 6/6/06

559. Mr Pickup challenged the circularity of the money flow simply by observing that the payments were made on two different days. We accept the correctness of the observation, but find that it does not affect the circular money flow.

May deal 7 (Chart E12A/136)

560. In this deal on 24 May 2006 Powerstrip supplied NTS with 3000 Nokia N70 phones which the latter proceeded to sell to BTS. However, the narrative on the relevant Powerstrip FCIB bank statement shows the transaction as relating to 9000 Nokia N70 phones. Mr Pickup questioned the correctness of that narrative. We find that the narrative is not inconsistent with the transactions that took place on 24 May 2006 for, as Mr Cunningham observed, on the same date as Powerstrip purchased the 3000 N70s and sold them to NTS, it also purchased a further 6000 Nokia N70s which it proceeded to sell to Electrex (Midlands). For so finding we rely on exhibit RM2 on the CD rom which, pursuant to the Direction, is admissible as to the truth of its contents and is deemed to be agreed by BTS. Our finding does not affect the circular money flow.

May deal 8 (Chart E12A/150)

561. The challenge in this case was in all material respects identical to that in April deal 3, and again we are satisfied that the circular money flow was not affected.

May deals 15 and 16 (Chart E12A/174)

562. Amira, as financier in Cell 5, made three investment loans to finance this particular group of transactions. Two of them it made to Negresco which, it will be recalled, was a Kamran company, and the third it made to Comica itself those matters being the subject of Mr Pickup's challenge in this case. That does not affect the circular money flow found by Miss Parikh.

May deals 38 and 39 (Chart E12A/223)

563. In this case, Mr Pickup made a challenge similar to that he made in relation to May deals 3 and 8. On 31 May 2006 BTS was supplied with 5000 Nokia 8800 phones by NTS. BTS divided the phones into two consignments, one of 2000 phones which it supplied to CIDP and the other of 3000 phones it supplied to Planetmania. CIDP and Planetmania went on to supply their entire purchases to BRD. But whereas BRD made payment of £1,084,500 for the phones it had purchased from Planetmania on 22 June 2006, it did not make payment of £724,000 for those it had bought from CIDP until 26 June 2006. We observe that on 22 June 2006 BRD was paid £1,072,000 by Comica for the phones it purchased from Planetmania, but was not paid by Comica

for those purchased from CIDP until 26 June 2006. We further observe that the monies applied by BRD were provided by Amira by way of three investment loans: £72,000 and £1 million on 22 June 2006, and £700,000 on 26 June 2006. We accept that the financing of a split deal in that way was unusual, but that is the way the FCIB evidence clearly indicates it having been done. We find that the financing of the deals did not affect the circularity of the money flow in relation to the entire original deal.

564. Mr Pickup further observed that BTS paid NTS £800,000 as "P/P bts/nts outstanding deals" on 21 June 2006, i.e. before it was paid by its customers. Why it did so was not explained by Mr Tomlinson, nor was it made clear to us why it could be said that the payment affected the circular money flow. We find that it did not affect that flow.

June deals 1 and 2 (Chart E12A/249)

565. In this split deal of 22 June 2006, BTS supplied each of Intangible Media and Planetmania with 2000 Nokia N90 phones. Intangible Media sold its purchase to Forex, and Planetmania sold its own to BRD. Forex and BRD both sold their holdings to Comica. The supporting FCIB bank statement for Comica shows two debits on the account of the same amount, £539,500, on 28 July 2006 (over a month after the transactions took place) each indicating the payment to be for 2000 Nokia N90 phones. The bank statement shows a third payment of £539,500 on 31 July 2006, the narrative relating to that payment reading "brd,2k,nk,n90,22" [BRD, 2000 Nokia N90]. Forex paid Intangible Media on 28 July 2006 and BRD paid Planetmania on 31 July 2006. Not surprisingly, Miss Parikh allocated the payment made on 31 July 2006 to the purchase from BRD. Mr Pickup asked why she had chosen that payment for inclusion in her chart rather than the earlier one of £539,500 available for the purpose. Since in our judgment the 31 July payment was clearly intended to relate to the BRD transaction, we do not accept that Miss Parikh's choice was indicative of her adopting a method of allocation that could not be said certainly to identify a payment as relating to a particular transaction, so that her method should be regarded as suspect. For completeness, we add that BTS was paid by its customers on the day each of them was paid.

566. Mr Pickup raised a further point relating to those deals arising out of the onward movement of monies beyond Adobcom, the supplier to the UK acquirer. Adobcom transferred payment to Negresco (Parasail), Negresco to Solutions Beyond, Solutions Beyond to Fonecode Solutions, and Fonecode Solutions to Comica. The point he made was that there was a difference in the amount of money received by Fonecode Solutions, £1,049,000, with the narrative "payment against invoice", and the payment by Fonecode Solutions to Comica, of £740,000, with the narrative "investment loan". Mr Pickup questioned Miss Parikh's allocation of the figures on the bank statement to her chart saying there was no apparent explanation for the reduction in the figure of almost £300,000, or as to whether the money movements were in respect of the same goods or in any way related. Since the accounts of Solutions Beyond and Fonecode Solutions were not produced, we are unable to take the matter further and, since Mr Pickup did not dispute that the funds went from Comica round to Parasail (both controlled by the same individual), as Miss Parikh showed, we accept that the money flow was circular.

The money chains in the challenged BTS deals in Cell 5

567. In our judgment, none of the challenges made by Mr Pickup alters the analysis of Miss Parikh, so that we find that there was a circular flow of money in every one of the Cell 5 deals she analysed.

Cell 10 deals

568. BTS carried out 19 broker deals in this cell, including a single acquisition deal which was broken down into four sales (May deals 1 – 4). Miss Parikh analysed 10 of the 19 broker deals, but her conclusion that there was a circular money flow in all of them was challenged by Mr Pickup in relation to only one, May deal 4. Mr Pickup made the point that the narrative on the supporting FCIB bank statements relating to one of two part payments made by FAF, BTS's customer, to Valdemara, FAF's own supplier, did not match the description of the goods in the related invoice. However, the narrative relating to the other payment did match the invoiced description and, since in the aggregate the two sums concerned matched the sum invoiced and the date of the challenged payment was consistent with its having been made for this deal, we accept that monetary circularity of the chain is established.

569. Having ourselves reviewed Miss Parikh's analysis of all the Cell 10 deals, we find that there was a circular flow of money in every one Miss Parikh analysed.

BTS May deal 33

570. We were provided with the timing analysis for the payments relating to May deal 33 (BTS Invoice 5014), a Cell 10 deal. That analysis is included in the Schedule to our decision. It was conducted by Mr Young. He included the timings of the log-ins by the various parties in the chain. On the basis of the timings revealed, Mr Cunningham asserted:

> "Sir, the notion that the story told by the money chains is a sequence of accidents or coincidences is, in our submission, preposterous. Everybody on that money chain sheet had their part to play …"

and :

> "You cannot accidentally log in in the middle of a money circle, a multi-handed money circle that operates around the world, through a number of different IP addresses. You cannot log in by accident. Somebody has said to Mr Tomlinson: log in at time X and log out at time Y and accept the money and transfer it. Sir, that is contrivance and organisation and orchestration and the person orchestrated, Mr Tomlinson, cannot have been an innocent intruder into that exercise."

571. In cross-examination of Mr Tomlinson in relation to the timing of his log-in to the FCIB server in respect of deal 33 it was suggested that he was being controlled by a third party who instructed him to go online and make the relevant payment as part of a chain of transactions that he knew to be contrived. He rejected the suggestion. He

also totally disagreed with a further suggestion by Mr Cunningham that he was "right in the middle and knowingly in the middle of the money movement," that he went on line in accordance with instructions from someone and, having been paid by his customer, proceeded to pay his supplier.

Discussion

572. For his assertions Mr Cunningham relied on three principal factors: the fact that the Appellants each had an account with the FCIB; the movement of money within the transaction chains was circular; and the times at which the Appellants logged into and out of the FCIB server were indicative of orchestration.

573. As to the first factor, it is common ground that each appellant had a sterling account with the FCIB; as to the second we find that the money flows in the transaction chains of BTS were circular; as to the third, we accept that the time BTS logged into and out of its account with the FCIB was indicative of orchestration which, when coupled with the money chain evidence, indicates contrivance and orchestration.

The remaining BTS deals

574. BTS carried out four direct tax loss deals in the period with which we are concerned. It accepts that each of those deals was connected to a fraudulent tax loss, so that we need not deal with them in the present context.

NTS deals

Deals within the First Touch contra-trading scheme

Deals 1 – 4 (E12/11,18,26 and 33)

575. NTS carried out four broker deals that led back to the alleged contra-trader First Touch, deals 1-4. As we have said, Officer Emery carried out an analysis of the FCIB material. She found that in the deals the money moved in a circle; the pattern and the participants in the money flows fitted the patterns exhibited in the money flows of the other First Touch deal chains she analysed.

576. In relation to those four deals, Pol Comm was the EU supplier to First Touch. It sold to NTS which sold to Opal 53. Opal 53 proceeded to sell back to Pol Comm. Pol Comm made payment to Opal 53 before it received payment from First Touch. That was the only point raised by Mr Pickup. It does not alter the circular flow of funds.

Direct tax loss deals

577. NTS carried out 19 deals that traced back directly to tax losses. Sixteen of them led to the defaulter Anfell, and three to Midwest Communications Ltd ("Midwest"), a trader also admitted by NTS to be a fraudulent defaulter.

578. Again it was Miss Parikh who carried out analysis of the FCIB material. In each case, with the exception of deal 18, she claimed to find a circular money flow. Her analysis was unchallenged in 12 cases: deals 5,6,12,13,14,15,16,17,20,21,22 and 23.

Deal 5 (E12/39)

579. By way of example of the money flows in the NTS transactions we take deal 5. It was typical of the deals NTS carried out in period 04/06 and the invoice chain is set out earlier in our decision. The money flow in relation thereto started on 2 April 2006 by Pol Comm paying to East Telecom invoiced sums of £500,000 and £664,500. It then followed the invoice chain in the reverse direction until it reached a buffer, RK Brothers. That company then made payment direct to Multimode, omitting two other buffers in the chain, of sums of £586,000 and £578,398, the accompanying narratives on the FCIB statement reading "part on mp/341, 3400 93i" and "bal on mp/341, 3400X93I" respectively. The money flow ended with two payments by Multimode to Pol Comm on 21 April 2006, one of £500,000 and the other of £411,250.

580. We shall now deal with the challenges made by Mr Pickup in the remaining six cases.

Deal 7 (E12/65)

581. Mr Pickup again questioned the pattern in payments identified by Miss Parikh saying that they showed "similar failings and inaccuracies" to those found in her analysis of the BTS deals; they raised questions "as to the reliability of the analysis undertaken". The invoice chain reflecting the order of sales of 1500 Nokia N9500 phones in the chain of which deal 7 formed part shows invoices raised in the following sequence on 13 April 2006: Anfell as UK acquirer (£489,181.88), through the buffers Realtech Distribution (£489,534.38), RK Brothers (£489,622.50), Guess Trading (£489,975), Wildberry (£490,856.25), Scorpion (£491,737.50), NTS as broker (£493,500), and East Telecom as EU customer (£494,250). East Telecom's own customer was Pol Comm. The corresponding payment chain shows all payments, except those made by Pol Comm and Multimode (the latter not appearing in the invoice chain but identified by HMRC as the probable EU supplier) being made on 18 April 2006. Pol Comm and Multimode made payment on 20 April 2006. But whereas the invoice chain started with Anfell and Realtech, Miss Parikh's chart showing the payment chain omitted those two companies, RK Brothers making payment to Multimode, and Multimode making payment to Pol Comm completing the payment circle. The sum received by RK Brothers was the £489,622.50 it had invoiced, but the sum it proceeded to pay to Multimode was £485,505 (FCIB narrative "mp/343/500 9500"); and the sum Multimode paid to Pol Comm was £817,500 (FCIB narrative "p/p 5k 9500"). The narrative relating to Pol Comm's payment to East Telecom reads "Full payment 1.5k 775NK 6680", the reference to "6680" being to the goods in NTS's deal 8. We should add that the payments made by Multimode, Pol Comm and NTS were all combined payments, and in NTS's case related to both its deals 7 and 8.

582. Mr Pickup also queried with Miss Parikh the difference between the credit in Multimode's account from RK Brothers and the onward debit from Multimode's account to Pol Comm. She explained it as being accounted for by the fact that the larger sum included the phones in NTS deal 8, to which he responded saying that the

narrative associated with Multimode's payment made no reference to Nokia 6680 phones and therefore could not be said to have been related using best judgment. She was further challenged on changes she had made to her charts following the release of the FCIB Paris server evidence on 27 September 2010, and replied that whilst HMRC had full records relating to UK transactions, for EU transactions they had to rely on other EU fiscal authorities for information provided under mutual assistance and such as they obtained was frequently incomplete.

583. We may usefully include Mr Pickup's submissions following the above exchanges as they are relevant to our conclusion. He said:

> "These exchanges summarise neatly the difficulty faced by Miss Parikh and the limitations of the charts that she is able to produce. Whilst for the UK element of the transaction chain she is able to cross-reference from the FCIB account statements to the paperwork made available by the VAT officers for the relevant traders, the same cannot be said for the EU links in the chain. She exercises best judgment (which is no more than informed guesswork) on the basis of the narrative on the Paris server data and the amount transferred from one trading entity to another. This is inherently unreliable since she is dependent upon narratives which on her own admission she has found to be from time to time in error. They may be in error as to the quantity of phones traded, whether the payment is a part payment or full payment and whether the payment is indeed as she suggests a combination payment, for example in respect of deals 7 and 8. In many cases as here the payments are not contemporaneous and occur some days later. It can be shown by reference to the statements of account that the payments are made from monies received into the account from other traders in respect of other transactions. These traders and these transactions do not relate to the particular transaction chain for which her chart is drawn."

584. We pause at this point to say that we do not accept that Miss Parikh's "best judgment" was nothing more than "informed guesswork". We take her point that the narrative found on the FCIB statements was not always correct; therefore it was not necessarily determinative. It was quite clear from Miss Parikh's evidence that she carefully considered all the FCIB material before her in deciding whether payments should be included in her charts; she took into account other transactions traders had entered into and, admittedly of necessity to some extent, by a process of elimination reached her conclusions. That was a perfectly proper and sensible way to go about her work.

585. The fact that the payment from Pol Comm to East Telecom in relation to deal 7 was made after the payment by East Telecom to NTS may, as Mr Cunningham suggested, have indicated where the beginning and end of the money flow lay, but it did not affect its circularity. We are quite satisfied that there was a circular money flow in relation to deal 7.

Deal 8 (Chart E12/79)

586. Deal 8 is inextricably linked with deal 7, and the observations we have made in relation to that deal apply equally to the present one. Again Mr Pickup challenged the

payment by Multimode to Pol Comm on the basis of narrative and amount, and again we observe that the narrative is not necessarily determinative. We are satisfied that there was circularity in the money flow.

Deal 9 (Chart E12/93)

587. As with deals 7 and 8, Miss Parikh's chart indicated that the monies received by NTS from East Telecom, its EU customer, were not the identical ones that East Telecom received from Pol Comm, East Telecom's own customer. The payment to NTS was made on 18 April 2006 whereas Pol Comm only made payment to East Telecom on 20 April 2006. The narrative on the FCIB statement dealing with the payment made by Multimode, the EU supplier to which the monies returned to complete the circular money flow, to Pol Comm on 18 April 2006 is inconsistent with the content of the invoice raised by NTS. What is plain from the FCIB records is that on 18 April 2006 RK Brothers, a buffer in the chain, transferred £831,820 by way of third party payment (again omitting Realtech and Anfell) from its own FCIB account to that of Multimode. On the same day Multimode transferred sums of £782,500 and £500,000 to Pol Comm, the narrative relating to the latter referring to "p/p 3K Nokia 8800" phones, the same model as was included in NTS deal 9. We accept that the quantity referred to in that narrative differs from that in deal 9, 1900 phones. However, notwithstanding the difference in narratives, there was certainly circularity in the money flow, as Miss Parikh found.

Deal 10 (Chart E12/107)

588. The UK section of the supply chain for deal 10 shows that NTS bought 4000 Nokia 8800 phones from Scorpion. The other suppliers in the chain in transaction order were Sunny Traders, Caz Distribution, RK Brothers, Realtech Distribution, Anfell, PZP Ena and Multimode. NTS brokered the phones to the German company Opal 53 which in turn sold to East Telecom. Mr Pickup noted that there was a shortfall in the two payments made by East Telecom to Opal 53 which Miss Parikh was unable to trace. We accept the situation was as she found, but it does not affect the circularity of the available money flow. On the balance of probabilities, we find that the money flow was circular.

589. Once more RK Brothers made third party payments omitting Realtech and Anfell but on this occasion the narrative relating thereto clearly revealed the fact. We rely on that information to support our findings in relation to deals 7 and 8.

Deal 11 (Chart E12/120)

590. In relation to this deal for 3000 Nokia N70 phones, Miss Parikh identified two payments made on 24 April 2006 by the buffer RK Brothers to Multimode, again the EU supplier, totalling £752,460 (narratives "part inv mp 356 3K N70" and "bal inv mp356 3K N70") and included them in her chart. She further identified a single payment made on the same day of £750,000 by Multimode to Ascomp, a company that appeared only in the payment chain between Multimode and East Telecom as EU customer, the narrative of which reads "p/p 4Kx6280 6Kx9300 3KxN70 4KxN8800", and again included it in the chart. On the same day two further payments, each of £750,000, were made by Multimode to Ascomp. Miss Parikh was asked why she had chosen the particular one included in her chart since the narrative for the other two

was identical to that for the one chosen. In reply she claimed to have done so applying her judgment. We can see nothing to object to her having done so.

591. Mr Pickup next challenged Miss Parikh's inability to find a balance payment from East Telecom to Sigma Sixty, NTS's customer, she having been able to find only a part payment of £439,750 on 24 April 2006. She replied simply saying that she had been unable to find an entry showing payment of the balance anywhere on Sigma Sixty's bank statements. In our judgment, the payment made on 24 April 2006 establishes the circular money flow. Again we find that there was such a flow.

Deal 18 (Chart E12/248)

592. In relation to this deal, Miss Parikh's chart shows her having been unable to trace payments through three (of nine) segments of the monetary circle, all six traceable being payments relating to transactions within the UK. In an earlier chart relating to this deal, she claimed to have been able to trace the missing payments, but said that on further information in the form of the narrative on the FCIB statement becoming available to her (presumably on the FCIB Paris server evidence being released in September 2010) she accepted her earlier decision to have been wrong. In the light of the contents of Miss Parikh's present chart, Mr Pickup submitted that its contents were "mere speculation". We find that the six segments relating to the UK transactions reflect partial circularity of the money flow.

Deal 19 (Chart E12/257)

593. Once more Mr Pickup's cross-examination in challenge to Miss Parikh's conclusion concentrated on the EU payment element of the transaction chain. She identified a payment of £735,360 as having been made by the buffer RK Brothers, once more acting as a third party payer (again omitting Realtech and Anfell), to Multimode as EU supplier on 24 April 2006, followed the same day by a series of six money transfers by Multimode to Ascomp totalling £4.5 million. Again Ascomp appeared only in the payment chain between Multimode and the EU customer East Telecom. The narrative attached to five of the transfers describes them as part payments, and that attached to the sixth refers to "remaining balance", the quantities including "4K x W800", W800 being the model of phone in the deal. Thereafter, also on the same date, Ascomp paid East Telecom two sums, one of £281,250 and £439,750, the latter payment being replicated between East Telecom and Sigma 60, NTS's customer.

594. The payment of £439,750 shown on Miss Parikh's chart is in fact a duplication of the payment made by East Telecom to Sigma Sixty in relation to the transaction between those traders in NTS deal chain 11, and thus was not available for use in relation to deal 19. We accept that that payment was inadvertently included in Miss Parikh's chart. Mr Cunningham submitted that, given the connections between East Telecom and Sigma Sixty in other chains, a flow of money from one to the other was good evidence of fraud. Since four of the 24 NTS transaction chains with which we are concerned included supplies by those two companies, and at least one or other of them was involved in all but two of NTS's deals 5 – 23, we accept Mr Cunningham's submission as being correct. We again accept that HMRC have established circularity in the money flow.

The NTS money chains

595. To summarise, we find that HMRC have proved that there was a circular money flow in 18 of the 19 NTS money chains analysed by Miss Parikh, and that in the exceptional case, deal 18, they have proved a partially circular flow.

NTS Deal 16 (Chart E12/210)

596. As we mentioned earlier Mr Pickup did not challenge Miss Parikh's analysis of the money flow in relation to Deal 16, so that NTS accepts that the money flow in relation thereto is correct. That flow was checked by Officer Andrew Adamson, an HMRC computer analyst. He extracted information from the computerised records of the FCIB showing the timing of the payments made in the deal 16 chain of transactions. The stock sold in that deal consisted of 2000 Nokia 8800 handsets. All payments in the chain were made on 24 April 2006.

597. The payments shown in Mr Adamson's chart start with seven payments made by the Spanish company Multimode to the Portuguese company Mountainrix. The payments were all part payments for 5200 Nokia N90s, 2000 Nokia 8800s, 5000 Samsung D800s and 6000 Nokia 7380s, and were made between 13.48.18 and 14.00.26 on 24 April 2006. Mountainrix then made 6 payments for the same products to East Telecom between 14.12.14 and 14.36.08. East Telecom made a single payment of £950,000 for the 2000 Nokia 8800s to CIDP, the French customer of NTS, at 14.36.09. (i.e. 1 second after receiving the last part payment from Mountainrix).

598. CIDP made two payments to NTS; one of £400,000 at 14.57.09, and the other of £480,000 at 14.57.10. NTS had already paid its supplier Deb Techno when it received the monies from CIDP, its payment having been made at 12.24.02 the same day. (Rather than treating that payment as an indication of NTS's innocence, as Mr Pickup urged us to do, viewed against all the evidence before us we regard it as an indication that NTS was so confident that it would be paid by its customer that it mattered not that it had not itself been paid when it made payment).

599. Deb Techno paid Highfield Distribution £927,075 at 16.48.01, Highfield Distribution paid Wildberry £1,980,250 at 17.03.12, the payment covering four invoices including that for the Nokia 8800s. Wildberry paid Tracker Trading £921,200 at 17.24.13, Tracker Trading paid RK Brothers £920,730 at 17.48.07, and at 18.09.04 RK Brothers paid £915,240 back to Multimode.

600. Thus the funds moved in a circle on the one day from Multimode to NTS in 1 hour 9 minutes, and from Deb Techno back to Multimode in 1 hour 21 minutes.

601. The FCIB did not retain the computer IP address data and account log in session time until 1 May 2006 so that data prior to that date was not available to us.

602. Whilst dealing with the money flows in NTS's deals, we should record that we find that in each of its deals 5, 6, 7, 8, 9, 10, 13, 17, 19, 20 and 21 NTS purchased from Scorpion, and the funds flowed from Multimode and back to Multimode. The Amira group did not appear in any of those transactions. In our judgment, those facts

illustrate plainly that Mr Humphries was correct to remove Scorpion's transactions, other than buffer transactions, from Cell 5.

The remaining BTS "split deals" in Cell 5

603. Miss Parikh's analysis of the Cell 5 split deals that were not challenged by Mr Pickup extended to 12 such deals. As the invoice trail for those deals went cold on BTS making supplies to a customer in the EU, her analysis of the monetary flow fills the gap as to what BTS's customers were paid for and when, and where the money came from for the purpose. The analysis reveals:

May deals 15 and 16 (Chart E12A/174)

604. On 26 May 2006 NTS sold BTS 5000 Nokia 8800 phones. BTS sold 3000 of them to Planetmania and the remaining 2000 to Intangible Media. Seemingly both Planetmania and Intangible Media sold their holdings to Forex for the latter company made payment for them, having had finance for the purpose provided by Negresco. Negresco was itself financed by Amira. All payments were made on 21 June 2006. The narrative on the FCIB statements makes plain that the payments selected by Miss Parikh relate to the transactions to which we have referred and to no others. (We might add that that is the case in relation to all the other payments referred to in this subsection of our decision i.e. that relating to the remaining split deals in Cell 5).

May deals 23 and 24 (Chart E12A/191)

605. In these deals made on 30 May 2006, BTS was supplied with 6500 Sony Ericsson W900i phones by NTS. It sold 3000 of them to Planetmania and 3500 to CIDP. Planetmania was paid for the phones it seemingly sold on to Forex, which in turn was paid for them by Negresco. CIDP was paid for the phones it seemingly sold on by Negresco itself. Negresco was provided with the necessary funds by loans from Amira. All payments were made on 7 June 2006.

May deals 38 and 39 (Chart E12A/222)

606. On 31 May 2006 NTS sold BTS 5000 Nokia 8800 phones. BTS sold 2000 of them to CIDP and the remaining 3000 to Planetmania. Both customers sold their purchases to BRD and that company made payment for them on 22 June 2006 and 26 June 2006, having been provided with the necessary funds by Comica, itself financed by Amira.

June deals 1 and 2 (Chart E12A/249)

607. On 22 June 2006 NTS sold BTS 4000 Nokia N90 phones. BTS sold half of them to Intangible Media and the other half to Planetmania. Intangible Media seemingly sold its holding to Forex, and Planetmania to BRD for those companies made payment for them. Both Forex and BRD were provided with the necessary finance by Comica. The chart shows Comica's funding as having been provided by Fonecode Solutions. All payments were made on 28 July 2006.

June deals 38 and 39 (Chart E12A/292)

608. Also on 22 June 2006 NTS sold 4800 Nokia 9300i phones to BTS. BTS sold half of them to Intangible Media and the other half to Planetmania. Seemingly, Intangible Media sold its purchase to BRD, and Planetmania its to Forex. Both BRD and Forex were provided with the necessary funds to pay for their purchases by Negresco. The chart does not show the source of Negresco's funding. All payments were made on 4 July 2006.

June deals 40 and 41 (Chart E12A/305)

609. On 27 June 2006 NTS sold 3500 Nokia 9500 phones to BTS. BTS sold half of them to Sigma Sixty and the other half to Intangible Media. Sigma Sixty seemingly sold its holding to Hilton Moore, and Intangible Media to BRD for those companies made payment for them. Hilton Moore was provided with the necessary funds by Comica, and BRD by Negresco. Both Comica and Negresco were provided with "Investment loans" for the purpose by Amira. All payments were made on 5 July 2006.

610. At this point in our decision it is convenient to note that in all the VAT accounting periods prior to those concerned in this appeal, the Appellants were repaid their input tax repayment claims. There was no evidence before the tribunal from the FCIB bank statements of any of the monies reclaimed being distributed amongst other traders or being paid to others in their transaction chains. Had there been, HMRC would have relied on it. If the VAT reclaims paid to the Appellants did represent the profits of fraud, Mr Pickup claimed that one would have expected to see evidence of the profits being distributed amongst the many parties in the fraud. The fact those reclaims were simply used to undertake further similar trades was a strong indicator that they simply represented the Appellants being repaid the input tax they had outlaid on their purchases. We accept as fact that HMRC met all the Appellants input tax repayment claims for the periods prior to those with which the appeal is concerned, and that the Appellants' FCIB bank statements seemingly contained no evidence of those reclaims being distributed among other traders.

Discussion

611. In four of the NTS sales that turned into 8 deals in BTS's hands i.e the remaining split deals in Cell 5, it is plain that the deals were financed by Amira. Of the second in time of the remaining two original deals, June deals 38 and 39, we merely observe that since in the four deals where Amira was the financier funds were provided to Comica or Negresco, it is not unreasonable to assume that the finance was also provided by Amira, and on the balance of probabilities we find that it was.

612. Mr Pickup claimed that in April, May and June 2006 the FCIB presented as a reputable off-shore international bank offering state of the art e-banking facilities, with the necessary flexibility to suit traders such as the Appellants in the wholesale distribution mobile phone market. There was nothing in the market or the public domain to suggest otherwise. There was certainly nothing that Mr Tomlinson could have known to suggest either that the bank was engaged in fraud, or that it would be closed and subjected to investigation and the removal of its licence. The Appellants

opened their accounts with the FCIB in 2004 at a very early stage in the bank's history.

613. Mr Pickup admitted that the analysis of data from the FCIB showed what appeared to be, at least in part, contrived money chains. They showed that the Appellants' transactions formed part of those chains, but he submitted that they did not prove circularity, or that the Appellants were controlled, or knowingly participated in fraud. Miss Parikh conceded that much of her analysis, specifically concerning the movement of money between European traders, was based on what she initially termed "best judgment", but which she later conceded was no more than "guesswork." Mr Birchfield agreed that his analysis could not exclude the presence of an innocent dupe in the chains. Further, he conceded that the "place to put" that dupe would have been as broker in the clean chain. The FCIB data showed no more than the Appellants receiving money from their customers and paying money to their suppliers, those transactions happening within a short space of time. Mr Pickup claimed that was exactly what one would have expected to find of a legitimate trader engaged in 'back to back' transactions.

614. Coupling the evidence in this subsection, which is all documented, with our own analysis of the "split deals" (see the following subsection relating thereto), reinforces our rejection of a claim by Mr Pickup that the splitting of deals was inconsistent with Mr Humphries' claim that the traders with which we are concerned operated in schemes. Mr Tomlinson may not have known to whom his customers sold or from where they obtained the necessary finance for their purchases, but he did know that payments for each group leading to a split deal were nearly all made on the same day.

615. What our own analysis of BTS's split deals, coupled with that of Miss Parikh of the FCIB material, clearly reveals is that the deals were split at the point of acquisition by BTS and the phones comprised in them were subsequently returned to the main Cell 5 scheme in the original deal form as identified by Mr Humphries. That in each chain the split occurred on the phones being acquired by BTS, in our judgment provides yet further evidence that Mr Tomlinson knew that the deals were orchestrated and contrived.

23. PERCENTAGE PROFITS PER TRANSACTION (MARK-UPS)

616. Although not specifically pleaded, at the hearing HMRC asserted that there were non-commercial patterns in the mark-ups applied by the Appellants. They said that in broker deals the mark-up percentages were based on the particular chain of transactions concerned, and whether the chain was a default chain or a contra chain. The mark-ups did not vary according to the quantity, price or model of phone, so that Mr Cunningham submitted we should infer that Mr Tomlinson was being directed as to the mark-up he could apply in any particular case. As the assertion relied on nothing more than simple arithmetical calculations using figures in the Appellants' own documents, we are content to include it in HMRC's case.

617. Implausible though the size of the overall scheme involved in the instant case may have appeared at first sight, in this age of computers where programmes of the

type necessary to cope with many and detailed transactions are freely available, we are satisfied that the scheme existed in the form described by Mr Humphries and Mr Murphy. In every transaction chain constructed by HMRC the bottom line was that an amount of VAT was not declared

618. For the purpose of analysis we shall deal with HMRC's claim using information contained in the documents included in the Materials Bundle supported by the Appellants' own and their suppliers' invoices, but start with HMRC's "master schedule" inserted at tab 4 of Bundle XX.

619. Mr Tomlinson rejected HMRC's assertion maintaining that he did not and had never worked on percentage mark-ups and saying, "The profit margins that we make and the profit margins that historically we have made are on a pounds figure. Percentage margins don't come into it". He maintained that the variants in the margins he achieved in pounds and pence indicated his trading to be legitimate, and were the result of genuine arm's length trading.

620. Mr Pickup contended that the deal sheets showed a fundamental weakness in HMRC's assertion, saying they demonstrated that mark-ups were generally applied in increments of 25p, although there were a limited number of 5p. He submitted that if traders were operating on a percentage commission, one would have expected margins to have been in increments of 1p and not always rounded to the nearest 5p. It could not be suggested that the controlling minds used absolute mark-ups for all deals other than the broker's, but used a percentage for that of the broker.

621. Mr Pickup further maintained that the "master schedule" over-simplified the position by reducing the mark-up percentages to just one decimal place. Taking NTS deal 1 as an example (see below) applying 13.4% to the purchase price of £298 resulted in a sale price of £337.93, and not the £338 obtained. In order to arrive at a profit margin of £40 by dictating a percentage mark-up, Mr Pickup submitted that the controlling minds would have had to descend to the detail of three decimal places; the percentage mark-up that would have produced a sale price of £338 was 13.425%. It was inconceivable that Mr Tomlinson was directed in respect of each transaction to apply a mark-up at such a level of detail. To test Mr Pickup's submission, in relation to BTS's June Cell 10 deals, we have calculated the percentage profits obtained in them to three decimal places, and include our calculations at the relevant point in our analysis.

622. As we explained earlier, the 16 deals carried out by BTS in June 2006 said by HMRC to be in Cell 10 were recorded on just 9 invoices, and involved but two customers, PhoneC@nnected and FAF International. The invoice trail produced by HMRC in each case led back to one of two contra-traders, Epinx or Kwality, in the case of Epinx directly, or via the buffer Aram in the case of Kwality. Further, there were only two EU suppliers to the contra-traders, namely Kiara and Hennar. HMRC analysed the invoices for the 16 sale transactions and proved to our satisfaction that, calculated to one decimal place, BTS made 8% profit on all those deals except three, one in which it made 8.1% and two in which it made 7.9%.

We then proceed to calculate to three decimal places the % profits obtained in the Cell 10 deals

Deal No	Date	Quantity and product	Purchase price	Sale price	Profit	% profit per master schedule	% profit calculated to 3 decimal places
16	22.6.06	5000 Samsung D600	£142	£153.50	£11.50	8.1	8.098
16	22.6.06	1400 Nokia 6280	£160	£172.75	£12.75	8.0	7.968
16	22.6.06	2500 Nokia 9300i	£246	£265.50	£19.50	8.0	7.926
17	22.6.06	1200 Samsung D600	£135.50	£146.25	£10.75	8.0	7.933
17	22.6.06	2000 Nokia N70	£175.50	£189.50	£14.50	8.0	7.977
18	22.6.06	4000 Nokia 9300i	£226.50	£244.50	£18	8.0	7.947
19	22.6.06	1000 Nokia 6280	£159	£171.75	£12.75	8.0	8.018
19	22.6.06	3000 Nokia N90	£267.50	£289	£21.50	8.0	8.037
20	22.6.06	2000 Nokia N80	£273	£294.75	£21.75	8.0	7.967
20	22.6.06	2000 Nokia 9500	£288.50	£311.50	£23	8.0	7.972
21	22.6.06	3250 Nokia 8800	£315	£340	£25	8.0	7.936
22	22.6.06	3000 Sony W810i	£163.50	£176.50	£13	8.0	7.951
22	22.6.06	1000 Nokia N90	£278.50	£300.75	£22.25	8.0*	7.989
23	22.6.06	1995 Nokia 8800	£316	£341	£25	8.0	7.911
23	22.6.06	3000 Nokia 9300i	£227	£245	£18	8.0	7.929
24	22.6.06	4500 Sony W900i	£292	£315.25	£24.25	8.0	7.965

* In the master schedule provided, the percentage profit calculated for this deal is shown as 4.4%. That clearly is an error, and we have therefore corrected the percentage mark-up obtained.

623. We note that in some instances e.g. deal 21, the % profit should be 7.9% rather than the 8% contained in the master schedule, but we ignore the mistakes as being de minimis. The fact is that all 16 Cell 10 deals produced a profit of 8% or a figure within 0.1% of 8%.

624. In our analysis of BTS's split deals we earlier set out the calculation of the combined percentage profits of BTS and NTS both in the Cell 5 split deals and those involving onward sales of unbroken consignments in that cell. We therefore need not repeat the exercise at this point, but remind ourselves that the percentage rates obtained varied between 1.8% and 2.7%, in the split deals being mainly focused towards the lower end of that range, and between 2.0% and 4.4% in the remaining Cell 5 deals.

625. In the first four deals of BTS with which we are concerned, its April deals 2-5, all of which were direct tax loss deals, the company achieved the following profit percentages:

April Deal No	Date	Quantity and product	Purchase price	Sale price	Profit	% profit
2	27.4.06	3750 Nokia 8800	£385.25	£393	£7.75	2.1
3	27.4.06	4375 Nokia 9300i	£305.25	£311.50	£8.25	2.1
4	27.4.06	3900 Sony W900i	£287.50	£293	£5.75	2.1

5	27.4.06	4500 Nokia N90	£265.25	£370.50	£5.25	2.1

626. For completeness we now include the calculation of the percentage profits obtained by BTS in the three deals with which we have not already dealt.

May Deal No	Date	Quantity and product	Purchase price	Sale price	Profit	% profit
32	31.5.06	3600 Nokia 8800	£328	£331	£3	0.9
33	31.5.06	7000 Nokia 6111	£137	£138.35	£1.35	1.0
34	31.5.06	4475 Nokia 9300i	£268.25	£270.75	£2.50	0.9

627. We then turn to the NTS deals in point in the appeal.

628. On 30 March 2006 NTS carried out four transactions said by HMRC to be in the First Touch contra-trading scheme, deals 1-4. In each one it made a profit of between 13.4% and 16.1% as follows:

Deal No	Quantity and product	Purchase Price	Sale Price	Profit	% profit per master schedule
1	2000 Nokia 9500	£298	£338	£40	13.4
2	1500 Nokia 9300i	£299	£341	£42	14.0
3	1500 Sony W900i	£296	£340	£44	14.9
4	1200 Sony W800i	£155	£180	£25	16.1

629. The remaining NTS deals, i.e., deals 5-23, all traced back to the UK acquirers Anfell Traders or Midwest Communications, HMRC maintaining that they were comprised in a scheme financed by Multimode. In the transactions carried out on 13 April 2006, BTS's profit varied between 13.8% and 17.9%. In those deals carried out on 19 April 2006 its profit was between 12.1% and 14.1%, and in those carried out on 26 April 2006 between 7.1% and 9.4%.

Deal No	Date	Quantity and product	Purchase price	Sale price	Profit	% profit per master schedule
5	13.4.06	3400 Nokia 9300i	£295	£342	£47	15.9
6	13.4.06	400 Nokia N90	£260	£296	£36	13.8
7	13.4.06	1500 Nokia 9500	£279	£329	£50	17.9
8	13.4.06	775 Nokia 6680	£150	£172.50	£22.50	15.0
9	13.4.06	1900 Nokia 8800	£376	£442.50	£66.50	17.7
10	19.4.06	4000 Nokia 8800	£394	£441.50	£47.50	12.1
11	19.4.06	3000 Nokia N70	£217	£245	£28	12.9
12	19.4.06	5000 Samsung D800	£158	£178.50	£20.50	13.0
13	19.4.06	6000 Nokia 9300i	£301	£340	£39	13.0
14	19.4.06	4000 Nokia 6280	£191	£218	£27	14.1
15	19.4.06	5200 Nokia N80	£250	£282.50	£32.50	13.0

16	19.4.06	2000 Nokia 8800	£395	£440	£45	11.4
17	19.4.06	3000 Sony W900i	£270	£306.50	£35.50	13.5
18	19.4.06	2000 Nokia 9300	£172	£194	£22	12.8
19	19.4.06	4000 Sony W800i	£180	£199.50	£19.50	12.2
20	19.4.06	6000 Nokia 7380	£242	£273	£31	12.8
21	26.4.06	1000 Nokia 8800	£390	£426.50	£36	9.4
22	26.4.06	2000 Nokia 9300i	£303	£324.50	£21.50	7.1
23	26.4.06	2000 Sony W900i	£276	£300.50	£24.50	8.9

Transactions on 22 June 2006

630. As a further part of our analysis of the mark-up percentages obtained by the Appellants, we have looked at certain transactions they carried out on 22 June 2006. On that date BTS entered into 31 sales transactions, 15 in Cell 5 and 16 in Cell 10. In the Cell 5 transactions NTS always acted as the final buffer to BTS's broker, so that again in calculating the percentage profit per transaction we have aggregated the profits made by the two companies. It will be recalled that HMRC's calculations of the percentage profits made by the Appellants showed that in deals made in Cell 5 transactions their combined profits were usually between 2% and 2.5%; and in Cell 10 transactions BTS's profits were, broadly speaking, 8%.

631. The transactions in both cells on 22 June 2006 included those in phone models Nokia N90, Nokia 9500, Nokia 9300 and Nokia 8800. Our own analysis of the those transactions taking the percentage profit obtained in each to three decimal places using (A) to indicate Cell 5 and (B) Cell 10 shows:

Nokia N90

	Deal no (June)	Quantity	Purchase price	Sale Price	Profit percentage
(A)	1 and 2	4000	£263.50	£269	2.087
(B)	19	2000	£273	£294.75	8.037

Nokia N9500

	Deal no (June)	Quantity	Purchase price	Sale Price	Profit percentage
(A)	3 and 4	5000	£282.75	£288.50	2.033
(B)	20	2000	£294.75	£311.50	7.967

Nokia N9300

	Deal no (June)	Quantity	Purchase price	Sale Price	Profit percentage
(A)	7 and 8	4500	£230.75	£235	1.84
(B)	16	2500	£246.00	£265	7.926
(B)	23	3000	£227.00	£245	7.911

Nokia N8800

	Deal no (June)	Quantity	Purchase price	Sale Price	Profit percentage
(A)	9 black	2500	£445	£454	2.5%
(B)	21 silver	3250	£315	£340	8%

632. We find that the percentage profits made by BTS and NTS in the Cell 5 deals and BTS in the Cell 10 deals on 22 June 2006 were, in the case of its deals in Nokia N90 phones, 3.85 times higher in the Cell 10 deal than in its Cell 5 deals; in the case of the deals in Nokia N9500 phones 3.91 times higher in its Cell 10 deal than in its Cell 5 deals; in the case of the deals in Nokia 9300 phones 4.307 and 4.299 times higher in the Cell 10 deals than in the Cell 5 deals; and in the case of the deals in Nokia 8800 phones, ignoring the difference in colour, was 3.92 times higher in the Cell 10 deal than in its Cell 5 deal.

Discussion

633. In our judgment the fact that in every deal in Cell 10 BTS obtained a percentage profit of 8%, or a figure within a whisker of that percentage, whereas in every deal in Cell 5 it made profits between 2% and 2.7% indicates clearly that Mr Tomlinson was told at what price to buy and what to sell. They confirm our earlier inferences that there was a total absence of negotiations in the Appellants' transactions, and that Mr Tomlinson is dishonest.

634. As we have said, the information we have used to calculate the profit percentages was all contained in the Master Schedule as supported by BTS's suppliers' invoices and in BTS's own invoices. Very importantly, it was contemporaneous. Consequently, Mr Tomlinson knew it at the time the deals were made.

635. It appears plain to us that HMRC's claim that there were non-commercial patterns in the mark-up percentages obtained by the Appellants in their transactions is fully justified. We agree that in their broker transactions the mark-ups obtained by the Appellants were calculated on a percentage basis, whilst those in buffer transactions were calculated on an incremental basis. Being satisfied that the mark-up percentages obtained by the Appellants clearly indicated that they were not operating in a legitimate, free and competitive market, as suggested by Mr Cunningham, we do infer that Mr Tomlinson was directed as to the mark-up he could apply in each case.

636. Mr Tomlinson claimed to be an experienced and intelligent businessman. Accepting that he was, it must have been obvious to him that on 22 June 2006 in some deals in exactly the same make and models of phones, in round terms he made four times more profit than in other deals.

637. The differences in actual profits obtained by the Appellants must also have been obvious to him. We are not here talking in terms of absolute profit differences of hundreds of pounds, but tens of thousands of pounds. The Appellants' deals were mostly in sums of about £1 million, and profits reflected that size. In the three deals

in Nokia N9300 phones BTS carried out on 22 June 2006 it made potential profits, i.e. assuming input tax repayment by the UK government, of £19125 (4500 phones), £47500 (2500 phones) and £54000 (3,000 phones). That the first of those deals involved a much larger quantity of phones than did the other two clearly indicates that BTS obtained no discount for dealing in quantity – a fact contrary to all usual commercial experience and practice. It also indicates that Mr Tomlinson knew that in certain deals the Appellants were allowed to make much more profit than in other deals, but all was dependent on the cell involved in a particular deal.

24. FURTHER INDICATORS OF MR TOMLINSON'S DISHONESTY

638. Before we proceed to deal with the subject of this section of our decision, there is one preliminary matter we must dispose of. In the original BTS statement of case, which was served as long ago as 2008, HMRC made reference to two convictions of Mr Tomlinson. Despite BTS having been professionally represented throughout the appeal, no objection to their disclosure was made until Mr Cunningham mentioned them in his opening statement. Mr Pickup then submitted that we should not admit them in evidence as they were spent. We heard submissions from both parties on the point, and decided to admit them. Having now had an opportunity to consider the convictions, we place no relevance on them and ignore them. We thus need not provide our reasons for deciding to admit the convictions.

639. We then turn to deal with what in our judgment are the further factors pointing to Mr Tomlinson's dishonesty.

Supplier declarations

640. Mr Tomlinson acknowledged in cross-examination that supplier declarations provided by the Appellants were important, and of no value to anyone unless true and reliable. Amongst the evidence produced were 39 such declarations made by BTS, 11 to CIDP, 19 to Intangible Media, two to Megantic Services, three to David Jacobs, and four to Svenson Commodities.

641. The declarations BTS made to Intangible Media, all signed by Mr Campbell (whose conduct Mr Tomlinson endorsed), read, "We are the legal owner of the goods that will be supplied …". In evidence to us Mr Tomlinson said that BTS and NTS obtained ownership of phones they agreed to purchase only when they paid for them. He admitted that when the declarations were made to Intangible Media, BTS was not the legal owner of the goods to which the declarations related. In relation to the declaration made in relation to BTS May deal 12, carried out on 26 May 2006, the following exchange took place in Mr Cunningham's cross-examination of Mr Tomlinson:

> C: … You only paid for the goods once you yourself were paid?
>
> T: Correct

C: Thank you. So unless you had paid for the goods in question on 26 May 2006 Mr Campbell's declaration that "we are the legal owner" was the opposite of the truth?

T: Yes, it was [in]correct. [We have corrected what we believe to be an error in the transcript].

C: No, no, opposite of the truth. It is a much more robust thing I am putting to you. This is not just sleight of hand; this is your company through Mr Campbell, honest etc., whose conduct you endorse, this is him saying the very opposite of the truth.

T: I say that he signed it incorrectly.

C. But that is a falsehood?

T. He has signed it incorrectly, Mr Cunningham

….

C. … You are telling your customer a lie. You do not own the goods you are selling them?

T. All I can say is that document has been signed incorrectly by Mr Campbell

…

C. … we are talking about a million pounds worth of product. All right? A million pounds; that is not £10?

T. No

C. A million pounds' worth of product. You are inviting the tribunal to believe your customer Intangible Media is a bona fide arm's length trader who is trusting you to deal with them honestly and truthfully. Is that what you wish the tribunal to conclude?

T. I do.

C. Yes. Why are you telling them a lie?

T. Telling who a lie?

C. You are telling Intangible Media a lie.

T. I'm sorry, Mr Cunningham, but I don't see it as a lie.

…

C. What's it then? Just a mistake?

T. I believe it's just a mistake.

C. In your favour? A mistake about owning a million pounds worth of product.?

T. Well, I believe that because of the way the goods will have been shipped on hold to Intangible Media, they were held at the order of the freight forwarder; that Intangible would have known that we hadn't paid for the stock.

C. So what is the point … the point of the lie?

T. The point of the lie is that in the supplier declaration form supplied by Intangible Media, they spell out their …

C. What they want?

T. "In order to maintain a high standard of trading practice we require that you duly complete and sign this supplier declaration form" [A quote from the form]

C. Are you saying they should have added the word "truthfully"?

T. No, I'm not

C. Isn't that a given?

T. No.

642. The cross-examination in relation to the BTS supplier declarations provided to CIDP, again all signed by Mr Campbell, followed the same lines as that in relation to the BTS declarations to Intangible Media, but took place against a background of each declaration requiring its maker to state both that BTS had title to the goods and had paid for them in full. Again Mr Tomlinson was adamant that they had been signed "by mistake".

643. In four supplier declarations, yet again signed by Mr Campbell but in this case on behalf of NTS, to Svenson Commodities dated 1 February 2006, 20 February 2006 and two dated 21 April 2006 [E160E/377, 378, 386 and 387] he confirmed that "We have carried out IMEI number checks to ensure that we have not purchased the same goods more than once." Three further declarations, identical in form to that to which we have just referred but in this case in favour of David Jacobs, one dated 13 February 2006, and two dated 21 March 2006 were signed by Mr Campbell [E160E/401, 403 and 407]. On Mr Tomlinson's own admission, we find that in February, March and April 2006 neither NTS nor BTS carried out IMEI checks on phones acquired, so that the declarations must have been false.

644. On 10 February 2006 NTS made a supplier declaration to Megantic Services [E160E/212-213]. Once more it was signed by Mr Campbell. In it, he ticked a number of boxes which confirmed, inter alia:

> "You have title to those goods having paid for them in full".
>
> "You can supply IMEI/Box numbers for at least 25% of the goods if requested."
>
> "You have a signed declaration from your supplier confirming they have title, can supply 25% of the IMEI/Box numbers and are VAT registered and that they have done a similar check on their suppliers."

645. As to the first item, Mr Tomlinson once more admitted that since NTS had not paid for the goods it had no title to them. As to the second, since the Appellants, again on Mr Tomlinson's own admission carried out no IMEI checks in February 2006, NTS could not have supplied the IMEI numbers in question. And in relation to

the third, the Appellants made no claim to hold such a declaration. We find that all three declarations were false.

646. A similar declaration in favour of Megantic Services dated 17 March 2006 appears at E160E/216. Again we find all three declarations made in it were false.

Discussion

647. Every supplier declaration made by Mr Campbell before us was false: each one untruthfully stated that the appellant company concerned owned goods and/or that they had been paid for in full and/or that certain specified checks had been carried out on them. We are unable to accept Mr Tomlinson's claim that the statements made by the Appellants' in their supplier declarations as to the ownership of goods were "mistakes" and nothing more. To do so we should also have to accept that he is unable to distinguish between a mistake i.e. an unintentional error, and a deliberate lie. We believe he is able to do so. His claim confirms our view that he is dishonest.

Due diligence

648. Mr Cunningham then moved on to deal with the Appellants' due diligence, Mr Tomlinson having claimed that their records in that behalf showed that they had made proper checks, albeit admitting that certain of the records did not exist when the Appellants traded with the companies concerned. The cross-examination in that regard proceeded as follows:

> C. If you advanced to the tribunal material that you say was part of your decision making process and in fact it was not in existence when you took the decision, that would be a misleading exercise, would it not?
>
> T. No, it wouldn't
>
> C. It would not?
>
> T. No, I don't believe it would.

649. Mr Pickup placed considerable reliance on HMRC's failure to check the Appellants' due diligence on traders with whom they had not traded. That led Mr Cunningham to raise the matter with Mr Tomlinson in the following way:

> C. Can I just touch very briefly with one question on your repeated reliance, through my learned friend, on the rejected traders? Your due diligence, which I am going to submit we have just established is entirely spurious in relation to those who you accept rejection, is rather academic, isn't it?
>
> T. No, not at all. No, I believe it's my due diligence working.
>
> C. You got it wrong every single time in relation to those you accepted?

T. Unfortunately, as HMRC admitted, there is nothing a trader's due diligence could have done which would have alerted me to the possibility of fraud in my supply chain.

C. Not even a zero credit rating in relation to a supplier who was telling you that he had spent £11 million?

T. No.

650. The supplier to which Mr Cunningham was referring was Scorpion. In supplier declarations provided to NTS in relation to deals carried out between 13 and 26 April 2006, it revealed that it was committed to pay its suppliers £11.8 million. The Experian report on Scorpion [E159/283] obtained by NTS says that it was "not able to provide a [credit] report on the company as it was incorporated a short time ago". It will be recalled that Scorpion was incorporated on 26 April 2005.

651. Next, Mr Cunningham dealt with a sale to CIDP (May deal 36). Mr Tomlinson was asked whether he would have been prepared to say to CIDP on 31 May 2006 that BTS had paid for goods it was selling to that company and had title to them, a supplier declaration of that date signed by Mr Campbell stating that it had paid for them and had title. He replied and the cross-examination continued in the following way:

T. No I wouldn't have, I wouldn't …

C. You are putting distance [between yourself and Mr Campbell]

T. I'm not, not at all, no.

C. No. It's a lie, isn't it?

T. It's not a lie, no. The first paragraph of that supplier declaration form [that BTS had title to the goods] is untrue.

C, But not a lie?

T. If you categorise it as the same, then …

C. Yes, I do.

T. … then I'm sorry, it's untrue.

T. The supplier declaration forms that … are here in evidence would be the same as the supplier declarations that would have been supplied for all of the previous deals that BTS and NTS undertook.

…

T. What I'm saying to the tribunal is that these particular supplier declarations amongst, I presume, a lot of other supplier declarations have been signed incorrectly by somebody who was under my control.

C. You see, Mr Tomlinson, a mistake –anybody can be forgiven for that. But we appear to have – we only have supplier declarations that you have produced in relation to these two customers, CIDP and Intangible Media. [That was incorrect; there are number of other declarations in the papers – see above], and

they all have this in. It appears you have a total disregard for what you say to your arm's length customer in relation to title and payment?

T. Unfortunately, Mr Cunningham, that is what the document says.

…

T. It's signed in error. I accept that it is in error

,…

C. … You recall the sentence that I asked you questions about. "You have title to those goods having paid for them in full". Did you want CIDP, did you expect CIDP, to accept that as a truthful assertion?

T. No, I didn't.

C. You didn't?

T. No, because it's obviously been ticked incorrectly

C. Well, how were they to know?

T. They weren't to know.

C. No. So I will ask you again, did you expect CIDP, not knowing that it was incorrectly signed, to take it at face value?

T. Yes.

Discussion

652. We regard the replies of Mr Tomlinson to the questions put to him about due diligence to speak for themselves as clearly further demonstrating his dishonesty.

Opening FCIB accounts

653. On opening the Appellants' bank accounts with the FCIB, Mr Tomlinson was required by para 5 of the application form to "certify and covenant" that he "was not aware and had no reasonable grounds to suspect" that in relation to any previous supply of goods there was a problem with unpaid VAT. He so certified and covenanted.

654. Mr Cunningham asked him whether that was a truthful statement, to which he answered "Yes". It was then pointed out that when he completed the application forms in October 2004 both BTS and NTS were appealing against decisions of HMRC refusing input tax repayment claims they had made, and that in the statements of case earlier served in their appeals it was alleged that there was a failure to account for VAT by a supplier in the chain above the relevant company. Mr Cunningham's cross-examination continued:

C. … So you were aware that it was at least alleged that there was a failure to account in the supply chain above you?

T. I've basically not taken into consideration the outcome of that appeal. [The appeal was allowed in 2006]

C. No, there was no outcome then; this was just an allegation?

T. Yes.

C, Yes, and an allegation is something that must have made you aware or have reasonable grounds to suspect that something was going on?

T. In regard to the allegation in the statement of case?

C. Yes, but you were able to give a statement to the contrary effect?

T. Yes

C. That did not worry you?

T. No.

Discussion

655. Once more the facts speak for themselves as showing Mr Tomlinson's evidence to be untrue. Mr Tomlinson's declarations were false and further confirm his dishonesty.

Insurable risks

656. At para 24.5 of the consolidated statement of case, HMRC allege that the Appellants failed to obtain any independent insurance for the goods in which they traded, and that indicated that their trading was contrived. To deal with that allegation, in his evidence in chief at para 58 of his first witness statement [WS19/144], Mr Tomlinson admitted that neither BTS nor NTS effected insurance on its purchases saying that it was common practice within the telecommunications sector for the freight forwarder holding the goods to take out insurance on them. No evidence whatsoever was produced in relation to any of the Appellants' deals to show that insurance had even been considered, let alone its existence checked.

657. Against the background of neither company having title to the goods purchased until they paid for them in full, and thus having no insurable interest, Mr Cunningham put to Mr Tomlinson in cross-examination that para 581 on WS19/144 – "given that the appellant did not have title to the goods it traded in, it would have been difficult to demonstrate an insurable interest in those goods" - was flatly contradictory with the supplier declarations made to CIDP (that BTS had title to the goods in question having paid for them in full – see e.g. E160B/375). Mr Tomlinson acknowledged that it was. Mr Cunningham continued:

C: So, you are telling your customers, and they don't know otherwise, one thing about title and you are telling the tribunal another. That's right isn't it?

T. No, I disagree. I believe that the paragraph at 581 is correct.

C. Yes

T. And I believe that that [the supplier declaration] was signed incorrectly

C. Yes, but I'm the customer. I don't know that, do I? I'm relying on that.

T. You are, yes

C. Yes, so you are telling the customer one thing and the tribunal the opposite? It's inescapable isn't it?

T. It is, yes it is.

Discussion

658. Mr Tomlinson admitted that he made false declarations to customers as to the Appellants ownership of the goods in which they dealt. Against that background, we regard his invitation to the tribunal to deal with the ownership question on the basis of the Appellants not owning them as both impudent and dishonest.

Export on hold

659. On 19 April 2006 Deb Techno, NTS's supplier in its deal 15, gave instructions by fax [E135/45] to the UK freight forwarder holding the goods, Warehouse Logistics, saying "Please allow my customer NTS Specialised Equipment Ltd to ship these goods on hold. Do not release these goods until you have written authorisation to do so."

660. On 20 April 2006, Mr Campbell, who Mr Tomlinson admitted would not have known whether Deb Techno was owner of the goods or had paid for them, gave instructions by fax to the EU warehouse nominated by CIDP, NTS's customer, EU Logistics of Germany, in relation to the same goods [E158/265] in the following terms: "Please can you allocate and release to CIDP the goods referred to."

661. Mr Cunningham asked Mr Tomlinson whether the instructions to the two warehouses were incompatible, to which the latter replied "No", adding that Mr Cunningham misunderstood the working of the hold and release system. Mr Tomlinson explained that system as starting with the UK freight forwarder Warehouse Logistics having control of the goods. He said that Deb Techno "would have instructed" Warehouse Logistics by phone to allow NTS to ship the goods, but had no evidence to produce confirming that it had done so. The document at E158/265 informed the European freight forwarder that, when the goods reached it, to quote Mr Tomlinson, "they are already allocated and released. We know that the freight forwarder can't release those goods, but we are just putting our paperwork in place."

662. Mr Cunningham's cross-examination on the point continued:

C. Sorry, how on earth does that work? I am Mr EU Logistics. Am I to read an instruction as per 265 as saying "Do not release"?

T. The goods are held to order of Warehouse Logistics.

C. How does EU Logistics know that?

T. Because the goods will have been shipped by Warehouse Logistics to EU Logistics on hold under Warehouse Logistics name

C. What are you doing on page 265?

T. We are allocating the stock when it gets into EU Logistics and releasing it. It's one document.

C. I can understand that. What does "release" mean?

T. The document was for point of reference which was for ease for us. That's what it's for. That once the goods have got to EU Logistics in Germany, the allocation and release was put in place at the same time. The goods couldn't have been released to CIDP because – which is what it says on the instruction – because they are held to order of Warehouse Logistics.

C. Right. I just want to work this through, because I can't make head or tail of it. The last bold words on 265 are "At our instructions". I take instruction to mean the instructor saying to the instructee do something?

T. We instructed Warehouse Logistics to ship them.

…

C. Forget, just put a mental block on page E135/45 and tell us what 265 is telling us.

T. 265 is an instruction to EU Logistics that those items that are listed on 265, the 5200 Nokia and the 2000 Nokia, are to be allocated and released to CIDP.

C. I understand that. What does "release" mean?

T. The word release means to let them go.

C. Yes. So on 45 we have a very clear instruction: "Do not release; do not let them go." On 265 we have the polar opposite; "Let them go".

T. That document [265] is sent for ease of reference for us when the payment is made.

…

T. Rather than sending two separate pieces of paper. It's how EU Logistics will have wanted their paperwork in place: the allocation and release.

C. I'm sorry. You want the tribunal to believe this is a bona fide, legitimate business you are running.

T. Correct

C. This is an instruction from you, page 265, from NTS through Mr Campbell, who you have said is an honest and reliable man

T. He is

C. Would you have been prepared to sign this?

T. I would have been, yes.

C. Thank you. Right. Let's assume that the signature at the bottom of this is Nigel Tomlinson … and it has been received by EU Logistics. Are they to have read the line "Please can you allocate and release" as including a "not" in it?

T. No … The ship on hold procedure that we've used for many years prior to the period that's in the appeal in exactly the same way, in which case the goods have been allocated to me. They've been – we have been allowed to ship the goods on hold. Those goods have gone on hold, and I think possibly the CMR documentation might confirm it. There it is "ship on hold" … The UK freight forwarder has those goods in its control. They are on hold to the freight forwarder.

C. Right. I get all of that. Let's just go through 265. We haven't looked at these words, but underneath CIDP "Those goods … have been delivered"; in other words they have gone to you.

T. Yes

C. So you are telling the person who has received these goods something; you are telling them to allocate – agreed?

T. Yes

C. And you are telling them to release – agreed?

T. Yes

C. But in fact they are to read that as not to release?

T. They are to – that document has gone as one single document. In certain circumstances throughout these deal papers you see an allocation only, and then separately you see a release. And that's because that particular freight forwarder, that's how they wanted it to be done. This particular freight forwarder wanted it in one document. So we have given an instruction to a forwarding freight forwarder to allocate and release on the same document. Those goods can't be released until Deb Techno released them to BTS.

C. How does EU Logistics, in the face of a very clear instruction to release; how does it work out that actually you mean the opposite?

T. I don't know how they work that out, Mr Cunningham

C. It's preposterous

T. It's not preposterous; it's held to the order of Warehouse Logistics

Judge: Can we just clear this up? What is not clear to me is what instructions, if any, are given by Warehouse Logistics to EU Logistics.

C. None, as far as we know, sir.

Mr Pickup: But where is the authorisation to Warehouse Logistics to let these things go?

C. Sir, we have never seen any.

T. It's on the next page, I think, sir

Mr Pickup: It's at page E135/46. It's on the next page.

[E135/46 is a fax from Deb Techno to Warehouse Logistics. The relevant part of it reads, "Please release the above stock [2000 Nokia 8800 phones] to NTS Specialised Equipment Ltd."]

Judge: But that is addressed to Warehouse Logistics

C. Quite

T. Yes, who have shipped the goods

C. No, no. That is not what the tribunal is asking for.

…

Mr Pickup: The instruction to release to warehouse from Deb Techno was only made on receipt of payment, which is dealt with on E135/47 and on 48.

[The documents at E135/47 and E135/48 are FCIB intra-account transfers]

C. That just, if I may say so, muddies the water, because what is going on on page 265 if there hasn't been payment?

Judge: Can I just be clear about this in my own mind?

C. Of course, sir.

Judge: So far as EU Logistics are concerned, the only instruction we have is whatever information is contained in the CMR

C. What we weren't provided with, and never provided with, was any written instruction or any faxes between Warehouse Logistics and EU Logistics. The only information … that we got was what's on the CMR. And what we have got to try and make sense of this … is 265, which is an unqualified instruction from NTS to EU Logistics to release, and everybody – I think you invite the tribunal to conclude that the release instruction meant the opposite?

T. I'm sorry, Mr Cunningham, I disagree with you. The CMR that has gone with that shipment clearly states – it says ship on hold. My understanding and my knowledge of the industry, and the way it works today, is exactly the same way. We have shipped goods this year ship on hold. The goods are shipped by the freight forwarder to another freight forwarder. The goods are held there to the order of the freight forwarder.

Judge: Right. I am just going to interrupt … once more. So far as the CMR is concerned, as I understand it, that is an instruction to those involved in the shipping of the goods.

T. Yes

Judge: It is not an instruction to the EU freight forwarder?

T. No, the CMR is provided to us as evidence of export. That's correct yes. That information comes to me. I don't have any information between Warehouse Logistics and EU Logistics.

Judge: Yes. That's fine

Discussion

663. Mr Tomlinson admitted that the Appellants made no attempt whatsoever to obtain permission of the true owner of the goods for their despatch abroad; indeed, they made no attempt even to identify that person. Such a situation would never have

been allowed to arise in a true commercial transaction. Nor did they attempt to find how long the goods had been in the UK, or how long the chains of transactions were. Notwithstanding the absence of title to the goods, since the Appellants adduced no evidence whatsoever to deal with the export on hold point, we find that they obtained no authority to transfer the goods abroad to freight forwarders whose identity would have been unknown not only to the true owners of the goods but also to the Appellants' suppliers. In the absence of any corroborative evidence whatsoever, and against the background of our finding that Mr Tomlinson is dishonest, we reject an uncorroborated claim by him to have obtained by telephone authority for the Appellants to transfer goods abroad, prior to payment for them

664. As Mr Tomlinson quite correctly observed, in some cases the document issued by the Appellants on a deal being completed simply allocated the goods sold to the customer. In none of those cases did the Appellants adduce any evidence to show that they subsequently issued a document releasing the goods. In the absence of such documents we infer that there was no practical difference between "allocation" and "allocation and release". It mattered not which form was used, the customer was free to deal with the goods concerned as it wished.

665. We regard the exchange with which we have just dealt as clearly demonstrating contrivance, artificiality and orchestration. We might have referred to the Appellants' allocate and release arrangements as explained by Mr Tomlinson as implausible, but accept Mr Cunningham's use of "preposterous" as more boldly and truly describing them. The system Mr Tomlinson explained was uncommercial, and his evidence was incredible. No genuine trader would have behaved as he did. The section we have cited from Mr Tomlinson's cross-examination contains a number of clear indicators of dishonesty, and we treat them as such.

666. It defies logic and commercial reality that each trader in the Appellants' transaction chains was able to, and indeed did, relinquish possession of goods of great value without payment having been made for them, or any security for payment having been provided. Equally illogical is Mr Tomlinson's claim that, notwithstanding that a supplier retained title to goods pending payment, the trader allocated stock was permitted to export it. And despite not having title to phones, again illogically, each trader continued to trade them until the EU importer behaved atypically and paid his supplier, whereupon payment cascaded down the chain of transactions and title to the phones correspondingly ascended it. The position of the EU importer is equally unbelievable and illogical. For no disclosed reason, that trader unilaterally decided to pay its supplier – a risk that no legitimate trader would have taken.

Summary

667. In our judgment, each of the matters to which we have referred in this section of our decision confirms our earlier finding that Mr Tomlinson is dishonest. We consider him to be thoroughly dishonest.

25. MR EDMONDS' EVIDENCE

668. As we have said, essentially Mr Edmonds was responsible for the Appellants' due diligence. He knew all about their earlier appeals, what allegations had been made by HMRC about their trading, what MTIC fraud involved, what HMRC required traders to do to avoid becoming involved in MTIC fraud particularly as explained in Notice 726, the history of the *Optigen* case, and what approach to trading the Appellants took following the decision in that case.

669. Mr Edmonds made plain that he was less than happy with HMRC's co-operation with the Appellants. In his witness statement, which formed his evidence in chief, in dealing with what was "reasonable" in Notice 726 terms, he said:

> "Whilst Notice 726 made it clear that NTS was not expected to go beyond what was 'reasonable', that word was not defined. NCT [Mr Tomlinson] and I took the view that BTS could not be expected to know its suppliers' supplier or the full range of selling prices throughout the supply chain. This would be neither commercial nor practical. If NCT knew from whom his customer was sourcing the goods, we felt that this might suggest to HMRC collusion, price and margin fixing and contrivance. NCT could not be expected to make a judgment on the integrity of the whole supply chain when only his counterparties were known to him. Essentially, if NCT considered his customer/supplier to be bona fide, he had to believe that these counterparties would conduct their own reasonable due diligence and that this would be repeated by each supplier/customer throughout the chain".

670. Mr Edmonds went on to say that, since HMRC had access to information and records not available to traders, "NCT and I concluded that it was not unreasonable to rely on HMRC to make use of its considerable resources in identifying and dealing with traders that were not genuine".

Discussion

671. We regard the phrasing of the extract from Mr Edmonds' witness statement as particularly revealing. As we read it in the context of the remainder of his evidence, it was tantamount to him saying that the Appellants took care to ensure that they did not obtain information about traders in their transaction chains to prevent HMRC making allegations as to their knowledge in that behalf. (That they could obtain information, at least retrospectively, was shown in relation to transactions involved in the Appellants' earlier appeals).

672. We also regard it as plain from evidence of Mr Edmonds that he and Mr Tomlinson took the view that if HMRC could not prove that the Appellants were dealing with fraudsters they were free to deal with whomsoever they wished, whether or not they were fraudsters: they could continue trading and make input tax repayment claims. If challenged they could, indeed did, rely on HMRC's inability to prove fraud to justify their behaviour.

673. Mr Edmonds' conclusion was directly contrary to the advice offered to traders in Notice 726, as he must have known. His conclusion completely ignored the advice in the Notice as to how to ensure the integrity of supply chains. It also sought, quite wrongly, to impose upon HMRC the burden showing that the Appellants transactions were connected with fraud.

Having considered Mr Edmonds' evidence against the background of the whole of that presented to us, and particularly his knowledge of the Appellants' earlier appeals and their 2006 trading, we have concluded that he is as dishonest as Mr Tomlinson; that is to say he too is thoroughly dishonest.

26. MR CAMPBELL'S ABSENCE

674. Throughout his evidence Mr Tomlinson referred to Mr Campbell as an "honest man". He said he had decided on legal advice not to call Mr Campbell as a witness for the Appellants as he, Mr Tomlinson, accepted full responsibility for all that Mr Campbell had done on behalf of the Appellants.

675. In *Wisniewki v Central Manchester Health Authority* [1998] PIQR 324 Brooke LJ indicated that failure to call a witness does not inevitably lead to an adverse inference being drawn, saying:

> "From this line of authority I derive the following principles in the context of the present case:
>
> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

676. In reliance on the *Wisniewski* case, Mr Pickup submitted that we should not draw adverse inferences from Mr Campbell's absence unless we were satisfied that there were important matters on which his evidence was vital.

677. Mr Pickup submitted that we should decide the appeal on the evidence presented and not from adverse inferences drawn from an absence of evidence. Mr

Tomlinson and Mr Edmonds had given evidence as to all live issues in the appeal with support as to the nature and operation of the grey market by their expert witness, Mr Attenborough. It was not a case for adverse inferences to be drawn from the absence of witnesses suggested by HMRC. There was no evidence to suggest that the Appellants had sought to conceal relevant and damaging evidence.

678. We consider there are matters on which Mr Campbell's evidence is vital.. As every one of the supplier declarations before us made by the Appellants was false in stating that they had title to the goods in which they were dealing and/or had taken certain other steps to ensure the validity of its transactions, and everyone of those declarations was signed by Mr Campbell, his evidence was vital in relation to the following questions:

i) what instructions were given to him by Mr Tomlinson as to the completion of supplier declarations generally?;

ii) whether he signed each declaration before us on Mr Tomlinson's instructions?;

iii) whether in his opinion the declarations were just "mistakes"?; and

iv) whether in his opinion the signing of the declarations falsely was honest?

679. In Mr Campbell's absence, we draw an adverse inference in relation to each one of those four matters. We infer that Mr Campbell completed and signed each declaration strictly in accordance with Mr Tomlinson's general instructions as to the completion of all such declarations, and that those instructions were to sign all of them falsely. We also infer that Mr Campbell knew that the declarations were untrue and that he knew that in signing each declaration he was acting dishonestly.

27. UNCOMMERCIALITY

680. Mr Cunningham divided the evidence as to the uncommerciality of the Appellants' deals between due diligence and uncommerciality generally. We shall do likewise.

A) DUE DILIGENCE

681. Mr Tomlinson explained his understanding of due diligence as being to provide the Appellants with enough information about the background, history and current operating practices of counter parties to enable him to determine whether the trader concerned was bona fide and one with whom he wished to trade.

682. Mr Tomlinson and Mr Edmonds jointly developed the Appellants' due diligence strategies and, as we have said, the latter undertook their due diligence work. Mr Tomlinson said that he considered due diligence to be of paramount importance "in protecting HMRC from the impact of MTIC fraud" but, in cross-examination, modified that statement saying that the purpose of due diligence was to protect both himself and HMRC.

683. Mr Tomlinson contended that the Appellants were able to conduct reasonable enquiry only on their immediate suppliers and immediate EU customers. As to conducting further enquiry, he maintained that there was significant commercial sensitivity amongst traders to releasing details of their own suppliers and customers to render it impossible to conduct due diligence beyond the immediate supplier and customer prior to completing a deal.

684. Mr Tomlinson accepted that, in the light of the proximity of the fraud, the very least he was required to do was to carry out all possible due diligence, and to be very sensitive to any uncommerciality in trading.

685. We take as a given that Mr Tomlinson was aware that the Appellants' own purchases formed parts of chains of transactions, sometimes short sometimes long, for the chains involved in the various deals the subject of the transactions in the Appellants' appeals made in 2003 and 2004 were set out in full in the respective statements of case.

686. In order to expedite NTS's input tax repayment claim for period 02/04 Mr Edmonds wrote to HMRC on 2 June 2004 providing the requested names of all the members of a particular supply chain in which NTS acted as broker and, on 11 June 2004, followed that letter with the VAT registration numbers of three traders in the chain HMRC sought. In relation to those letters, Mr Tomlinson maintained that he had only been able to obtain the information supplied as the transactions had taken place some time earlier; he would not have been able to obtain similar information for current transactions.

687. Mr Tomlinson divided the due diligence undertaken by the Appellants into two separate periods, before and after 1 September 2005. He claimed that on that date the Appellants adopted a more detailed due diligence strategy than that they had earlier used. He accepted that prior to 1 September 2005 their due diligence process was rudimentary; it involved him reviewing the contents of the introduction packs provided by traders and forwarding them to Mr Edmonds to enable the latter to verify traders' VAT numbers with HMRC Redhill. Standard contents of such a pack included a letter of introduction from the trader, the trader's certificate of incorporation, its VAT certificate, bank details and a utility bill. Sometimes the pack contained details of the trader's accountant and solicitor. Post-1 September 2005 the standard pack was included in the first of two stages of Mr Tomlinson's "enhanced due diligence process". The new system provided for a company to be awarded a maximum of 170 points – a score incapable of achievement by any company since some points were awarded on an alternative basis. The system contained no indication of how the points had been weighted.

688. Mr Tomlinson explained that there was no mark a trader had to pass. Rather, the new process was intended to show how far a potential supplier/customer had met the criteria: the more valuable a criterion the more points were awarded. It was an indicator to help him decide whether to deal with a particular trader. He decided to deal with some traders achieving low point scores and not to trade with others scoring well.

689. Having reviewed a trader's introduction pack, Mr Tomlinson said he sometimes decided to take the application to trade no further; on other occasions he claimed to send the introduction pack to Mr Edmonds, or Mr Edmonds' assistant, Carl Butterfield, for verification of the VAT number through HMRC Redhill.

690. Mr Tomlinson further claimed the "enhanced process" to be designed to quantify essential information obtained and to inform the Appellants' wider judgment; it was never designed as a pass or fail system. Whilst the judgment of the ECJ in *Optigen* was not released until January 2006 Mr Tomlinson claimed there was "sufficient confidence in the industry as to [its] outcome from early 2005 to mean that once more the U.K. had become an active market". Under the enhanced due diligence process, and following discussions Mr Edmonds was said to have had with professionals specialising in the mobile phone industry, Mr Tomlinson said he determined the level of due diligence the Appellants were to carry out. He built it into a checklist weighting various criteria to be considered, and for each element to be awarded points.

691. None of the many new due diligence forms produced to us was dated. As Mr Tomlinson admitted, a number of them contained information that could not have been obtained by the Appellants until after the period with which we are concerned, rendering them of no use for due diligence purposes. He maintained that earlier copies of the forms had been prepared, but that they had been destroyed on the existing forms being prepared. In the absence of any corroborative evidence, we are not prepared to accept his claim.

692. Those traders passing Stage 1 were then said to be considered at the new Stage 2. Checks at the latter stage were said to include obtaining trade references and ensuring that the traders were up-to-date in filing their accounts.

693. Mr Tomlinson and Mr Edmonds claimed that in the post-September 2005 period, the Appellants undertook due diligence on 87 traders, but Mr Tomlinson decided to deal with only 24 of them.

694. As part of HMRC's verification exercise in relation to the Appellants' earlier appeals, on 23 December 2005 Mr D'Rozario requested Edmonds & Co to provide the Appellants' due diligence documentation in relation to three named companies. It was provided on 12 January 2006. On 6 February 2006 he made a further request for information on two specific EU customers of BTS in periods 10/05 and 11/05. Edmonds & Co responded on 13 March 2006 addressing some queries and providing some documents but indicated that the Appellants would produce their due diligence only if a joint and several liability notice i.e. one provided for by Notice 726 was issued. It was suggested to Mr Tomlinson and Mr Edmonds that their attitude towards HMRC changed immediately following promulgation of the *Optigen* judgment by the ECJ from one of co-operation to one of obstruction. We find it unnecessary to deal with the argument about the change that ensued for in our judgment it takes matters no further.

695. To HMRC, the Appellants' due diligence was inadequate and totally failed to comply with the requirements of Notice 726. As Mr Tomlinson acknowledged having

received Notice 726 in 2003 and read it, he admitted that he knew from that time that in the business in which he was dealing fraud was, to use his own description, "prevalent".

696. Mr Tomlinson maintained that the Appellants had no need to obtain credit reports on the traders with whom they were dealing; their credit was not in issue. The Appellants were not required to pay for phones they had agreed to purchase until they themselves had been paid, i.e. every transaction into which they entered was reversible until they had been paid. Nevertheless, the Appellants did obtain Experian credit reports on the companies with which they traded.

697. Amongst Mr Tomlinson's further claims was one that it was not unusual for a trader not to have purchased goods it was selling, but merely to have had them "allocated" to it. He said the Appellants followed the allocation practice. That was despite the Appellants requiring their suppliers to provide supplier declarations confirming they had "purchased" the goods.

698. In his cross-examination of Mr Tomlinson in relation to due diligence Mr Cunningham focused on six companies, namely Deb Techno, First Touch, Scorpion, Sigma Sixty, CIDP and Opal 53. That exercise resulted in the following facts emerging.

Deb Techno

699. Deb Techno's trade classification, as shown on its VAT registration certificate was "Mobile phones retail". NTS carried out its first transaction with Deb Techno on 19 April 2006.

700. On the Appellants' undated due diligence form Deb Techno scored 115 out of the possible 170 [E159/58], a score ticked as "Satisfactory". Mr Tomlinson acknowledged that the score sheet could not have been produced until December 2006 – long after the period with which we are concerned.

701. In April 2006, Deb Techno as a new supplier to NTS made supplier declarations disclosing that it was committed to paying some £6.8 million for goods it had purchased in that month. Mr Tomlinson accepted that those supplier declarations indicated that it was in a position to pay for the goods it had purchased. He said he based his decision to trade with the company on the basis of "the integrity of my customer and his ability to supply me with that stock."

702. On 8 March 2006 Experian provided the Appellants with a credit report on Deb Techno [E159/65-81]. It showed that company to have been incorporated on 17 January 2001, its principal activity to be "Hardware consultancy: data base activities", its director to be Ajay Chahal, to have issued capital of £100 in £1 shares, and to have working capital of £6854. Experian's credit opinion and evaluation said "The balance sheet implies that the company did not trade during the accounting year to 31/1/2005. There is, therefore, an insufficient basis on which to assign a credit figure."

First Touch

703. First Touch also scored 115 points out of the 170 available points in the Appellants' due diligence check on it [E159/166]. On 30 March 2006 First Touch provided NTS with four supplier declarations indicating that it was committed to purchases totalling some £1,667,000. By that date Mr Tomlinson said he had probably been trading with that company for 10 months, and had no reason to believe that it would be unable to supply the stock in question.

704. The Appellants obtained an Experian report on First Touch dated 25 October 2005 [E159/177-180] suggesting a credit limit of £5000, and indicating that the company was of "average risk status".

705. Accounts obtained by the Appellants for First Touch approved by the company on 15 April 2006 showed its assets at 31 May 2004 to be £68,615. By 31 May 2005 those assets had gone and been replaced by a deficit of £421,427. We accept that the Appellants would not have been aware of the deficit until after their deals with First Touch on 30 March 2006, for that company's accounts were not filed with Companies House until April 2006.

Scorpion

706. Scorpion's director, Lamber Singh Teji, was appointed to the post on 26 April 2005, the date on which the company was incorporated. From 17 May 2002 to 25 October 2002 he was director of First Touch. Mr Tomlinson maintained that his confidence in dealing with Scorpion arose from his dealings with Mr Teji at First Touch.

707. The Appellants' due diligence form for Scorpion shows it as ultimately being allocated 105 points out of 170 [E159/276], but with no indication of the satisfactoriness of that total. The last piece of information contained in the form was not obtained until 18 August 2006, so that the form as produced to us could not have been prepared before that date.

708. NTS's first transaction with Scorpion took place on 13 April 2006. Thirteen supplier declarations it provided between 13 and 26 April 2006 showed it as having purchased and being liable to pay for phones to the value of £11,685,000.

709. The Appellants sought but were unable to obtain an Experian credit report on Scorpion, it saying "Experian are not able to provide a report on the company as it was incorporated a short time ago."

Sigma Sixty

710. In this case the due diligence form shows Sigma Sixty, a Dutch company, as having scored 80 out of 170 points, a score marked as "Satisfactory" [E159/331]. The due diligence documentation in relation Sigma Sixty is contained in E159/331-

432. Although based in Holland, the company's sole shareholder and director was Kenneth Clevernon Thorne, a British subject resident in Dubai. The company was first entered on the trade register on 12 January 2004, with issued capital 18,000 euros. The documentation produced included an Experian report, updated on 6 June 2006 – some time after a number of transactions with BTS were carried out. Significantly, the credit risk was estimated as being "Very high risk; a director's guarantee would be advisable". [E159/368]

711. NTS carried out its first deal with Sigma Sixty on 19 April 2006, but it was not until the following day that Mr Campbell requested Mr Edmonds to carry out a Redhill verification check on the company. The latter acted on the request on 21 April 2006. Subsequently, HMRC confirmed the validity of Sigma Sixty's VAT registration number.

712. It was not until 11 October 2006 Mr Tomlinson met Mr Thorne. Mr Tomlinson said that he had decided to deal with the company on the basis of his previous dealings with Mr Thorne. The Appellants' due diligence form took account of the October meeting so that it could not have been prepared in the form produced to us until then at the earliest.

713. Thus every aspect of the due diligence checks carried out on Sigma Sixty as recorded in the form produced to us took place after NTS's first deal with that company.

East Telecom

714. East Telecom was established in 2004 and its VAT registration certificate shows it was registered for VAT in Estonia on 16 February 2005. It scored 55 out of 170 points on the Appellants' due diligence form. It had as director one Kenneth Andresen, a resident of Oslo, Norway.

715. NTS's first relevant trade with East Telecom took place on 13 April 2006. Mr Tomlinson had earlier dealt with the company; but it was not until 19 April 2006 that HMRC Redhill confirmed its VAT registration number to be valid. Mr Tomlinson admitted that he would have traded with East Telecom irrespective of what his due diligence on that company revealed.

Opal 53

716. Opal 53 was incorporated on 16 November 2005. NTS first traded with it on 30 March 2006.

717. The company's due diligence on Opal 53 was mainly carried out after the latter date. For instance it was not until 13 April 2006 that NTS first sought to verify the company's VAT registration number.

718. On 7 July 2006 the Appellants obtained an Experian report containing details of Opal 53's establishment, capital and credit rating. The report revealed that the German company was managed by a British citizen, David James Mills, had capital of 25000 euros and its credit rating was "high risk". Experian reported, "Due to the recent incorporation of the company, we are hesitant to provide any credit recommendation at this stage.".

719. The credit score obtained by Opal 53 on the Appellants' due diligence form was 75 out of 170. [E159/234]

720. As Mr Tomlinson's visit to Opal 53 did not take place until 13 September 2006 and that fact was recorded in the due diligence form, again the form produced to us could not have come into existence before the visit took place.

Further examples of due diligence

721. In addition to the material to emerge from Mr Cunningham's cross-examination of Mr Tomlinson, to cover submissions by Mr Pickup indicating that the Appellants due diligence was robust and included all reasonable checks to ensure that its deals were not connected with fraud, we propose to look at the information to emerge on the three central contra-traders said by HMRC to have operated in Cell 5, and one of the contra-traders said to have operated in Cell 10.

Svenson Commodities

722. Svenson Commodities sold goods to NTS in April, May and June 2006 in 13 deals. NTS promptly sold them to BTS which proceeded to broker them to EU customers. In 7 of those deals Svenson Commodities acted as UK acquirer, and in the remainder as a buffer. In none of the Appellants' deal chains concerned was there a direct tax loss. However, during the appeal period Svenson Commodities entered into separate broker deals that did lead to tax losses and into broker deals that led back to an acquirer whose own despatch deals led back to tax losses.

723. The Appellants were introduced to Svenson Commodities on 4 October 2004. Following satisfactory completion of the Appellants' then due diligence process, Mr Tomlinson decided to trade with it, and trading commenced in December 2004.

724. The Experian credit report on Svenson Commodities, apparently dated 23 June 2005, contains the following "Opinion":

> "Although an apparent profit has been made in the first accounting period [to 31 December 2003]. The shareholders equity is low. In view of the foregoing, it is recommended that unsecured dealings should be limited to amounts below £500 and kept under supervision. Suppliers may wish to request a director's guarantee for more significant dealings."

Experian's final analysis said,

"In view of the size of the business and the nature of the information available, it has been considered prudent to place the company in an above average risk category."

David Jacobs

725. In May 2006 NTS purchased goods from David Jacobs that were exported to the EU by BTS in 9 deals. In each one of them David Jacobs acquired the goods from the EU; there was no tax loss in the transaction chains of NTS. The Appellants obtained David Jacobs' introduction pack on or before 26 October 2005 and, following satisfactory completion of their new due diligence process, Mr Tomlinson said that he decided to trade with it..

726. Again the Appellants obtained an Experian credit report on the company. It is undated but refers to a Voters Roll of 26 October 2005, and so must have been created after that date. The copy of part of the Report provided to us shows David Jacobs to have had issued share capital of £1, and its latest accounts, for the year to 31 March 2005, to reveal sales of £94 (sic) and a loss in the year of £876. Total current assets are shown as £1,111. The opinion of Experian as to David Jacobs credit worthiness is plain: "The Balance Sheet indicates a deficit in both capital employed and shareholders funds. In these circumstances, it is considered inadvisable to proceed with unsecured dealings." The Report goes on to conclude: "In view of the size of the business and the nature of the information available, it has been considered prudent to place the company in the highest risk category."

Powerstrip

727. Mr Tomlinson said that he was introduced to Powerstrip on 21 October 2005. Its original trading activity was the installation of satellite systems, but in October 2005 it moved into the wholesale distribution market of electrical items.

728. In April, May and June 2006 in 9 deals NTS purchased goods from Powerstrip which BTS subsequently exported to the EU. In four of the NTS purchases Powerstrip acted as a buffer and in the remaining five as the UK acquirer of the goods. Each of the chains concerned was a 'clean' chain.

729. Almost if not uniquely amongst the traders with which the Appellants dealt, Powerstrip had its own terms and conditions of trade, a copy of which were produced to us [E160F/798]. In relation to its sales, the terms [E160F/387] provide:

"9. The Equipment shall remain the sole and absolute property of the Company as legal and beneficial owner until it has been paid for in full and such payment has been cleared to the Company's bankers' satisfaction whereupon title shall pass to the Customer.

9.1 The Customer shall hold the Equipment as a fiduciary bailee for the company and shall be required to store it separately and keep it identified as the

property of the Company and the Company shall have the right to access the Equipment for the purposes of repossession thereof; and

9.2 The Company shall have the right to trace the proceeds of any resale of such Equipment made by the Customer.

730. No evidence was adduced by BTS to show that goods sold to it by Powerstrip were stored separately and identified as its property as required by condition 9.1. We find that they were not so stored and identified; the term was simply ignored by BTS.

731. Once more the Appellants obtained an Experian credit report on Powerstrip [E160F/414]. It showed the company to have issued capital of £100 and net worth of £10,181. The Opinion stated:

> "The shareholders funds figure is very low. In view of the foregoing, it is suggested that a director's guarantee is sought for unsecured dealings of significance."

Epinx

732. As we earlier explained, Epinx was one of the Cell 10 contra-traders. In May and June 2006 NTS purchased goods from Epinx in 13 deals. The Appellants were introduced to it on 12 October 2005. In three transactions on 31 May 2006 NTS purchased goods from Epinx, which in two cases it sold to PhoneC@nnected, and in the third case to FAF International. Those goods were imported into the UK by a defaulting trader Eutex. Epinx was therefore a buffer trader in the deals, and they were not part of an off-setting exercise. In 10 deals on 22 June 2006 BTS purchased goods from Epinx which that company had imported into the UK. Thus those were 'clean' chain deals and, allegedly, part of Epinx's off-setting process..

733. Amongst the documents provided to the Appellants at Stage 1 of their due diligence exercise was its VAT Registration Certificate of 13 June 2005 [E160E/48]. It showed Epinx's trade classification as "mail order house", a matter that the Appellants did not query.

734. The Appellants obtained an Experian Bronze Report on Epinx which is boldly headed "Risk Warning" [E160E/54-59] The report is undated but, as it contains references to a Voters Roll of 21 October 2005, must have been created after that date. The report contains a credit rating of nil, and a credit opinion saying, "A maximum risk company; all credit transactions should be supported by a director's guarantee".

Discussion

735. Mr Cunningham invited us to draw several important inferences from the Appellants' evidence of due diligence.

736. Mr Tomlinson accepted that, in light of the proximity of the fraud, the very least he should have done was the very best possible due diligence and be very sensitive to

any hint of uncommerciality in the trading. As we have noted, he said he considered due diligence to be of "paramount importance". However, his case was that he could only have known his immediate counter-parties and, seemingly, that he was therefore able to trade with impunity whatever happened to be going on in the rest of the chain. Mr Cunningham contended that that was precisely the opposite of the position set out in Notice 726 for the very reason that, as Mr Tomlinson accepted, he could not make a judgment in relation to traders further up the chain, and he knew he could not make a judgment about the integrity of the chain. To Mr Cunningham the response of an honest trader would, emphatically, have been not to trade. That Mr Tomlinson "had to believe" that all the other parties in the chain would do their due diligence properly was so naïve in Mr Tomlinson as to be incredible: it was as close as he came to admitting that he turned a blind eye to the fraud.

737. Even Mr Tomlinson's suggestion that he could only have known about his immediate counter-parties was, Mr Cunningham claimed, demonstrably untrue. He was able to find out for himself in 2004 the make up of a particular supply chain, including the VAT numbers of certain of the traders included in it. There was no reason he could not have done that in the periods in question in the appeal.

738. Mr Tomlinson's evidence was that his supplier did not need to have purchased the goods he was selling, and he did not accept that it was commercially strange for a vendor not to have purchased what he was purporting to sell. His evidence at first was that he was unaware whether his supplier had purchased the goods and he made no effort to find out whether he had or not. Later, he suggested it was a factor that he took into account. However, his documentation required a declaration from his supplier that the supplier had purchased the goods. His attempted explanation that a supplier declaring that it had "purchased" goods meant that it had merely had the goods allocated to it was, in Mr Cunningham's submission, "bluntly, pathetic".

739. Mr Cunningham submitted that the Appellants' due diligence was classic window dressing – the information was not obtained for the purpose of informing the decision to trade, but rather for the purpose of persuading HMRC and the tribunal that the decision to trade was reasonable. As Mr Tomlinson said in relation to East Telecom, he would have traded irrespective of the due diligence documentation.

740. Further Mr Cunningham contended, Mr Tomlinson's evidence in relation to the due diligence score sheets was "extraordinary". Mr Tomlinson claimed the undated sheets were produced as part of his decision making process. He also said that the due diligence information was used to reach the final score on the sheets. However, that meant, and he accepted, that the sheets were not in existence at the date he decided to trade with their subjects, because the information used to reach the final score did not come into existence until after he had traded. In his oral evidence he suggested for the first time that an earlier version of each sheet would have been in existence, but no such documents had ever been disclosed and in any event that claim was inconsistent with his witness statement.

741. Against the whole of the factual background as to the scoresheets, Mr Cunningham submitted that they were created after the event, to give the impression of a scientific system of due diligence when in fact no system existed. Given that

points were allocated simply because due diligence of a particular type had been done, irrespective of what it showed, due diligence was, for Mr Tomlinson, simply a box-ticking exercise; and the use of points in the circumstances was, Mr Cunningham further submitted, calculated to deceive HMRC and the tribunal into thinking that a scientific system was in place rather than simply a tick box system.

742. Mr Cunningham also submitted that Mr Tomlinson carried out very little due diligence before the deals were carried out and, in reality, did not even rely on the little that he did, as evidenced for example by his ignoring the poor credit ratings and low amounts of capital in relation to BTS's and NTS's trading partners compared to the huge deals entered into. Given those indicators, a reasonable and honest businessman would have walked away from the trade, yet Mr Tomlinson stood by his assertion that the due diligence he carried out gave him no concerns.

743. Although he accepted that the purpose of due diligence was to enable him to use his judgment to decide whether to trade with a supplier or customer, Mr Tomlinson persisted in saying that information he later received "confirmed" his judgment – apparently, his judgment was in fact the only factor. His judgment had been shown to be wholly unreliable in light of the letter he received in January 2003 from HMRC. His judgment was wrong in respect of the bona fides of every single counter party, as he accepted. Mr Cunningham contended that the only inference to be drawn was that he knew the deals would work out because he knew they were contrived, and his evidence consisted of an attempt to mislead the tribunal to find otherwise.

744. In the early days of Mr Tomlinson's trading, the Appellants' due diligence procedures were unsophisticated and not sufficiently thorough. However, recognising the risk of becoming connected with fraud, Mr Pickup claimed that they improved their systems. In September 2005, the Appellants implemented a robust system of due diligence designed to incorporate all reasonable commercial checks to try to ensure, as far as they could, that their transactions were not connected with fraud. HMRC's witnesses agreed that the system was detailed and had taken some time to be devised; it was evidence of Mr Tomlinson doing his best to follow the guidance in Notice 726.

745. In Mr Pickup's further submission, the Appellants could not have carried out any further due diligence or made any other reasonable checks on their immediate counter parties that would have identified either the fraud in the contra or contra 2 trader's broker chains, or the intended cover up fraud of the contra-traders. Mrs Evans accepted that, absent actual knowledge, no amount of due diligence could have detected the fraud in the contra or contra 2 traders' broker chains. The due diligence process was effective. Although, with the benefit of hindsight, it did not ensure that the Appellants traded only with bona fide traders, it did successfully weed out around three quarters of those traders who wished to trade with them. Mr Pickup invited us to accept that as evidence suggesting the effective operation of a robust due diligence system.

746. Many of the traders with whom the Appellants declined to trade were alleged by HMRC to be participants in the overall scheme, indeed were members of the cells of traders to which the Appellants were said to belong. Mr Pickup maintained that HMRC had ignored that aspect of the evidence. It had not been the subject of cross-

examination of the Appellants' witnesses, and could not be explained in the context of HMRC's case by their witnesses. If, as alleged, the Appellants were participants in the alleged overall scheme to defraud, why would they have rejected traders with whom they shared the common purpose of intending to defraud the Revenue?

747. Mr Pickup suggested that HMRC's case was inconsistent, it being suggested that the Appellants' due diligence was both very poor and yet designed solely to appease HMRC. The suggestion that the due diligence was all completed after the deals was not supported by the evidence and, significantly, was not put to Mr Edmonds in cross-examination.

748. Mr Pickup added that the fact that the Appellants' repayment claims were (on some occasions after significant delay) all released for payment through 2004 and 2005 and in respect of 01/06, 02/06 and 03/06 reassured the Appellants and gave them comfort that their due diligence was sufficient and effective, their suppliers and customers were reliable and their transactions were not tainted by fraud. There was nothing up to and including NTS's submission of the 04/06 repayment claim about the circumstances of its transactions to suggest that the only reasonable explanation for its transactions was that they were connected with fraud. The circumstances of the Appellants' transactions did not change in 04/06, 05/06 or 06/06.

749. Mr Cunningham described the Appellants' due diligence scoresheets as "extraordinary", a description with which we can only agree. Mr Tomlinson described the scoresheets as an important part of his decision making process, yet much of the information contained in them, as presented to us, was not available when he decided to trade with their subjects. Points were allocated simply because a particular type of due diligence had been carried out, irrespective of what it showed.

750. As we have said, HMRC officers who considered the Appellants' due diligence did not consider the documentation by the Appellants put forward in relation to traders with whom they chose not to deal. Their failure to do so was subjected to considerable criticism by Mr Pickup, he maintaining that the whole of the due diligence carried out must necessarily be taken into account in our consideration of whether the Appellants were duped.

751. In our judgment, the due diligence evidence presented showed that the Appellants' transactions were orchestrated and contrived; it was casual and amounted to nothing more than window dressing. Another way of describing it might be as a box ticking exercise. In those circumstances we consider it irrelevant that HMRC failed to consider the due diligence said to have been carried out on 87 traders with whom the Appellants "decided not to trade". In view of our earlier finding that the Appellants were told with whom to trade, it follows that any due diligence carried out on companies with which they did not trade was pointless.

752. We regard Mr Tomlinson's claim to have been unable to identify anyone in his transaction chains beyond his own suppliers and customers as implicitly saying that he was able to trade with impunity irrespective of whatever was going on in the remainder of the chains – behaviour completely contrary to the recommendations of Notice 726. We regard his claim that he "had to believe" that all the other parties in

the chains would do their own due diligence as incredible, particularly when viewed against the background of the various warnings of fraud contained in that Notice.

753. It is quite plain to us that such information as the Appellants obtained said to be for the purpose of informing their decisions to trade was ignored, particularly that relating to credit ratings. In our judgment, the credit ratings obtained were irrelevant for due diligence purposes, but rather were intended to satisfy HMRC and the tribunal that the decisions to trade were reasonable. The only factor Mr Tomlinson took into account, as he persisted in saying, was his judgment: the information obtained "confirmed" his judgment. We regard his admission that he would have dealt with East Telecom irrespective of what his due diligence on that company revealed as the plainest possible confirmation from his own lips that he regarded due diligence as totally irrelevant.

(B) UNCOMMERCIALITY GENERALLY

a) Phones of non-UK specification

754. All the phones in which the Appellants dealt in the appeal period were manufactured to a continental European specification in that their battery chargers were of the two-pin variety in common use in Europe, but not in the UK. Mr Tomlinson admitted in evidence knowing that no mobile phones were (or indeed are) manufactured in the UK, so that he knew that those dealt in by the Appellants must have been imported. He did not find that unusual or suspicious, maintaining that their presence in the UK was due to the different levels of supply and demand within the UK and Europe for particular handsets. He explained that phones might be released in one European country before release in another, providing an opportunity for profit in intra-community trade. He did, however, concede that, with the benefit of hindsight, there was an element of fraud in the Appellants' transactions, but was adamant that at the time they were made he did not consider them to be suspicious. He claimed there was no significance in the fact that the goods in which the Appellants traded were manufactured to a non-UK specification: to change the charger was straightforward and cost only 50p per phone – not a prohibitive expense when set against the profits to be made within the grey wholesale market, but one which the Appellants never incurred, phone chargers never being changed.

755. Further, Mr Tomlinson explained that, since the Appellants were exporting to EU customers, their goods were not intended for a UK end user and the charger was not an impediment to their onward transmission. The routing of export shipments through an intermediate country on their way to a final destination was, he claimed, a frequent occurrence in international trade, particularly of goods with a high value to weight ratio as they could bear the cost of re-exporting. The long established UK grey market with traders having specialised knowledge was yet another reason why mobile phones were transhipped via the UK.

756. We were provided with no explanation as to why such a large quantity of phones designed for a specific market outside Europe should be found in the UK with chargers designed for use in Europe, but not in the UK or America.

757. On three occasions the inspection report referred to the phones as having 3-pin chargers – a fact that was not queried by BTS.

Discussion

758. In our judgment, Mr Tomlinson should reasonably have asked what the phones were doing in the UK, why there was a market for them in Europe and why they had European 2-pin chargers. He was aware that all those matters raised questions requiring answers and completely ignored them. There was no likely explanation for the goods having been imported into the UK other than that they were to be exported, and Mr Tomlinson knew that to be the case.

b) Nokia 8801

759. The Nokia 8801 model phone was created specifically for the north American market, and was that continent's equivalent of the Nokia 8800, facts of which Mr Tomlinson admitted being aware. The Nokia 8801 operated on the three mobile phones frequencies in use in north America, only two of which were in use in Europe. Consequently, whilst the phone would work in Europe, it would not do so as widely or successfully as the Nokia 8800. Unchallenged evidence was adduced from Nokia itself that in 2006 only 299 retail sales of 8801 handsets were made in Europe and the United Arab Emirates. Yet BTS dealt in over 6000 phones of that model. BTS's purchase and sale documentation described the Nokia 8801 as being of "Central Euro(pean) spec", and thus having round 2-pin chargers as opposed to American flat 2-pin chargers.

760. As BTS made no claim that it intended to change the chargers to 3-pin chargers, we infer that the company always meant to export them.

Discussion

761. Mr Tomlinson's ignoring of the fact that some Nokia 8801 phones had 3-pin chargers constitutes a yet further indication to us that the inspection reports were mere window dressing.

762. We would repeat the content of our discussion on phones of non-UK specification.

c) Back-to-back trading

763. We find it necessary in dealing with back-to-back trading to make certain introductory comments. In para 99.12 of the consolidated statement of case, HMRC rely on the fact that "all of the deals in all three periods under appeal were back-to-back, being made on the same day for the same amount of goods and the same products." In his opening statement, Mr Cunningham observed that such trading meant "always matching one [deal with] another; supply always equalling demand; always unbroken, by which I mean the consignments are never broken." He was mistaken in saying that consignments were never broken, as we showed in relation to the split deals. In contrast, Mr D'Rozario said, "Some [deals] have been split but

nevertheless sold on within the day they were sourced. BTS was never left with stock it had not sold." We regard Mr D'Rozario's evidence as correctly explaining a particular form of back-to-back trading that, together with standard form such trading, i.e. in unbroken consignments, was carried out in the present case, and as is included in the statement of case.

764. In the first of his witness statements made in the NTS appeal, Mr Tomlinson contended that HMRC's criticism of back-to-back trading revealed a misunderstanding of the way in which the wholesale grey marketed operated, and asserted that it had operated in the way it did in 2006 for many years. He claimed the Appellants' trading model to be standard within the industry, and long established: it was one with which he had grown up and understood. He said that NTS continued to operate in the same way today, but presented no evidence to support the claim. In the absence of any evidence as to NTS's current trading practices, we do not accept the claim, which in any event is irrelevant for present purposes.

765. Furthermore, he said that back-to-back trading was a feature of the grey market; given the small margins on transactions a trader had to transact in significant volumes of goods in order to make a profit. The transactions had to occur within a very short period of time to avoid the risk of "negative price fluctuation". As unit prices for phones varied from day to day, it would have been uncommercial for a trader to hold stock, or to buy stock without having had in place a related sale or sales.

766. Mr Tomlinson added that once one of the Appellants had entered into an agreement for sale, the stock agreed to be sold needed to be transported to the designated EU freightforwarder for the EU customer's inspection, payment to be made to the UK broker and onward shipment made to the customer's customer. He also claimed that manufacturers periodically reduced prices resulting in their agents dumping stock discounted as a result thus offering profit opportunities to experienced traders. He produced no evidence to support his claim that manufacturers periodically reduced prices, but in evidence Mr Sorocka accepted it as correct, as we do.

767. As the trading model used was said by Mr Tomlinson to be designed to meet the fast moving nature of the grey market, he maintained that in many instances the paperwork followed behind the agreement; the dates on many documents did not match those on which deals took place. The important thing from the Appellants' viewpoint was that they met customer demand with stock available in the market, or stock that was to become available that day; those matters took priority over the creation of documents.

768. Mr Attenborough, the expert on the grey market for the Appellants, claimed that the market in mobile phones contained similar trading patterns to commodity markets, even though organised differently. He went on to say that back-to-back trading was one of a number of ways in which traders could protect themselves against price volatility, and claimed that alternatives to back-to-back trading available in other commodity markets were not available in the mobile phone market.

Discussion

769. As was pleaded by HMRC in the statement of case (see para 99.12 thereof) if a trader were contacted first by a customer, there would be a delay between obtaining the order and finding someone able to supply the precise quantities and specifications of goods required by the customer. That no such delay ever occurred in the Appellants' transactions, requirements being instantly matched in every single case, in our judgment, indicates that their deals were artificially contrived.

d) No written contracts

770. Notwithstanding the huge sums involved in the Appellants' individual deals, the Appellants did not enter into written contracts. Exceptionally, Powerstrip had its own written terms of trade but, as we earlier found, they were totally ignored. Otherwise, we were unable to find anything other than the contents of the Appellants' trading documents before us to say on what terms they dealt with their suppliers and customers. In oral evidence Mr Tomlinson did make a single claim as to a term of the contract; that if anything did go wrong he was able to return stock to his supplier, but produced nothing to support the claim.

771. In the case of purchases, the documentation consisted of a stock offer from the supplier, a purchase order from one of the Appellants, and the supplier's invoice. None of the documents contained anything more than the make, model, quantity and price of the phones concerned. In the case of sales, the documentation consisted of nothing more than a stock offer from one of the Appellants, a purchase order from the customer, and the sales invoice.

772. In cross-examination, Mr Tomlinson accepted that there were risks involved in the way in which the Appellants traded in valuable stock, but said that never in his trading in the wholesale market had he ever entered into written contracts with his counter parties. He maintained that HMRC failed to appreciate the nature of wholesale trading in mobile phones; price and availability were subject to change several times a day, making it impossible to insist on written agreements with counter parties.

773. Mr Tomlinson admitted that the Appellants never had title to any of the phones in which it dealt; saying they had no risk whatsoever.

Discussion

774. As the Appellants' documentation contained no terms or conditions of trade, no provision was made for the payment of goods, the transfer of title in them and their delivery. Nor was there a formal returns/exchange policy in place should the phones traded have proved to be faulty or damaged.

775. In our judgment, in contracts as large as those entered into by the Appellants written terms and conditions of purchase and sale, if necessary in at least a basic standard form, would reasonably have been expected.

776. That Powerstrip could devise straightforward standard conditions of sale indicates that the matter was not one incapable of resolution without detailed negotiation (see the section on Due Diligence).

777. The absence of contractual documentation indicates to us that the Appellants did not trade on terms which protected them in the event of dispute with their suppliers or customers. It further indicates, and we find by inference, that the Appellants contracts were not genuine, but rather were contrived. The business of the Appellants was simply document generation.

e) Absence of inspections

778. Mr Tomlinson acknowledged that the obtaining of inspection reports on goods the Appellants were purchasing was important, and said that they requested the UK freight forwarders holding goods to provide them with inspection reports and relevant CMR documentation in relation to the movement of the goods

779. Implicitly he accepted that inspections of goods being purchased were necessary not only to ensure that counterparties were trustworthy and capable of carrying out their contractual obligations, but that the transactions themselves were maintained. He said that he had an arrangement with the UK freight forwarders whereby they gave him an assurance that the goods existed, and provided him with "verbal" i.e. oral, confirmation that they had inspected the goods and found them to be satisfactory. Only on receipt of that confirmation did he proceed with a deal.

780. In cross-examination, Mr D'Rozario, the assurance officer for BTS, accepted having seen inspection reports for one of BTS's 10 deals in 04/06 (deal 10), 40 of the 45 deals in 05/06 (missing deals 1-4 and 8), and 7 of the 37 deals in 06/06 (deals 15, 21, 23, 36, 37, 40 and 41). He accepted that in the type of trading in which BTS was engaged it was standard practice for inspection by the UK freight forwarder to be requested, and that he would not have expected a trader such as BTS to have inspected the goods itself. He further said that BTS's own paperwork included requests to the freight forwarders for reports.

781. Mr Tomlinson admitted not having produced an inspection report for every BTS deal in point, and that the company had not itself examined the goods. He maintained that freight forwarders had refused to provide inspection reports for goods they had examined because they had not been paid for them. HMRC's decision in May 2006 to expand their extended verification programme resulted in the company's input tax repayment claims for 04/06 onwards not having been met and the consequent lack of cash prevented it meeting its bills and being able to trade.

782. In re-examination, Mr Pickup took Mr Tomlinson to an inspection report at E160B/66. That report is dated "3/4/06" and relates to 3750 Nokia 8800 mobile phones held by MSC Freight Ltd, the UK freight forwarder holding the goods in BTS April deal 2, a deal which took place on 27 April 2006. Apart from the facts that the report is said to relate to the same make, model and quantity of phones in April deal 2 and was provided by the freight forwarder that dealt with that deal, there is nothing else to connect the report to that deal. Three other inspection reports, in all material

respects identical to that to which we have just referred except that each referred to a different model and quantity of phones, were produced for BTS April deals 3, 4 and 5. The goods in the last two of those deals were included in CMR no 70320346A, as was mentioned in the related inspection reports. The CMR shown as relating to April deals 2 and 3 was no CMR70320346B; it was not produced. In the light of that evidence Mr Pickup invited us to infer that, notwithstanding that their dates could not be reconciled with those of the deals in question, the inspection reports relate to the four deals. In our judgment, on the balance of probabilities we find that they did so relate.

783. No inspection reports were produced for BTS May deals 1 to 4, all being acquisition deals and thus not disputed deals in the appeal. Mr Tomlinson explained, and we accept, that inspection reports were produced only for those deals under appeal. We therefore ignore the absence of reports for those four deals.

784. It will be recalled that in relation to the BTS deals carried out in period 06/06 only 7 of the 37 inspection reports were produced. Mr Tomlinson explained their non-production as being due to HMRC's decision to verify the company's returns for 04/06 and 05/06 resulting in the company being unable to meet the costs of its freight forwarders in period 06/06 and they, in turn, refusing to supply hard copies of the inspection reports on BTS purchases.

785. In summary, we find that the Appellants failed to produce 4 inspection reports for period 04/06, one such report for 05/06, and 30 reports for 06/06.

Discussion

786. We were provided with no evidence whatsoever to corroborate Mr Tomlinson's claim that the UK freight forwarders holding goods for the Appellants telephoned them to say that they had inspected goods and found them satisfactory. In its absence, coupled with his dishonesty, we are not prepared to accept the claim.

787. Nor was a shred of evidence produced to us to support his further claim that the reports for period 06/06 were missing because BTS was unable to pay for them. We did not see even a manuscript note confirming that goods had been inspected and found to be in order. Invoices for the missing inspection reports were not produced. In the absence of any corroborative evidence, we are not prepared to accept the truth of Mr Tomlinson's claim to have been unable to obtain inspection reports.

788. Even had we been prepared to accept Mr Tomlinson's explanation for the non-production of the 06/06 reports, we should not have been prepared to believe that he attached the importance he claimed to inspection reports. In our judgment, viewed against the background of the whole of the evidence before us, that aspect of the Appellants' due diligence consisting of inspection was nothing more than window dressing.

f) No meaningful insurance

789. Para 99.11 the statement of case states:

"Despite the high value of the goods involved, BTS has not provided any evidence that it insured any of the goods – if the goods were to be lost, stolen or damaged, there would be no way for BTS to recoup any loss. One reason for BTS not taking out adequate insurance would be that BTS knew that the transactions were contrived for the purposes of MTIC fraud and, therefore, no matter what happened to the goods, it would be paid."

790. In evidence, Mr D'Rozario accepted that freight forwarders had to have insurance for goods held in situ in their warehouses. He was asked about the position that arose once goods left a warehouse and were in transit between UK and EU warehouses, and said he understood that it was usual for the transporter to effect insurance cover. He confirmed that he made no enquiries to determine the position of goods BTS was consigning through UK warehouses. To some extent, officer Emery confirmed Mr D'Rozario's evidence, agreeing that goods would be insured in the freight forwarder's warehouse, assuming a valid policy was in force. She referred to a change in the law that occurred prior to the appeal period whereby freight forwarders were required to be registered with the Financial Services Authority if they wished to sell insurance policies to customers to cover goods in transit. Mrs Emery accepted that insurance premiums for goods in transit policies were considerable, and that it was for each trader to decide whether to effect insurance. Mr Tomlinson claimed that, although he had made enquiries about the insurance of goods allocated to the Appellants, he had been informed that as he did not have title to the goods he had no insurable interest. He had therefore not insured the goods himself. Nevertheless, he maintained that his manner of trading was industry standard, and pointed to his meeting with Mr D'Rozario on 28 September 2003 where the question of the Appellants' insurance through freight forwarders was raised and, Mr Tomlinson claimed, approved by Mr D'Rozario.

791. In cross-examination, Mr Tomlinson accepted that he was unable to produce any evidence of goods being insured whilst allocated to the Appellants, saying that the failure to produce such documents was his "mistake", and that he had produced to Mr D'Rozario a copy of one freight-forwarder's insurance document. Mr D'Rozario could not recall ever having seen such a document, and in its absence we find that the document was not produced.

Discussion

792. The evidence clearly showed that the Appellants did not arrange insurance cover for any goods in which they dealt. In our judgment, their lack of insurance, and of any interest in whether cover had been effected, indicates that insurance was a matter of no concern to them, and that the goods in which they dealt were not held in furtherance of legitimate and genuine trading.

g) Irregularity of trading days

793. The Appellants' invoices indicated that they traded on only 13 of the 90 days between 30 March 2006 and 30 June 2006 inclusive. BTS carried out 32 broker deals

over 6 days in 04/06; 45 broker deals over 5 days in 05/06; and 41 broker deals over 2 days in 06/06, 24 of those 41 deals taking place on 22 June 2006. NTS carried out 23 broker deals over 4 days in period 04/06.

794. HMRC allege the peculiar spread of dates on which the companies traded and, more importantly, did not trade, to be significant and suspicious; the patterning and clustering were strange, and although generally occurring at the end of month, were not uniformly so. The Appellants' behaviour was "not readily compatible with regular commercial trading."

795. Mr Tomlinson claimed that transactions were primarily carried out at the end of the month, first, because the funding of broker transactions was heavily reliant on OEMs releasing supplies of phones at the end of the month. It did not occur to him that the trading pattern concerned was indicative of the market being controlled.

796. He said the fact that the Appellants carried out no trading between 30 March 2006 and 13 April 2006, and between 28 April 2006 and 27 May 2006, did not mean that the grey market ceased to operate in those periods, but its quietness might have been the result of traders awaiting input tax repayments. He did not find it surprising that BTS undertook 22 transactions on 22 June 2006, but had carried out none in the previous three weeks. He said that if the amount of the input tax repayment BTS received in June 2006 were to be calculated, it would probably be seen that the company had spent the funds available to it .

797. Mr D'Rozario accepted that, following his investigations into trading in the grey wholesale market in mobile phones, towards the end of some months OEMs such as Nokia commonly reduced the price of products that were not selling well. That resulted in their authorised distributors (who were compensated for the price reductions) resorting to the grey market to dispose of unwanted stock. Mr D'Rozario further accepted that the feature of the operation of the grey market could "perhaps explain" why a lot of BTS's transactions were carried out towards the end of the month.

798. Asked specifically about the transactions of BTS on 22 June 2006 in the context of the three week period immediately preceding that date being one in which there were no transactions, Mr Tomlinson maintained that, "We would have still been speaking to suppliers and customers on different products, on different models. We will have still been checking our trading boards. We would still have been answering the phones. We will have still been checking the online trading boards to see when Nokia's new products were being released."

799. To a question suggesting that all the traders with whom BTS contracted on 22 June 2006 suddenly emerged and entered into agreements, Mr Tomlinson replied:

> "No, not at all, no. The negotiation that will have taken place the days before, maybe a week before the stock was going to be made available towards the end of the month, which Nokia's own distribution system, the way that they manufactured products and delivered them at the end of the month and other

products became available into the grey market, the negotiations will have been taking place over a period of time."

800. Mr Tomlinson maintained that HMRC's claim that the trading pattern of the Appellants, was "peculiar" illustrated that they failed to understand the nature of the Appellants' operations, their commerciality, and the operation of the grey market.

Discussion

801. In the witness statements that formed his evidence in chief, Mr Tomlinson made no claim to have been negotiating deals in the days prior to those on which deals were completed. That on June 2006 24 transactions involving 14 different entities should have been concluded, none in June before 22 June and none after except on 26 June, we find quite remarkable.

802. Since, in our judgment, all the evidence points to the Appellants not having traded in the genuine grey wholesale market in mobile phones, and Mr D'Rozario having qualified his acceptance of trading late in the month, we do not regard them as having operated as genuine traders.

803. In our further judgment, the statement of Mr Tomlinson relating to the negotiation of deals carried out on 22 June 2006 set out above is yet another illustration of his dishonesty. Once again we rely on the reasons we gave for rejecting his evidence in relation to the split deals to reject his claim to have entered into detailed, genuine commercial negotiations with suppliers and customers.

h) Disregard of price differentials

804. As we mentioned earlier, on 22 June 2006 BTS/NTS entered into two transactions in Nokia 8800 phones, the one at £315, the other at £444.50. We accept that the former deal was in silver phones, and the latter in black phones which were much more valuable. In those circumstances we may ignore HMRC's claim that the "striking differential" in price in that deal was indicative of fraud.

i) Remote delivery

805. HMRC refer to the despatch of goods to EU countries that were not the base of the customer to whom they were sold as 'remote delivery'. They do not assert that it is an uncommercial practice.

806. In 39 of the 41 EU despatch deals BTS carried out in period 04/06 the EU freight forwarder to which goods were shipped was based in a different country from that of the residence of its EU customer. Although that arrangement contravened no VAT or fiscal regulations, it was suggested by HMRC that it followed the general pattern of bulk shipment seen normally in the MTIC sector. HMRC accept that a UK broker is required to despatch goods to the freight forwarder of its customer's choice.

807. In witness statements made by Mr Tomlinson in the two separate companies' appeals (i.e. before their consolidation), he referred to the hold and release system as

not operating throughout Europe and suggested that as one reason why a customer might use a freight forwarder in a country other than its own base. He did not find it surprising that a customer made a request for goods to be sent to a different country from its base.

808. He contended that the practice of remote delivery was entirely commercial within a wholesale distribution market if looked at from the perspective of the EU customers. It was, and remains, a common, though not universal, practice in the wholesale grey market in mobile phones.

809. In the split deals a number of the purchase groups we have reconstituted consisted solely of Planetmania and Intangible Media. They instructed BTS to transport goods purchased to EU freight forwarders as follows:

Deals	EU freight forwarder
May deals 23 and 24	Freight Connections
May deals 15 and 16	Pro Logic
June deals 1 and 2	Pro Logic
June deals 14 and 15	Intersprint
June deals 25 and 26	Pro Logic
June deals 29 and 30	Heinrich Schneider
June deals 36 and 37	Euresco
June deals 38 and 39	Euresco

810. Planet Mania and Intangible Media thus instructed all five EU freight forwarders used by those companies involved in split deals.

Discussion

811. Against the background revealed in the penultimate paragraph, which patern was applicable to all the split deals, so far as we can tell the choice of EU freight forwarder was arbitrary; it was based on no obvious reason. In the absence of any reason, and in the circumstances in which all the Appellants' split deals were carried out, we consider the facts relating to remote delivery yet another indicator of the uncommerciality of the split deals. That Planetmania and Intangible Media were working in harmony must have been obvious to Mr Tomlinson from the documents generated by BTS's trading with them. We infer that the choices of freight forwarders were intended solely to confuse HMRC; they further indicate contrivance and orchestration.

812. Whilst the reasons for the choice of freight forwarders in the Appellants' remaining deals is unclear, the fact that 39 of the 41 deals carried out by BTS in June 2006 resulted in goods being delivered to a freight forwarder in a different country from that of BTS's customer should, we believe, at least have suggested fraud to Mr Tomlinson.

j) Delivery of goods prior to receipt of payment

813. In BTS May deal 6, the sales invoice was raised on 24 May 2006, and movement of the goods per the CMR took place on 7 June 2006. BTS received payment for its supplies on 26 June 2006. In May deal 7, the sales invoice was again raised on 24 May 2006, and the goods moved on the same day, but BTS did not receive payment until 7 June 2006. Those were two of the three examples of movement of goods prior to receipt of payment Mr Cunningham put to Mr Tomlinson in cross-examination as indicating the uncommerciality of the deals concerned. In both cases, Mr Tomlinson acknowledged the correctness of the dates of the events in question. The third example Mr Cunningham chose was that of BTS May deal 38. The sales invoice was dated 31 May 2006 (E160C/85), as was the CMR (E160C/90). Payment was not made until 26 June 2006 (E160C/91-93). Mr Tomlinson refused to accept that those events were uncommercial, claiming that the goods had to be moved abroad to enable the customer's own EU freight forwarder to inspect them. Nor was he prepared to accept Mr Cunningham's claim that "it was all pre-arranged, contrived, artificial and organised".

Discussion

814. That goods were transported abroad at the Appellants' request without having been paid for, or payment having been secured, we have no hesitation in describing as uncommercial. We adopt Mr Cunningham's claim in its entirety.

k) No added value

815. HMRC suggest that another feature of uncommerciality in the Appellants' trading was that they added no value to a transaction chain in return for their profit margin; goods were sold in back-to-back transactions.

816. As Mr Cunningham put it, it is reasonable to enquire what a trader has done to gain a profit: in ordinary commerce as a matter of common sense one does not make money for doing nothing. The Appellants made enormous profits for doing little more than arranging for goods to cross the English Channel. As a matter of common sense "the FTT [in *Optigen*] was entitled to consider why the Appellant was so richly rewarded for doing so little and why it was able to sell the goods for so much more than it purchased them for, when it had not altered them or added any value to them in any way …"

817. The Appellants accepted that they did not modify or adapt goods to make a profit, nor did they hold stock and await a rise in price to make a profit.

818. Mr D'Rozario accepted in cross-examination that a broker was required to make a considerable financial commitment and take a risk deserving of reward by a substantial profit margin. Further, Mrs Emery acknowledged that she would have expected a broker to make substantially more profit than a buffer in the same chain, saying the broker would have had greater costs to cover than a buffer, and would have needed to cover the input VAT in some way or other.

Discussion

819. It is part of the Appellants' case that the disputed transactions followed an identical pattern to those undertaken by them since they entered the wholesale market in 1998, and HMRC had met all their input tax repayment claims prior to those in dispute. We were invited to conclude that HMRC having made the repayments claimed by the Appellants, they were entitled to assume that their transactions were genuine so they could continue trading as they had for long been doing.

820. In dealing with this matter, we might first usefully mention a submission made by Mr Pickup that, "At no stage have [HMRC] raised with the Appellants any concern that the trading is uncommercial in that they are making a substantial profit in return for little or no effort or contribution." That HMRC refused to make payment of the Appellants' input tax repayment claims in 2002 and 2004 on the basis that the activity in which they were involved was non-economic, i.e. uncommercial, appears to us in itself to refute that submission. HMRC had no alternative but to meet the Appellants' repayment claims for those 2 years once the Advocate General released his opinion in *Optigen* early in 2005.

821. As did Mr Cunningham, we ask ourselves why the Appellants were so richly rewarded for so little work, and respond by saying that, viewed in isolation, the facts may be insufficient to indicate knowledge or means of knowledge of fraud on the Appellants' part. But when considered together with other matters, they may, indeed must, be viewed differently. We regard the facts as yet further indicating orchestration and contrivance.

l) Profits

822. HMRC suggested that the profits made by the Appellants in the appeal period were unreasonably large when compared with the margins obtained by other traders in their transaction chains, and that amounted to uncommerciality.

823. In April, May and June 2006 BTS achieved gross profits of £2,095,768, and NTS £2,277,087 – a total of £4,372,856.

824. Mr Tomlinson accepted that neither BTS nor NTS made a loss on any deals in the appeal period. And, we might add, nor did anyone in any of their transaction chains.

825. Mr Tomlinson confirmed that the Appellants' profits on transactions in January, February and March 2006, in respect of which months HMRC had met his companies' input tax repayment claims, was £1.747 million.

826. In reply to a question put to him in cross-examination suggesting that the Appellants had done nothing to achieve the profits in fact obtained, Mr Tomlinson, said:

> "I disagree with you, Mr Cunningham. There's negotiation, there's counter-parties outside the UK, there's trading partners in the UK that we are negotiating price on to get the best we can for that particular product."

827. When asked if he thought the profits obtained by NTS were astonishing, Mr Tomlinson said:

> "No, that was the trading pattern that we had followed. That was the liquidity coming back into the market of NTS. We had been repaid our reclaim for the 01/06 period. We had been repaid by HMRC for our 02/04 period in that time."

Discussion

828. Against that factual background, in opening Mr Cunningham put HMRC's case as that

> "These are colossal sums of money. They are sums of money made with no commercial risk. They are by many factors more than the amounts of money that anyone else in the chain is able to make, and you [the tribunal] are asked to believe that this is the product of genuine trading, arm's length, bona fide commercial trading. We say that this is an incredible proposition."

829. We accept that the evidence available to us indicates that the margins obtained by the Appellants on individual transactions within cells were no different from those they achieved in earlier periods of trading. We further accept that the Appellants made substantial profits in 2005 and earlier, and that HMRC met their input tax repayment claims for those periods.

830. In our judgment, we must consider Mr Tomlinson's claim that liquidity was returning to the market in 2005 and early 2006 against the background of the unchallenged witness statement of Mr Stone in which, it will be recalled, he said that there was a great increase in MTIC goods trading "with no apparent commercial or economic explanation for that increase". We have no hesitation in preferring the evidence of Mr Stone to that of Mr Tomlinson, and reject the latter's claim that an increase in liquidity was the basis of the increase in trade.

831. We then focus our attention on Mr Tomlinson's statement that negotiations formed a part, an important part, in the Appellants achieving substantial profits in trading. Again in reliance on our holding that in "split deals" Mr Tomlinson's claim to have negotiated prices for purchases and sales was untrue and our inference from his evidence that he is dishonest, we reject his claim that successful negotiations formed the basis of the Appellants' profits. We infer that negotiation played no part in the determination of the Appellants' profits in the appeal period. As Mr Cunningham said, the Appellants' claim that their profits were the result of genuine, arm's length trading was an incredible proposition. Once more, we consider the evidence to indicate orchestration and contrivance.

m) Turnover

832. HMRC's reliance on the Appellants' profitability as indicative of uncommerciality is closely linked to that of their turnover in the appeal period.

833. In January 2006 BTS's net sales totalled £18.7 million – an increase of 422% on that in the preceding 12 months; 695% when compared with that for the preceding month of December 2005.

834. As we have said, NTS did not trade between February and October 2004 because its repayment claim for period 02/04 was subjected to extended verification on the ground that the company's transactions were not an economic activity. The Advocate-General's opinion in *Optigen* was released on 16 February 2005.

835. In period 11/04 NTS resumed trading, achieving a turnover in that period of £1,018,000. But turnover in the next following period, 01/05, fell to £766,250. Thereafter, leading to and in the period with which we are concerned, turnover increased as follows:

04/05	£9,107,784
07/05	£23,478,663
10/05	£21,633,900
01/06	£20,599,485
04/06	£60,339,203

836. The Appellants claimed the huge increase in turnover in period 04/06 to be due to increased global demand for mobile phones; they were able to take advantage of their position in the market, coupled with experience, contacts and the additional funding allowed them to take advantage of a booming industry. In contrast HMRC attributed the increase in turnover in very large part to be due to the effect of the release of the *Optigen* judgment

Discussion

837. Mr Pickup submitted that our consideration of the matter of turnover must be examined against the background of the impact of the tribunal decisions in *Optigen* and *Bond House*, the release of the Advocate General's opinion in the joint cases, the decision of HMRC to satisfy input tax repayment claims which followed that opinion, and the judgment of the ECJ in *Optigen*. We are content to proceed as he suggested.

838. As we mentioned earlier, Mrs Sara Evans was HMRC's assurance officer for NTS. She tested Mr Pickup's skills in cross-examination to their limit, not only answering the questions put to her clearly and concisely, but doing so in such a way as to enhance HMRC's case rather than to confirm the legitimacy of that of the Appellants, as he clearly intended. She proved to be an excellent witness and emerged the undoubted victrix in the encounter. At one point in the cross-examination, in dealing with NTS's transactions with the company Deb Techno, that company it will be recalled having been registered for VAT as late as October 2005, Mrs Evans was asked, "But they have arrived, haven't they, at a time when the market, we know, on the figures we see in NTS and on our general understanding of the market was being restored to confidence and getting more liquidity?" she replied, "Yes, they've arrived at just the time the fraud starts to take off."

839. The evidence presented to us clearly confirmed the correctness of Mrs Evans' reply. We need say nothing more about the Appellants' turnover, being satisfied that the explanation for its increase early in 2006 was attributable to the *Optigen* judgment being delivered in January of that year. Clearly, in the period with which we are concerned, the Appellants took full advantage of HMRC's resultant inability to challenge MTIC trade; their deals were orchestrated and contrived.

Other uncommercial features of the Appellants' trading

840. There are a number of other matters we might have taken into account in dealing with orchestration and contrivance, but we propose to restrict ourselves to three of them.

n) Nokia 8800

841. The phones in BTS April deal 2, May deals 15, 16, 32, 38 and 39, and June deals 21, 23, 34, 35 were all in, or included, Nokia 8800 models. On 27 June 2006 BTS carried out 4 deals in that model: 2 (June deals 28 and 29) at a purchase price of £443.25 (+VAT) per handset, and 2 (June deals 34 and 35) at a purchase price of £317.25 (+VAT) per handset. That difference in price was explained by Mr Pickup (no evidence being adduced as to the matter) as being due to the fact that the phones in the former deals were black in colour whereas those in the latter deals were silver, and the former were more valuable than the latter. Only in the invoices for both purchases and sales relating to the four deals on 27 June 2006, was their colour plainly stated.

Discussion

842. If the colour of Nokia 8800s made so much difference to their value, we should have expected it to have been an essential part of their description in all the deal documentation for that model of phone. Yet with the exception of the deals on 27 June 2006, all the trader's own documents were silent as to colour (but in the inspection report for May deal 15 the colour of the phones was shown as "stainless steel", and in the report for June deals 21 and 23 the phones were said to be "multi-coloured").

843. In our judgment, the omission of the colour of the phones in the majority of the invoices in 8800 deals once more suggests that the deal documentation was created purely and simply to provide the traders concerned with evidence sufficient to satisfy HMRC that the deals were genuine. We infer that they were not genuine.

o) Sony Ericsson W800i and W900i

844. The inspection report obtained by NTS in relation to its deal 4 indicates that the goods sold to it were Sony Ericsson W900i phones. But the deal documentation throughout refers to the phones in question being of the W800i model

Discussion

845. In our further judgment, in the light of the contents of the inspection report the failure of NTS to check in which model of phones it was dealing is yet another indicator that the deal documentation and inspection reports were created purely and simply for "window dressing" purposes; it indicates that the deals were not genuine ones.

p) IMEI numbers

846. It will be recalled that at the meeting held on 25 September 2003 Mr Tomlinson agreed with Mr D'Rozario that the Appellants would record the IMEI numbers of all the phones in which they dealt. Subsequently, without reference to or informing HMRC he reversed that decision. He was thus unable to say whether he had previously dealt with phones in which the Appellants were trading.

Discussion

847. Once more, the Appellants' behaviour was inconsistent with their dealings being in the legitimate wholesale market in mobile phones. It provides yet further indication that their deals were connected with fraud, and we so infer.

28.SUBMISSIONS FOR HMRC

848. We need not deal with the entirety of Mr Cunningham's closing submissions as we have already taken care of many of them in our discussion of the various points on which we are required to base our decision.

849. As far as remaining matters are concerned, Mr Cunningham submitted that each of the fraudulent tax losses arose as part of orchestrated fraudulent schemes, involving each of the participants in the transaction chains, including the EU suppliers and customers and, of course, the Appellants.

850. He claimed the evidence of the cells within which the fraudulent contra-traders operated was a particularly compelling feature of the fraud. Transactions within each of the cells followed a pattern distinct to that cell. The Appellants' transactions fitted into those patterns, in each case following the same pattern as that found in the chains of other brokers operating within the cell, and varying according to the cell in which the transactions were conducted.

Knowledge

851. On the basis of the evidence as a whole, Mr Cunningham invited the tribunal to find that Mr Tomlinson entered into all the transactions carried out by BTS and NTS well knowing that they were connected with fraud. If not, he clearly should have known of the connection with fraud.

852. Mr Cunningham submitted that the evidence as to Mr Tomlinson's knowledge of the connection with fraud was wide-ranging, and was to be judged in the light of his experience generally as a businessman. He was plainly an articulate and intelligent man having, to use his own words adopted during cross-examination, "sharp business acumen". He had been incredibly successful in his dealings in mobile telephones, making net profits of almost £1.75 million in the first quarter of 2006, and standing to reap a gross profit in excess of £4.37 million from the deals under appeal. As the sole director of the Appellants, he took responsibility for all of the actions of the Appellants, and accepted that all of the actions taken by BTS's sole employee, Mr Campbell, were taken with his knowledge and approval.

853. Clearly it was necessary for the tribunal to have in mind what Mr Tomlinson knew, and also what he should have known, with the usual safeguard against hindsight. Mr Cunningham contended that the tribunal was entitled to draw inferences from what Mr Tomlinson accepted he knew, from what he said and did, including what he said in evidence. There were powerful inferences to be drawn from Mr Tomlinson's evidence and from the nature of his dealings.

854. His central and, indeed, only defence was that he did not know what his deals were connected with fraud, and he invited the tribunal to find him honest. His defence was simply a denial and an assertion that he was honest and, save for Mr Edmonds and his expert witness, he had called no other evidence: not a single fellow trader, not a single freight forwarder, not even Mr Campbell was called to testify in his favour.

Character

855. Mr Tomlinson invited the tribunal to accept him as a reliable and honest trader. He further urged it to find that his fellow traders and HMRC saw him as such; that he was a good citizen who deplored criminality, dishonesty, and would do everything he could to assist and co-operate with HMRC to eradicate the fraud.

856. Mr Cunningham submitted that the evidence was such that the tribunal must find that he was the opposite of all of those things. His failure to engage with HMRC was particularly striking. He met Mr D'Rozario only twice, having refused invitations to meet him. He insisted on correspondence being conducted through his accountant. Over a long period, he refused to supply his due diligence documentation. (We find the matters mentioned in the last three preceding sentences as additional facts). In the context of his trading, Mr Cunningham submitted that the proper inference was that Mr Tomlinson took the view that due to the judgment in *Optigen*, HMRC were powerless to deny him VAT repayments, however he traded.

857. His only business experience had been in dealing in mobile phones. He had been aware of Notice 726 since 2003. He therefore knew from that time that the business in which he was dealing was one that involved widespread fraud - "prevalent" was his word – that he might be held liable for fraud in relation to any previous supply, and that would apply to a fraudulent tax loss anywhere up the chains. An honest, respectable trader and a good citizen would have walked away. Mr Cunningham further submitted that the fact that Mr Tomlinson chose not to walk

away was indicative that he was neither. From Notice 726, he knew that the fraud involved purchasing VAT free from an EU state – which he knew was happening in his chains – and dispatch from the UK. Again, he continued to trade. Mr Tomlinson accepted that all he had done was carry out steps in relation to his supplier, and claimed that that was sufficient under Notice 726.

858. Mr Cunningham added that Mr Tomlinson had specific indicators that fraud was "prevalent" in his area of trade – he had brought two previous appeals where HMRC had identified circular movements of goods and had denied input tax repayment claims on the grounds of non-economic activity. He accepted that he had had numerous veto letters, both in relation to BTS and NTS, warning him that fraudsters were getting close to his sector of the industry. He was warned as early as January 2002 that 13 of his suppliers had to that date been identified as missing traders who, between them, had failed to account for VAT in excess of £15 million. That must have told him that his trading was very close to the fraud and that his due diligence – based on his judgment as it remained during the periods under appeal – was inadequate. Mr Cunningham submitted that the inference must be that he was quite happy to turn a blind eye to the fraud to make as much money as he could. Further, he did not find it odd that HMRC pressured high street banks to prevent traders carrying out transactions through them, such that he was no longer able to bank in the UK and had to open a bank account in the Dutch Antilles. He ignored the obvious message that HMRC were very concerned about the "industry" as he described it.

Manipulation

859. Mr Cunningham considered Mr Tomlinson's case as to duping by his counter parties to sit very ill with the way he had sought to portray himself. He was a man of obvious intelligence and had had considerable success in business. With the benefit of hindsight he accepted that the fraud was all around him – there was some sort of collusion between his suppliers and his customers.

860. No witness or document had been produced to support Mr Tomlinson's account of how the Appellants' businesses ran day by day. Against the background of the manipulation involved Mr Cunningham submitted that his account could not have been an accurate one. Given the level of contrivance and sophistication of it, those controlling the fraud would not have allowed a "free agent" to be involved. The irresistible inference to Mr Cunningham was that Mr Tomlinson knew that his transactions were connected with fraud, and he took the decision to carry them out in the hope of making large sums of money.

861. As shown in the schedule at file XX4, the Appellants' profit mark-ups were consistent with the schemes of which their deals formed part. The margins were determined by date and by cell. Mr Cunningham contended that Mr Tomlinson must have known that he was being manipulated for that to be so. More broadly, the fact that the Appellants operated within different schemes and behaved according to the pattern of the schemes made the inference of knowledge of fraud very powerful.

862. In addition, for the above reasons, Mr Cunningham contended that the deals entered into by the Appellants were part of highly organised and orchestrated schemes

to defraud HMRC. Mr Tomlinson accepted that to be the case. In most deals there was clear evidence that every party involved in the transfer of goods and cash was a knowing party to the fraud. Mr Cunningham submitted that there was a compelling inference to be drawn that such schemes would not realistically have operated without the knowledge of Mr Tomlinson; not necessarily knowledge of the whole scheme and the parties in it, but certainly knowledge that the transactions were connected with fraud and the Appellants would be expected to play their parts, in particular making claims to HMRC for repayment of VAT. That was underlined by the appearance of NTS as a buffer within the scheme – as highlighted during the cross-examination of Mr Birchfield, the appearance of an innocent buffer would have been remarkable.

863. In conclusion, Mr Cunningham submitted that, looked at in context, the transactions upon which HMRC had denied input tax credit were connected with fraud and, indeed although HMRC did not have to prove that they were part of a scheme, Mr Cunningham submitted that they were in fact contrived and orchestrated as part of MTIC fraud. The Appellants knew or must have known this. Alternatively, at the very least, the Appellants should have known that the only reasonable explanation for the transactions entered into by them was that they were connected to fraud.

29. SUBMISSIONS FOR THE APPELLANTS

864. We have dealt with a number of Mr Pickup's submissions in the course of our decision, and now proceed to rehearse the remainder.

865. In summary, he submitted that the decision to deny BTS its right to deduct input tax in periods 04/06, 05/06 and 06/06, and that to deny NTS its similar right in the quarterly period 04/06 were wrong in law. Whilst the Appellants conceded that HMRC could prove, in so far as was relevant, that there had been fraudulent evasion of VAT in their direct tax loss chains save in respect of Anfell (a matter with which we have already dealt and thus may ignore) and the broker chains of the alleged contra-traders and contra 2 traders and that the necessary connection existed in the Appellants' direct tax loss chains, on the evidence adduced Mr Pickup contended that HMRC had failed to prove the necessary connection between the Appellants' broker transactions and the fraudulent tax losses in the alleged contra-traders' broker chains or the broker chains of the alleged contra 2 traders.

866. Mr Pickup maintained that HMRC's case was, in reality, one of actual knowledge, as Mr D'Rozario accepted in evidence. Although HMRC also sought to put their case in the alternative, the case was one of actual knowledge or nothing, given their assertions that: Mr Tomlinson was an active and dishonest participant in orchestrated cells of traders intent on defrauding the Revenue; that the Appellants' due diligence was created fraudulently to deceive the tribunal; that the Appellants payments were part of contrived money chains; and that BTS itself acted as a dishonest contra-trader;

867. In relation to knowledge, Mr Pickup observed that in respect of a contra-trading chain HMRC must prove knowledge on Mr Tomlinson's part of either the fraudulent

tax loss in the contra-trader's broker chain, or the fraudulent off-setting exercise conducted by the contra-trader. As to knowledge in respect of a 'two tier' contra-trading chain, HMRC must prove knowledge on the part of Mr Tomlinson of either the fraudulent tax loss in the broker chain of the contra 2 trader, or the fraudulent off-setting conducted by the contra 2 trader and the off-setting exercise conducted by the contra-trader.

868. Mr Pickup yet further submitted that there was no direct evidence of actual knowledge. HMRC relied on circumstantial evidence which did not permit the drawing of an inference of actual knowledge.

869. Mr Pickup submitted that the Appellants' transactions, in the appeal period and before, were bona fide commercial transactions completed following arm's length negotiations between themselves and their counter parties. There were no un-commercial features of those transactions that could lead the tribunal to conclude that the Appellants knew that their transactions were connected with the fraudulent evasion of VAT or, alternatively, that they should have known that the only reasonable explanation for the transactions was that they were so connected.

870. He maintained that the Appellants' transactions should be viewed against the background of the expert evidence as to the legitimate grey market. In 2006 there was a significant, vibrant and growing grey market in the wholesale distribution of mobile telephone handsets. The UK was a major market and likely to have handled around 10 million handsets in 2006, with 7 million being exported. Whilst the Appellants would not have known the precise size of the market within which they were operating, they, through Mr Tomlinson, were familiar with the nature and character of the market. It was therefore reasonable for them to expect to be able to be supplied with substantial quantities of handsets and to be able to find customers for them, both in the UK and the EU. Although the Appellants were exporting to EU member states it would have been unlikely that the phones would have reached an end user in that state. They would more likely have been traded on to their final destination which could have been anywhere in the developing world.

871. The Appellants' trading model: back to back transactions; not holding stock; always being able to match sales to purchases, was in the opinion of Mr Attenborough consistent with what he would have expected to see in any commodities market. Moreover the use of intermediaries (adding value) was not unusual in a chain of transactions, trading goods within an established network sometimes within the U.K. to export again to an EU customer who may well then have exported to an emerging market, e.g. in the Middle East, Far East, Asia or Africa.

872. Mr Pickup claimed that Mr Tomlinson was not a newcomer to the market seeking to take advantage of a fraud prevalent in the sector. He had devoted his working life to the telecommunications sector since 1988, had operated in the wholesale grey market since 1998, and had traded in substantial volumes, with multi-million pound turnover, making substantial profits. He was highly experienced and very knowledgeable about mobile telephone handsets. He had a wide network of contacts in the industry and so was well placed to profit from the buoyant grey market

that grew rapidly in 2005 and 2006 because of the liquidity and confidence returning after *Optigen* and the repayment of outstanding repayment claims.

873. The circumstances of the Appellants' trading from 1998 to June 2006 did not change. The disputed deals follow the same pattern as other transactions in the wholesale market and the transactions conducted by the Appellants over many years.

874. The Appellants, through Mr Edmonds, whether by phone calls, visits or written correspondence maintained regular contact with Mr D'Rozario. They afforded a high level of co-operation and assistance to HMRC, and were transparent in their dealings with them.

875. The Appellants' refusal, via Mr Edmonds, to provide their due diligence records until service of a notification letter under Notice 726 was based on legal advice and Mr Edmonds' interpretation of the notice. Mrs Evans agreed that Mr Edmonds' interpretation was a reasonable one. Mr Pickup contended that the evidence did not support the suggestion that there was a change in attitude as a result of the *Optigen* decision and did not provide the foundation for any justifiable criticism of the Appellants.

876. Mr Pickup observed that all of the Appellants' trading was conducted under the watchful eye of Mr D'Rozario, who concluded, on all the evidence, that their transactions were likely to be connected with a possible fraud. He made his decision to deny BTS its right to deduct input tax on the basis that its transactions "may" have been connected with fraud. That they "were likely' to be so connected was, in Mr Pickup's submission, not enough. The test was wrong in law. It followed that the original decisions to deny in the case of BTS were erroneous. The fact that Mr D'Rozario remained of the view that the Appellants knew or should have known that their transactions "may" have been connected with fraud was significant and potentially undermined the case for HMRC.

877. The circumstantial case as to actual knowledge of the Appellants presented by HMRC, in Mr Pickup's further submission, principally rested on the fact that all of the broker transactions of the Appellants in their direct loss chains and the contra-traders in the alleged contra chains could be traced back to a fraudulent tax loss, either in their own chains or in broker chains of other traders with whom they were said to be connected. Save for the off-setting of the contra and contra 2 traders there was nothing to connect the Appellants' transactions, whether by product or personnel, save for the fact that all the broker transactions of the contra-traders could be traced back to a fraudulent tax loss.

878. As to contrivance, Mr Pickup added that the Appellants did not know and could not have known whether the trading they engaged in was contrived or not. The trading, certainly in so far as the Appellants could have determined by reasonable due diligence, was not contrived. It only now appeared contrived with the benefit of hindsight and many years of verification undertaken by HMRC.

879. Far from there being un-commercial features in the Appellants' trading, Mr Pickup contended that in fact there were numerous contra-indicators of fraud, specifically:

(a) That one of the Appellants' payments in the FCIB transaction chains analysed (NTS Deal 16, chart at E12/210) was found to be out of sequence with the payments of the other traders shown on the charts, suggesting "that perhaps NTS were acting out of the overall scheme";

(b) That the timing of the Appellants' payment in one of the two transactions analysed (BTS invoice 5000) was shown to have been made nearly two hours after the payment that preceded it, in contrast to the other transactions examined in which payment was made in strict sequence;

(c) That Mr Murphy admitted that the Appellants, in splendid isolation, on Exhibit RM4 (E4/1) were unconnected to any of the other companies included within the scheme;

(d) That the Appellants routinely, and almost without exception, split their deals between different EU customers;

(e) That there was no patterning in the Appellants' mark-ups in absolute terms, in contrast to the other traders in the deal chains;

(f) That the Appellants spent considerable time and substantial expense devising a detailed system of due diligence in an effort to follow the guidance in Notice 726 which in its application to one trader examined, HMRC thought satisfactory;

(g) That the Appellants' due diligence process was applied rigorously and demonstrably functioned effectively because it resulted in the Appellants declining to trade with numerous other traders alleged to be co-conspirators in the overall scheme;

(h) That the Appellants had been trading in the wholesale distribution market since 1998 and, unlike the vast majority of traders, NTS remained trading in that market today, taking advantage of the introduction of the reverse charge in June 2007; and

(i) That, on occasions, Mr. Tomlinson had sought positively to assist HMRC to eradicate fraud from the sector to which he had devoted his adult life by providing the names of traders that he considered to be suspicious.

880. Mr Pickup concluded his submissions contending that HMRC had failed to prove that the Appellants, at the time they entered into the disputed transactions, knew or should have known that their transactions were connected with the fraudulent evasion of VAT; the appeal should be allowed with costs.

30. CONCLUSION AND REPLY TO QUESTION 4: DID THE APPELLANTS KNOW OR HAVE THE MEANS OF KNOWING THAT THEIR PURCHASES WERE OR WOULD BE CONNECTED WITH THE FRAUDULENT EVASION OF VAT?

881. Before proceeding to answer question 4, and giving the reasons for our answer, it is first necessary that we deal with those submissions of the parties with which we have not already dealt.

882. However, to complete the record we should first note that we have most carefully considered all the evidence adduced by the Appellants. We have also taken full account of acceptances by various witnesses for HMRC that a number of aspects of the Appellants' trading behaviour and practices were consistent with their having been genuine traders in the legitimate grey wholesale market in mobile phones.

883. The one witness for the Appellants with whose evidence we have not dealt was that of their expert, Mr Nigel Attenborough. He likened their trading model in the appeal period to that found in a commodities market. His claim in that behalf was challenged on the basis that commodity trading was strictly controlled, whereas there was no control in the mobile phone market. We accept that the Appellants' trading model as described to us - back-to-back trading, not holding stock, always being able to match purchases with sales – was consistent with practice in a typical of commodity market, but it was without control. Neither Mr Attenborough nor the corresponding expert for HMRC, Mr Taylor, was able to provide us with details of the size of the wholesale grey market in mobile phones in 2006, so that their evidence took things no further. For the record, we note that the Appellants did not seek to conceal any relevant evidence as to the size of the wholesale market.

884. A major plank in Mr Pickup's submissions was that the concept of contra-trading did not necessarily involve the knowing participation of the broker in the clean chain; the broker was not necessarily pivotal in the fraud. We accept the correctness of the submission.

885. Mr Pickup went on to submit that whether the Appellants were knowing participants in contra-trading fraud was determined by the type of fraud that was occurring, i.e. whether the profit came from the extraction of output tax by a missing trader, or the reclaim of input tax by the broker in the clean chain. The fact that contra-trading was occurring did not necessarily indicate that the Appellants knowingly participated in it; contra-trading fraud in its latter form could have occurred whether or not the Appellants were knowing participants.

886. Mr Pickup maintained that in the accepted description of contra-trading not even the contra-trader itself was necessarily a knowing participant in the fraud; it may have been a trader controlled (possibly without knowing it) by a "puppet master". Given that the contra-trader may have been an unknowing participant, he maintained that it was plainly unnecessary for the broker in the clean chain to have been a knowing participant.

887. On appeal to the High Court in *Livewire Ltd v Comrs of Revenue and Customs* [2009] EWHC 15 Ch Lewison J broadly accepted the points made by Dr Avery-Jones in *Olympia Technology* and also that the whole concept of contra-trading was to that extent a construct of HMRC. Lewison J emphasised that it was not enough for HMRC to identify two chains, suggest an accounting connection and label them as constituting "contra-trading". Mr Pickup urged us to follow the judgment of Lewison J in *Livewire* rather than that of Briggs J in *Megtian Ltd v HMRC* [2010] EWHC 18 (Ch) the former suggesting that the knowledge required was of the specific activity of the contra-trader or the fraudster rather than simply knowledge of a connection with fraud, as the latter indicated.

888. Mr Pickup's submissions in that behalf have been overtaken by the very recent judgment of the Court of Appeal in *Fonecomp Ltd v Revenue and Customs Comrs* [2015] EWCA Civ 39. It decided that the "*Kittel* principle" was not limited to cases where the default occurred in the same chain of supply as the trader's purchase. The Court went on to provide the following valuable guidance as to how the issue with which we are presently dealing is to be treated by courts and tribunals.

889. It was first argued for the taxpayer that the right to claim a credit or repayment of input tax, the "*Kittel* principle", was limited to cases where he knew or ought to have known that a default would occur in the same chain of supply as his purchase; it would not apply to contra-trading cases, where no such "connection" existed. Secondly, it was claimed that, even if the first argument did not succeed, the *Kittel* principle had been narrowed in later judgments of the Court of Justice of the European Union ("the CJEU"), as the ECJ has now become.

890. In relation to the taxpayer's first argument, having reviewed the EU relevant case law the Court of Appeal (Arden LJ delivering the judgment with which the other two members agreed) held that it contained nothing to suggest that by referring to a chain of supply in the case of *Bonik EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto'* (Case C-285/11), the CJEU necessarily meant a chain that was purely linear. It did so in reliance on para 62 of the judgment of the Court of Appeal in *Mobilx,* in the process observing at [28].

> " … Chains can be intersecting or have branches, as in chains of mountains. So there is no reason why the chain of supply should not be connected through a branch. It is the existence of the requisite connection between the transactions involved which makes the relationship between the transactions a chain."

891. Further, at [29] the Court of Appeal, having noted that there was nothing to suggest that the CJEU intended to narrow the *Kittel* principle to the narrow interpretation sought by the taxpayer, said:

> "… There is no doubt but that [knowing involvement in contra-trading] is an abuse of the VAT provisions. There is no doubt that the CJEU was aware of the breadth and complexity of these VAT frauds. In both *Kittel* and the case on which it is based [*Optigen*], the Opinions of the Advocate General stressed that the chains could be very complex. It is sufficient to set out the following

paragraph from paragraph 35 of the Opinion of Advocate General Colomer in *Kittel*:

> 'In reality the methods used are as fanciful and complicated as the imaginations of the people who think them up. I therefore agree with Advocate General Pioares Maduro who, in point 8 of his Opinion in *Optigen* …, finds that in every case the bottom line is that an amount received in respect of VAT is not declared'."

892. In conclusion in relation to the taxpayer's first argument, the Court agreed with paragraph 22 of the decision of Judge Bishopp in *Universal Enterprises (EU) Ltd v Revenue and Customs Comrs* [2014] STC 1515, a case relied on by HMRC:

> "22. The argument that a trader in a clean chain cannot be affected by anything which happens in a dirty chain is in my judgment wholly misconceived. Mr Young [counsel for the taxpayer] argued that there is nothing inherently wrong with contra-trading, a statement which, put in that way, is true: a trader who both imports and exports may legitimately organise his sales and purchases so that, at the end of a VAT period, he has little to pay, or a repayment claim. If he does so for reasons of cash flow, his conduct is unexceptionable. But that is not the reason for the contra-trading seen in cases of this kind. As has been said many times, not least by the then Chancellor in *Blue Sphere Global Ltd v Revenue and Customs Commissioners* [2009] STC 2239, its purpose is to conceal the fraud in the dirty chain and to make it harder to combat. The appellants' argument necessarily treats 'clean' as synonymous with 'innocent', but a clean chain in cases of this kind – that is, one in which each of the traders accounts correctly for VAT – is not innocent; it is an integral part of the fraudulent scheme. Even if I entertained any doubt (which I do not) that as a matter of EU law there is sufficient connection between a trader in the clean chain and the default in the dirty chain, there remains an insuperable connection with the fraudulent purpose of the clean chain."

893. The Court of Appeal rejected the taxpayer's first argument.

894. The taxpayer's alternative ground of appeal was based on claims:

> (1) that the words "should have known" (referring to the deemed knowledge of the trader) meant "has any means of knowing" per Moses LJ at [51] of *Mobilx*; and
>
> (2) that Fonecomp did not know the details of the fraud found by the First-tier Tribunal, or of the connection between its purchases and the fraudulent evasion of VAT.

895. The Court of Appeal dealt with a submission that the taxpayer could not have found out about the fraud even had it made inquiries because the fraud did not relate to the chain of transactions with which it was concerned. It did so in the following way:

"51. However, in my judgment, the holding of Moses LJ does not mean that the trader has to have the means of knowing how the fraud that actually took place occurred. He has simply to know, or have the means of knowing, that fraud has occurred, or will occur, at some point in some transaction to which his transaction is connected. The participant does not need to know how the fraud was carried out in order to have this knowledge. This is apparent from [56] and [61] of *Kittel* cited above. Paragraph 61 of *Kittel* formulates the requirement of knowledge as knowledge on the part of the trader that 'by his purchase he was participating in a transaction connected with fraudulent evasion of VAT'. It follows that the trader does not need to know the specific details of the fraud."

896. The Court of Appeal also rejected the taxpayer's alternative case, saying that the CJEU's case law did not require knowledge of the fraud in the chain of which its transactions formed part.

897. Thus it is plain that no special approach to connection is required in a case involving contra-trading; the only relevant issue is knowledge of fraud or means of knowledge.

898. As we earlier found on the facts of the present case, and particularly the evidence contained in the deal chains, the Appellants broker transactions alleged by HMRC to be part of contra-trading frauds were part of such frauds. We might add that we entirely agree with the observations of Judge Bishopp in *Universal Enterprises.*

899. Having done so, being satisfied that the purpose of the contra-trading we are considering was to conceal the fraud in the contra-traders' dirty chains and make it harder for HMRC to combat, we express ourselves satisfied that the Appellants were indeed pivotal in the contra-trading frauds alleged by HMRC.

900. We further accept that it was not until July 2005 that HMRC became aware of contra-trading, and that Mr Tomlinson was not told of it until mid-2006. Those facts avail the Appellants nothing.

901. We also accept that, with one exception, throughout the appeal period the FCIB presented as a reputable off-shore international bank offering state of the art facilities to its customers. The exception was the bank's requirement that potential customers declare that s.77A VATA had been complied with. That requirement should at least have put the Appellants on notice that all was not as it appeared on the surface.

902. The one submission of Mr Cunningham we are not entirely prepared to accept is that in which he claimed that, since the Appellants were able to provide HMRC with full details of the transaction chains in relation to their earlier appeals, they were able to provide similar information in relation to the chains with which we are dealing. Our acceptance is qualified, but as it takes matters no further, we need not further deal with the matter. In so far as the reminder of Mr Cunningham's submissions are concerned, we accept them unreservedly.

903. In our judgment, the Appellants' due diligence procedures after 1 September 2005 speak for themselves as indicating that they were nothing more than window dressing. We see no other way of describing their trading with some companies who were placed in the highest possible risk category by the credit rating agency Experian (David Jacobs and Epinx), and with others for whom Experian was unable to provide any indication of risk, e.g due to their very recent incorporation (Deb Techno). Further, in the case of Sigma Sixty, the evidence clearly showed that the Appellants carried out no due diligence on the company before first dealing with it. But, in our judgment, the factor most indicative of the irrelevance of due diligence to the Appellants was Mr Tomlinson's admission that he would have traded with East Telecom whatever the due diligence exercise on that company showed. In our judgment, looked at in combination, the matters to which we have just referred indicate that the Appellants had actual knowledge that the deals in which they were concerned were connected with fraud.

904. We appreciate that the Appellants may not have been aware of the circularity of the money flows in their transaction chains. However, for the payment patterns revealed by the analysis of the HMRC officers to have been maintained, the Appellants must have been involved in the chains: they must have been told when to expect to receive payment from their customers and when to make payment to their suppliers. To us, that is a further example of them having actual knowledge of a connection with fraud.

905. Equally indicative of their having actual knowledge is the fact that in each one of the 16 Cell 10 deals their combined profit was 8% or a figure within 0.1% of 8%. That they achieved such a result could only have been due to a complete absence of negotiation and of their having been told at what price to buy and at what to sell the phones in which they dealt, and we so infer.

906. On 22 June 2006 the Appellants entered into a number of Cell 10 deals and a number of Cell 5 deals, in each case in the same make, models and not greatly different numbers of handsets. In the former group the Appellants made roughly four times as much profit per phone as in the latter – a fact which we earlier inferred to be indicative of contrivance and orchestration. The clear absence of evidence of negotiation of prices in those deals enables us further to infer that the Appellants were controlled in their deals and had actual knowledge of a connection with fraud; their own documentation and that of their suppliers, all contemporaneous, clearly shows that to have been the case. We might add that the facts referred to in this paragraph and in the last preceding one in large part deal with, and in our judgment largely dispose of, the Appellants' claim to have been duped.

907. Not only was every deal the subject of the appeal completed in a single day, in each case the phones whilst in the UK remained in the possession of the freight forwarder instructed by their UK acquirer. They were then despatched to an EU freight forwarder nominated by the EU customer. The Appellants carried out no due diligence on any of the freight forwarders with which they dealt. Indeed, no evidence was adduced to indicate that they had ever dealt with any of the EU freight forwarders concerned before the transactions with which we are dealing took place.

Notwithstanding that the Appellants carried out no due diligence on the UK freight forwarders holding the goods, they entrusted them with the task of inspecting the goods they held. Whether they should have been so entrusted, we cannot say, but we should have expected some checks to have been made on companies advising on the existence and quality of batches of products said to be valued on average at £1 million. Those matters again point to the Appellants having had actual knowledge of fraud.

908. We have considered the uncommercial factors relied on by HMRC to show that the Appellants knew or should have known that their transactions were connected with fraud in some detail. Even viewed individually, a number of them indicate to us that the Appellants had actual knowledge of that connection. As examples, we might cite the ease with which they obtained huge profits at no commercial risk, and the large increase in BTS's turnover in period 06/06. But, taken in combination, we agree with Mr Cunningham's submission that they indicate actual knowledge.

909. However, had we had any doubt as to the answer to the question of the Appellants' knowledge, it was dispelled as the result of our analysis of their split deals. As we earlier inferred (see our discussion following that analysis), in each deal BTS was told when and from to whom to buy, when and to whom to sell, in each case at what price, and acted on instructions given to it. In our judgment, the evidence on which we relied to conclude that the deals were contrived and orchestrated shows equally that the Appellants had direct actual knowledge that their deals were connected with the fraudulent evasion of VAT. As Mr Cunningham suggested we should, we equate Mr Tomlinson's dishonesty with actual knowledge of fraud.

910. In our judgment, the evidence as to the result of the split deals finally disposes of the Appellants' duping claim; they knew that their purchases were connected with the fraudulent evasion of VAT. That brought them within the category of participants in the fraud.

911. Although in conclusion we have focused our attention on BTS's contra-trading deals, we are satisfied that our holdings are equally applicable to the Appellants' direct tax loss deals; they were participants in them too.

912. We are further satisfied that the Appellants are entitled to recover none of the input tax they have sought. It follows that we dismiss the appeal in its entirety.

913. In the event of the appeal being unsuccessful, Mr Cunningham made application for HMRC's costs. We grant the application, directing that the Appellants pay HMRC's costs of and incidental to and consequent upon the appeal, such costs to be calculated at the standard rate. In the event of the parties being unable to agree the amount of the costs, we direct that they be assessed by a Taxing Master of the Supreme Court.

914. We cannot conclude without thanking junior counsel for both parties for their assistance. We were required to conduct the entire appeal without a court clerk and had to rely on junior counsel to make available to us on a daily basis the files and documents we required. They performed that duty admirably.

915. 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: 24 March 2015

THE SCHEDULE

BTS – May deal 33

Step	Code	Trader	Date	Inv.No	Description	Units	Price	Net Value	VAT	Total
-5	Hijack	Eutex Ltd	31/5/06	101386	Nokia 6111	7000	136.45	955,150.00	167,151.25	1,122,301.25
-4	Missing	Dialhouse	31/5/06	3927	Nokia 6111	7000	136.60	956,200.00	167,335.00	1,123,535.00
-3		Yodem	31/5/06	191	Nokia 6111	7000	136.70	956,900.00	167,457.50	1,124,357.50
-2		Sabretone	31/5/06	31050602	Nokia 6111	7000	136.80	957,600.00	167,580.00	1125,180.00
-1		Epinx	31/5/06	Ep-05-EPMIN058254	Nokia 6111	7000	137.00	959,000.00	167,825.00	1126,825.00
Broker +1		BTS FAF Int	31/5/06	5014	Nokia 6111	7000	138.35	968,450.00	ZR	968,450.00

Points to note:

1. Whilst the phones were in the UK (i.e. from step –5 to broker) they remained throughout at the premises of Outime Logistics Ltd, a freight forwarder
2. Every customer was invoiced on 31 May 2006
3. Every transaction was back-to-back, i.e. it involved the same number of phones the same model and the same manufacturer
4. Every trader concerned made a profit
5. The profit per phone made in each case, ignoring that of the broker, was Eutex 15p, Dialhouse 10p, Yodem 10p, Sabretone 20p, Epinx £1.35
6. All payments were made in sterling.

Payment chain for May deal 33 – All payments made on 6 June 2006

	Time Logged on	Time money moved
Global Financial Services Management Ltd (Hong Kong)	13.34	13.36
Estocom Distribution (Estonia)	13.35	13.39
FAF International SRL (Italy)	13.33	13.48
BTS (UK)	13.33	13.57
Epinx Ltd (UK)	13.39	14.03
Sabretone Electrics Ltd (UK)	14.08	14.12
Yodem Ltd (UK)	14.11	14.21
Prabud Electronics KFT (Hungary)	14.35	14.39
Global Financial Services Management Ltd (Hong Kong)		

Notes:

1. Global Financial Services Management Ltd (GFSM) in Hong Kong, Estocom in Estonia, FAF in Italy, and Prabud in Hungary all logged on using the same computer IP address, i.e. they all used the same computer terminal.
2. The postal addresses of GFSM, Estocom and FAF were all to be found in the Costa del Sol area of Spain (Mijas, Malaga and Marbella)
3. Sabretone and Yodem both logged on using the same IP address
4. Yodem's transaction was the subject of a third party payment by G. G. Oxspring
5. All payments were made through sterling accounts with the First Curacao Investment Bank.