[2016] UKFTT 0406 (TC)

TC05160

Appeal number: TC/2010/05430 and TC/2010/04860

VAT- MTIC – onus of proof on HMRC – pleadings – connection - necessity of assessment – no - whether Kittel applies to the contra trading construct – whether the appellants knew or should have known that transactions were connected with a fraudulent evasion of VAT – yes - appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

AIRCALL INTERNATIONAL LIMITED and AIRCALL EXPORT LIMITED — **Appellants**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: HELEN MYERSCOUGH

Sitting in public at Bedford Square on 7-11, 14-18, 21, 22 and 31 July and 26 and 27 August 2014

The Appellants' Closing Submissions dated 24 September and response to Respondents Closing Submissions dated 20 October 2014

The Respondents Closing Submissions dated 22 September 2014

Ian Bridge of Counsel, instructed by The Khan Partnership LLP for the Appellants

John McGuiness QC and Ben Hayhurst of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

The appeals

TC/2010/05430

1. The appeal in relation to Aircall International Limited ("Aircall") was lodged on 25 June 2010 and was in respect of a decision of the respondents ("HMRC") dated 28 May 2010 denying Aircall input tax credit claims in the sum of £1,806,526.31 relating to 35 transactions (deals) in its monthly VAT accounting periods 04/06, 05/06, 06/06 and 07/06.

2. The amounts, corresponding VAT accounting periods and deal numbers are as follows:-

Periods	**Amount**	**Deal Numbers**
04/06	£880,968.72	1-20
05/06	£676,602.50	21-31
06/06	£83,405.09	32-33
07/06	£1,065,550.00	34-35

3. The 35 deals that generated the input tax, which are the subject matter of these appeals, consisted of purchases by Aircall of goods from UK traders and the onward sale and despatch of those goods to traders based in another Member State of the EU ("broker deals"). The goods were purchased with VAT at the standard rate and sold with VAT at the zero rate. Those deals were conducted over a period of four months being April to July 2006 with the first purchase on 3 April and the last on 27 July 2006.

4. HMRC has denied all of Aircall's export transactions for the VAT periods March-July 2006 with the exception of one deal in the VAT accounting period July 2006 regarding a purchase of 1500 Motorola C118 telephones from Calltel Telecom Limited and the sale to Majedh Electronics on 4 July 2006 in which the deal was traced back to the manufacturer Motorola. The margin on that deal was 19.64%. HMRC has not denied the input tax for Aircall's UK to UK deals or its acquisition deals carried out in the VAT periods in issue.

5. HMRC contend that all 35 of the contested deals entered into by Aircall have been traced to a tax loss via a defaulting trader and that the input tax incurred by Aircall in those transactions was connected with the fraudulent evasion of VAT and that Aircall knew or should have known that.

6. The Statement of Case incorporating a Schedule explaining the nature of Missing Trader Intra-Community ("MTIC") fraud in basic chains and with appendices including the decision letter with its appendix, the Notice of Appeal with its appendix and the deal sheets with deal chains was filed by HMRC on 20 September 2010.

TC/2010/04860

7. The appeal in relation to Aircall Export Limited ("AEL") was lodged on 28 May 2010 and related to the decision of HMRC dated 28 April 2010 to deny AEL's input tax credit claim in the sum of £44,730 relating to one transaction (deal) on 29 September 2006 included in its monthly VAT accounting period 09/06.

8. HMRC contend that the supply chain leading to AEL's one broker deal, Deal 36, traces back to Future Communications (UK) Limited ("Future"), which, it is now conceded, was at all material times a vehicle for the fraudulent evasion of VAT.

9. In its VAT accounting periods 04/06 and 07/06 Future made 6,971 supplies of goods and of those 69% of the broker deal chains have been traced back to UK tax losses of almost £144 million. Those broker deal chains have been traced back to seven UK traders and the output VAT remains unpaid.

10. There is no suggestion that there was any fraud in AEL's own supply chain.

11. HMRC contend that Deal 36 had been traced to a tax loss via the "contra-trader" Future and that AEL knew of the connection with the fraudulent evasion of VAT or, in the alternative, the appellants should have known of the connection.

12. The term contra-trader is widely acknowledged to be "an HMRC construct" to describe a trader which (a) buys goods from a defaulter and exports them claiming, in what is termed the "dirty chain", the input VAT ("the dirty input VAT") on the purchase; and (b) in a "clean chain", imports goods and sells them to a third trader, and then offsets the dirty input VAT against the clean input VAT on the sale to the third trader. The dirty input VAT is by this means sought to be transmuted into clean input VAT in the hands of the third trader; or at any rate the third trader is sought to be so distanced from the default that he could not know of the connection to it, or HMRC would not discover it.

13. The Statement of Case incorporating a Schedule explaining the nature of MTIC fraud in both basic and contra chains and with appendices including the decision letter and the deal sheet with deal chains was filed by HMRC on 13 September 2010.

General

14. The appeals were heard together at the request of both parties as, in the relevant period, although separate legal entities with separate bank accounts, statutory accounts and VAT registrations, both appellants effectively operated on a day to day basis as one unit sharing the same staff, premises and resources. The Tribunal refused the Application to consolidate the appeals and on 17 December 2010 directed that they be heard together.

15. Both appellants were represented by Mr Ian Bridge of Counsel instructed by the Khan Partnership LLP. The Khan Partnership LLP was previously known as Hassan Khan & Co and have acted for the appellants throughout. They also acted for AEL in their previous successful appeal to the Tribunal in 2005 ("the 2005 Appeal").

16. Mr John McGuiness QC and Mr Ben Hayhurst of Counsel appeared for HMRC. Throughout this decision we have referred to the respondents as HMRC but this should also be read, where appropriate, as a reference to HM Customs & Excise.

17. There are so many companies and individuals referred to in this decision that for ease of reference we annex at Appendix 1 a note of the primary Dramatis Personae (other than the parties and the defaulting traders) and the name by which they are referred to in this decision. That Appendix also identifies the many deals in which those companies feature in different capacities.

The materials before the Tribunal

18. We had the following bundles namely:-

(a) Pleadings including Opening Submissions for all parties.

(b) Unheard applications by both parties.

(c) Correspondence – this was a bundle extending to some 255 pages covering correspondence between the parties from June 2006 to April 2014.

(d) Appellants' disclosure – this comprised two bundles including miscellaneous documentation for each of the 35 deals in Aircall's appeal. On the antepenultimate day of the Hearing, in response to Mr Bridge's question as to the origin of those documents, Mr Ghazi confirmed that "These would have been with the files we would have had, attached to the deal sheets." Regrettably it only transpired on the penultimate day of the Hearing, this documentation having repeatedly been referred to in oral evidence, that many of those documents were not originals. They had been printed off long after the event and in many instances, since they were printed onto different templates did not carry the contemporaneous address or format. Some of what purported to be due diligence was information dating from periods long after those with which we are concerned.

    It was suggested they had been produced because the deal documentation in the other bundles was not complete, although at one stage Mr Bridge confirmed that that was not correct. On close examination, and we have closely examined the bundles, the reverse seems to be the case since there is a great deal more information in the other bundles. However, very helpfully the appellants' solicitors have compiled a schedule which, in large measure, gives both references and that was appended to their closing submission.

(e) Four bundles of HMRC's disclosure.

(f) 47 bundles of witness statements and relative exhibits.

(g) Two bundles of joint Authorities.

19. In the course of the Hearing we were provided with a file of deal packs.

20. In addition, a number of other Authorities were also provided to us. Those authorities which are included in the joint bundles of Authorities and in the other bundles are listed and annexed at Appendix 2 and will be referred to in the body of the decision by the appropriate reference. All other authorities to which we were referred are cited in full in the decision.

Applications

21. The Correspondence bundle disclosed a long history of applications and correspondence about the admission, or not, of evidence and exhibits. It is evident from that bundle that these appeals have been highly contentious. Over the last number of years there has been substantial disagreement between the parties in regard to the timing of service of evidence and the relevance of witness statements and evidence. The last Hearing in that regard was on 16 September 2013 and Judge Short issued Directions dated 20 September 2013 ("the Directions"), a copy of which is annexed at Appendix 3.

22. At the outset of the Hearing of these appeals there were a number of further applications which fell to be determined and thereafter the lengthy proceedings were punctuated by objections and yet more applications some of which, thankfully, resolved themselves. Since they are extensive, the detail of most of those applications, the rulings thereon and, where appropriate, the reasons therefore are set out in the Footnote to this Decision.

23. In summary, the primary preliminary applications were:-

i. The appellants' application for Directions that HMRC's skeleton argument be amended and limited and evidence or argument relating to allegations not pleaded be excluded. We refused that application on the basis that the Statements of Case together with the appendices thereto and the witness statements, served long before this Hearing, very clearly established not only the parameters and the general nature of the HMRC case but also considerable detail in regard to the allegations faced by the appellants. We were in no doubt that the appellants should have been, and indeed were, aware of the nature of the case that they faced.

ii. HMRC's application for admission of replacement witness evidence and a witness statement in regard to Operation Rosary, all of which were eventually admitted (with the omission of a few paragraphs).

iii. The applications for late admission of Mr Sheth's fourth witness statement, Mr Fletcher's second witness statement in answer thereto, Mr Sheth's fifth witness statement in response to Mr Fletcher and Ms Reed's witness statements also in response thereto.

24. In terms of the applications during the Hearing, the primary significant contentious matter was HMRC's application to serve a bundle of deal documents and

one assessment schedule and that application was refused on the basis that it was far too late.

25. There were a number of applications for costs and indeed it can be seen from the correspondence file and previous Directions that there are extant unresolved applications for costs. All applications in regard to costs were and remain reserved.

The evidence

26. Mr Bridge made it clear at the outset that he intended to cross-examine the "defaulting officers" to test their individual conclusions as to whether or not they could establish, with cogent evidence, that a fraud had taken place on the part of the defaulting trader. In the event, in fact, not all of the Officers were required. Specifically, it was conceded that Future, and therefore all of those in the contra chain were connected with the fraudulent evasion of VAT.

27. In closing submissions, the appellants very helpfully furnished us with Schedules on Deal Overview, Banking (based on HMRC's Schedule), Overview of Tax Loss (Connection) and Mark up and Margins.

28. In closing submissions, HMRC furnished us with an Appendix identifying "Documents establishing a connection and/or existence of an assessment" in respect of the deals challenged by the appellants.

29. We are very grateful to both parties for the detailed references to the Bundles.

Oral evidence

30. For the appellants we heard evidence lasting over a period of days from Mr Ghazi and we also heard briefly from Mr Sheth and Ms Reed.

31. For HMRC we had the evidence of the following Officers in regard to the undernoted defaulting traders, two of which were ultimately not oral evidence:

Deal Reference(s)	**Defaulting trader**	**Officer**
04/06 Deals 1, 2 & 15	Attic Attack UK Ltd ("Attic Attack")	Theresa Launder
04/06 Deal 3	Flooring Centre UK Ltd ("Flooring Centre")	Sheila Edmead
04/06 Deals 4, 7 & 14	CT Co UK Ltd ("CT Co")	Barry Patterson
04/06 Deals 5 & 6	Goodluck Employment Services Ltd ("Goodluck")	Barry Patterson
04/06 Deals 8 & 10	Wildtower Ltd ("Wildtower")	Nikolas Mody
04/06 Deal 11	Computec Solutions Ltd ("Computec")	Timothy Reardon

04/06 Deal 12	GPA International Ltd) ("GPA")	Michael Merriman (not oral)
04/06 Deal 13	RK Brothers Ltd ("RK")	Marva Harry
04/06 Deals 9, 16, 18 & 20	Skywide Ltd ("Skywide")	Stewart Yule
04/06 Deal 17	Apollo Communication Centre Ltd ("Apollo")	Pankaj Mandalia
04/06 Deal 19	Eclipse Windows, Doors and Conservatories Ltd ("Eclipse")	Judith Mooney (not oral)
05/06 Deals 21 to 27	Computec	Timothy Reardon
05/06 Deal 28	Stock Mart Ltd ("Stock Mart")	Christopher Williams
05/06 Deal 29	Regal Emporium Ltd ("Regal")	Susan Roberts
05/06 Deal 30	Cyberweb Limited ("Cyberweb")	Peter Dean
05/06 Deal 31	Sweetlime Ltd ("Sweetlime")	Timothy Reardon
05/06 Deal 31	Sweetlime	Barry Patterson
06/06 Deal 32	ICM UK Ltd ("ICM")	Andrew Shorrock
06/06 Deal 33	E Hogan Ltd ("E Hogan")	David Lee
07/06 Deal 34	Phone City Ltd ("Phone City")	George Edwards
07/06 Deal 35	DBP Trading Ltd ("DPB")	Allistair Strachan

32. We had the evidence of the following Officers in regard to specific matters:-

Officer	**Subject matter**	**Deal**
Neil Brownsword	Broker Officer, Aircall	1 to 35
Margaret Brown	Broker Officer, AEL	36
Anthony Bradshaw	Operation Apparel	13 and 31
John Grace	Operation Apparel	
Terence Mendes	FCIB/Operation Apparel	
Alan Ruler	FCIB	1, 8, 11, 12, 20, 23-24, 27-30, 32 and 34
Roderick Stone	MTIC General	
Sue Ogburn	Sunico	
Stephen Marshall	Operation Rosary	Deal 36
Judith Clifford	Future	Deal 36

33. We also had the uncontested written statements of Officers:

(a) Martin who had adopted the statements of Officer Coelho for E T Global Solutions Limited, a defaulter in regard to Future.

(b) Needs and Medcroft in regard to Okeda Ltd and UK Communication Ltd respectively both of who were defaulters in regard to Future.

(c) Andrew Letherby in regard to FCIB.

34. Lastly we had the evidence of John Fletcher.

The legal framework for MTIC fraud

35. As we indicate above, the basis for the refusal of input tax credit in both appeals is HMRC's contention that all of the 36 deals were connected the fraudulent evasion of VAT in what has been described as MTIC fraud and the appellants knew or ought to have known that.

36. Mr Bridge suggested that HMRC's opening submissions on law were largely uncontentious. However, it became apparent that the parties approach to the underlying law was not entirely in harmony. In closing submissions the appellants stated that two of the outstanding issues were:-

(i) What legal test is to be applied in determining whether in so called contra-trade cases there is a connection to fraudulent evasion of VAT?

(ii) What legal test is to be applied in determining whether or not the appellants should have known that the trading was connected to fraud?

Fonecomp

37. In opening its case HMRC took issue with the appellants' analysis of the law in regard to contra-trading. As both parties are aware the Court of Appeal has now issued its decision in *Fonecomp Limited v HMRC*[1] ("*Fonecomp*") and that clarifies the law in regard to contra-trading. *Fonecomp* is particularly useful, not only in regard to contra-trading, since it sets out very clearly the position in regard to the right to credit for input tax and/or repayment and analyses a number of the cases to which we were referred.

38. Mr Bridge argued that *Mahagében* and *Bonik* restrict the application of the *Kittel* principle in contra cases. At paragraph 33, *Fonecomp* makes it explicit that

(a) paragraph 62 of *Mobilx* is good law and that reads as follows:

"62. The principle of legal certainty provides no warrant for restricting the connection, which must be established, to a fraudulent evasion which immediately precedes a trader's purchase. If the circumstances of that purchase are such that a person knows or should know that his

[1] 2015 EWCA Civ 39

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

(b) the conclusion of Hildyard J *in Edgeskill Limited v HMRC*[2] at paragraph 124 is also endorsed and that reads:

"124. In short, nothing in *Mahagében*, or perhaps I should add for comprehensiveness, *T□th, Bonik*, or any other CJEU authority cited, including *Hardimpex KFT* case [C-444/12], LVK-56 [case C-643/11] and *Forvards V SIA* case [C-563/11] … involves any departure from or restriction of the *Kittel* principles as interpreted in *Mobilx*. As indicated above, that analysis is binding at this level, and I could only depart from it if I was persuaded that subsequent cases cast such doubt as to merit a reference to the CJEU: I have not been so persuaded."

39. The Court went on to consider what constituted a connection between the fraud and the transaction for which the trader seeks to exercise the right to deduct and concluded that

"43. Under the jurisprudence of the CJEU it is for the national court to determine if there was a connection on the facts, and this question is to be determined on the objective evidence and without reference to the trader's knowledge.

44. Furthermore in my judgment, there is nothing in *Kittel* which would lead to the conclusion that HMRC has to show that the transaction provides tangible assistance in carrying out the fraud. … Furthermore, … there is no warrant for reading in a requirement that, in a contra-trading case, the connection can be established only by inclusion of details of the transaction in question in a VAT return."

40. At paragraph 46, Arden LJ pointed out that the Court of Appeal had considered the extent of knowledge required by the *Kittel* principle in great detail in *Mobilx* and she endorsed Moses LJ in that case at paragraphs 59 and 60 which read as follows:-

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

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

41. The next issue was the determination as to what degree of knowledge of the fraud the trader must have in order to be liable to be a participant in it. At paragraph 49, Arden LJ endorsed the test set out by Briggs J in *Megtian* at paragraph 37 and that reads:-

[2] [2014] UKUT 38 (TCC)

> "37. In my judgment, there are likely to be many cases in which a participant in a sophisticated fraud is shown to have actual or blind-eye knowledge that the transaction in which he is participating is connected with that fraud, without knowing, for example, whether his chain is a clean or dirty chain, whether contra-trading is necessarily involved at all, or whether the fraud has at its heart merely a dishonest intention to abscond without paying tax, or that intention plus one or more multifarious means of achieving a cover-up while the absconding takes place."

42. At paragraph 51 Arden LJ stated:-

> "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 transactions 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* … 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".

43. Lastly, in the conclusion at paragraph 54 it is made explicit that CJEU case law does not require that a trader either knows the details of the fraud or of the connection between its purchases and the fraudulent evasion of VAT.

44. Mr Bridge had argued that HMRC must establish that a trader **must** have known about its transaction and the connection to fraudulent loss of VAT and it must be a default on the same goods; accordingly the "contra-trade construct" is invalid. *Fonecomp* has confirmed that that is not necessary and that the contra trade construct is certainly valid.

45. It is clearly the case 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.

Other authorities

46. The test in *Kittel* in respect of knowledge is that the requisite state of knowledge is that which existed at the time that the appellants entered into the disputed transactions. We recognise that whilst the question of knowledge must be applied to each separate transaction, the fact that the transactions occurred over a short period of five months was relevant to the developing knowledge on the part of the appellants, for example, as a result of the notifications and warnings provided by HMRC that the appellants' purchases had been traced back to defaulting traders.

47. We did not therefore view each transaction in isolation but decided that we were entitled to examine all of the available and relevant evidence and that therefore the surrounding circumstances of each transaction and the totality of the deals were relevant considerations as set out by Clarke J in *Red 12* at paragraphs 109-111 and endorsed by Moses LJ in *Mobilix.* Those paragraphs read:

> "109. Examining individual transactions on their merits does not, however, require them to be regarded in isolation without regard to their attendance 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, eg that it is part of a fraudulent scheme. The character and 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 1000 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, 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 the taxpayer knew or ought to have known the Tribunal is entitled to look at the totality of the deals affected 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."

48. In paragraph 40 above we have included the two paragraphs from Moses LJ specifically endorsed by Lady Justice Arden in *Fonecomp*. However, the following paragraphs where the Court of Appeal examined the ramifications of the decision of the ECJ in *Kittel* are also very relevant. What the Court of Appeal decided at the following paragraphs was:

"(41) In Kittel … after para 55 the court developed its established principles in relation to fraudulent evasion. It extended the principle, that the objective criteria are not met where tax is evaded, beyond evasion by the taxable person himself to the position of those who knew or should have known that by their purchase they were taking part in a transaction connected with fraudulent evasion of VAT … It extended the category of participants who fall outwith the objective criteria to those who knew or should have known of the connection between their purchase and fraudulent evasion. Kittel did represent a development of the law because it enlarged the category of participants to those who themselves had no intention of committing fraud but who, by virtue of the fact that they knew or should have known that the transaction was connected with fraud, were to be treated as participants. Once such traders were treated as participants their transactions did not meet the objective criteria determining the scope of the right to deduct.

(43) …A taxable person who knows or should have known that the transaction which he is undertaking is connected with fraudulent evasion of VAT is to be regarded as a participant and fails to meet the objective criteria which determine the scope of the right to deduct.

(51)…The court must have intended Kittel to be a development of the principle in Optigen… The court must have intended the phrase 'knew or should have known'… to have the same meaning as the phrase 'knowing or having any means of knowing' which it used in Optigen.

(52) If a taxpayer has the means at his disposal of knowing that by his purchase he is participating in a transaction connected with fraudulent evasion of VAT he loses his right to deduct, not as a penalty for negligence, but because the objective criteria for the scope of that right are not met. It profits nothing to contend that, in domestic law, complicity in fraud

denotes a more culpable state of mind than careless, in the light of the principle in Kittel. A trader who fails to deploy means of knowledge available to him does not satisfy the objective criteria which must be met before his right to deduct arises.

(61) Such an approach does not infringe the principle of legal certainty … A trader who decides to participate in a transaction connected to fraudulent evasion, despite knowledge of that connection, is making an informed choice; he knows where he stands and knows before he enters into the transaction that if found out, he will not be entitled to deduct input tax. The extension of that principle to a taxable person who has the means of knowledge but chooses not to deploy it, similarly, does not infringe that principle. If he has the means of knowledge available and chooses not to deploy it he knows that, if found out, he will not be entitled to deduct. If he chooses to ignore obvious inferences from the facts and circumstances in which he has been trading, he will not be entitled to deduct.

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

(81) …It is plain that if HMRC wishes to assert that a trader's state of knowledge was such that his purchase is outwith the scope of the right to deduct it must prove that assertion.

(82) But that is far from saying that the surrounding circumstances cannot establish sufficient knowledge to treat the trader as a participant. As I indicated in relation to the BSG appeal, tribunals should not unduly focus on the question whether a trader has acted with 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 focusing on the question of due diligence is that it may deflect a Tribunal from asking the essential question posed in Kittel, namely, whether the trader should have known that by his purchase he was taking part in a transaction connected with fraudulent evasion of VAT. The circumstances may well establish that he was."

It was common ground that these principles should be applied and in the light of the circumstances prevailing at the date of the transaction.

49. We also adopt the dicta of Lewison J in *Livewire:*

"76 (viii) It is not contrary to Community law to require a supplier to take every step that could reasonably be required of him to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion;

(ix) Likewise a taxable person can be expected to act with all due diligence and care."

The issues

50. There was very little in these appeals on which the parties were in agreement and there was frequent legal argument. Indeed, we did request a Statement of Agreed Facts but regrettably have not been provided with same. For that reason we have set out the facts and our findings thereon in considerable detail.

51. In determining this appeal we are required to consider the four questions approved by the High Court in *Blue Sphere 1* and quoted by Mr McGuiness in his oral opening, albeit by reference to *Edgeskill,* namely:

a. Was there a VAT loss?

b. Is so, was it occasioned by fraud?

c. If so, were the appellants' transactions connected with the fraudulent VAT loss?

d. If so, did the appellants know or should they have known of such a connection?

Other Issues

52. In the submissions numerous other issues were also raised by the appellants.

The appellants' arguments

No reason to be concerned

53. AEL had been successful in the 2005 appeal and that had given the appellants "confidence that they were dealing with their VAT issues in a satisfactory fashion". It was repeatedly stressed that they had been "vindicated". We think not. That is addressed in the discussion below under the heading "The 2005 appeal".

54. The fact that over a period of years substantial VAT input reclaims had been paid by HMRC gave the appellants assurance that HMRC had no concerns over their trading and counterparties. Firstly, we have no hesitation in accepting HMRC's argument that all repayments of VAT are made on a "without prejudice" basis, and secondly, and perhaps more pertinently, the 2005 appeal and the arguments presented at that Tribunal must have forcibly indicated HMRC's concerns about AEL's, and therefore both appellants', manner of trading. Thirdly, the raid with a search warrant on 16 August 2006 must surely have given immense cause for concern yet Deal 36 followed that.

Discrimination and policing of the market

55. It was argued that the principle of equal treatment was infringed by HMRC since they did not tackle all of the other parties in the supply chain and specifically that a number of the missing or defaulting traders had been identified as being involved in fraud and yet had not been deregistered or made the subject of any alternative civil or criminal enforcement process. Indeed, it was stated that "in other words the loss which arose on default was being deliberately ignored. This approach effectively set a trap for the Appellants".

56. Mr Bridge submitted that HMRC had had the opportunity to prosecute individuals in relation to VAT fraud and that on the facts of these appeals there is

evidence that HMRC failed to police the internal market in mobile telephones adequately, or at all, during the period of the relevant trading. Reliance was placed upon *Mahagében* for the proposition that HMRC must adequately police the market to ensure that defaulters were pursued. It was submitted that the approach of HMRC was flawed and arguably unlawful.

57. It was argued that for example in regard to a number of the defaulting traders, such as Computec, CT Co, Good Luck and Skywide, HMRC had not acted promptly enough. That is not a matter for this Tribunal. Similarly, the argument that HMRC did not act to prevent Sunico and its criminal partners from defaulting on VAT payments in the UK is not a matter for this Tribunal.

58. In *Powa* at paragraph 60 Ross J said

> "As to non-discrimination, this appeal concerns the decision by HMRC that the objective criteria determining the right to deduct input tax were not met as regards these claims for repayment by PJL (the appellants). If that is the case, PJL were not entitled to such repayments, irrespective of the position of anyone else … Furthermore, whether or not HMRC could have applied a similar approach to the traders who served as buffers in the chains (who would generally not be making a repayment claim to HMRC but simply crediting the input tax against the output tax received) does not affect that conclusion; and whether HMRC should have pursued those traders for an account of the output tax received, is a question of policy regarding the effective enforcement of the VAT regime, with no doubt limited resources. Accordingly, I consider that the principle of non-discrimination is not engaged".

59. It was also suggested that HMRC should have warned AEL about Sunico and disclosed information from their Danish counterparts. Although not bound by, we agree with, the reasoning of the FTT in *Eurosel* where it was found that it was not feasible for traders to seek to shelter behind the action or inaction of HMRC in order to escape the application of *Kittel*. That reads as follows:-

> "28. …In other cases HMRC have taken the view that how a trader operates is a commercial consideration for the trader and it is no part of their responsibility to necessarily alert that trader to the possibility that the trader is involved in an MTIC fraud. In fact there are many cases where to do so would be counter-productive and jeopardise the investigations …
>
> 29. We consider that the advising of traders of a potential MTIC situation is not a 'public law obligation' and we do not believe that it is necessarily prudent for HMRC to advise all individuals, who might be involved in the MTIC fraud, of that fact. We do not, therefore, accept that it is either an abuse of HMRC's powers or a breach of *Eurosel's* 'legitimate expectations' for them not to have been informed that they might be involved in an MTIC fraud."

60. One aspect of the appellants' case which was not explicitly addressed but is implicit in Mr Bridge's arguments is that because HMRC failed to prevent fraudulent trading by catching the defaulters, the market was awash with mobile telephones on which a default had earlier occurred, so therefore the appellants could not help but buy telephones connected to fraud in order to fulfil its customers' genuine trading requirements. The fact that there was evidence of extensive MTIC fraud is a factor that we weighed in the balance.

HMRC policy

61. It was argued that in around February 2006 in the face of eye watering losses from fraud, and approximately 18 months before the introduction of the reverse charge in 2007, HMRC instituted a blanket policy of denying input tax reclaims in all cases where extended verification led to a defaulting trader. Like Judge Porter in *Unistar* we agree that there is absolutely no evidence of any such policy and that has been denied repeatedly by Mr Stone, in particular, and HMRC in general. We have no jurisdiction to consider HMRC policy in that context. In any event such an assertion is irrelevant to the issue of knowledge.

The extent of tax losses, if any

62. Although the argument was not pursued at the Hearing, at paragraph 48 of the appellants' opening submission it was argued for the appellants that HMRC were seeking to deny repayment of input tax credits which amounted to more than the amount of tax said to have been lost and that that infringed Community law principles. The Upper Tribunal at paragraph 57 of *S&I* states:

> "57. It is now clear, therefore, that the FTT was mistaken in thinking that input tax should be denied only to the extent of the tax loss. The position is rather that a trader who falls to be treated as a participant in tax fraud loses the right to any input tax [credit], whatever the extent of the tax loss."

We are bound by, and agree with, that.

What is a tax loss?

63. It was argued for the appellants that without an assessment under Section 73 of the Value Added Tax Act 1994 or the determination of a debt due to the Crown in respect of an invoice under Schedule 11 (paragraph 5) of that Act no recoverable right to VAT is established. In the absence of an assessment, the right to tax had not crystallised in the form of an enforceable debt and only if the debt was recoverable could a lack of recovery amount to a loss to the Revenue. That is an argument which was advanced in the FTT appeal in *S&I Electronics v HMRC*[3] and it was comprehensively rejected at paragraphs 61 and 62 which read as follows:

> "61. We do not agree. The issue is whether there is, in the words of paragraph [59] of *Kittel*, 'fraudulent evasion of VAT'. It seems to us that this will be the case where, as the result of fraud, the State does not receive the VAT it ought to have received had the relevant legislation been complied with by the trader. The question of whether or not an assessment has been made is irrelevant.
>
> 62. Article 10 of the Sixth Directive indicates that the tax becomes chargeable when the tax authority becomes entitled to claim the tax from the person liable to pay. In that context there is fraudulent evasion where the person who is liable to pay, because of the relevant chargeable event (the delivery of the goods) has occurred, defeats the entitlement of the State by fraudulent means; that entitlement exists not by virtue of administrative action but by reason of the occurrence of the chargeable event. The ECJ said in *Société Financiere d'Investissements v*

[3] 2009 UKFTT 108

> *Belgium* [2000] STC 164 at 23, that Article 10 'enables the date on which the tax debt arises to be determined'. What is at stake in our view is fraudulent evasion of the payment of that debt, not of a later assessment."

Although not bound by that decision we entirely agree with that analysis. An assessment is not necessary. It is a mechanism for recovery of tax that is due. In our view the tax loss occurs when a trader does not account for the output tax.

Unparticularised pleadings with regard to fraud

64. This point was subject to extensive written and oral argument in regard to the appellants' preliminary application and that is summarised at A in the Footnote to this decision. We have set out at length our views on the pleadings and whether they establish the parameters of the appeals, which, in our view, they certainly do. As can be seen, it was argued that some 20 "new" matters were raised in the Opening Submissions. This is a very lengthy decision in any event so we do not set out at length the cross references to all 20 issues but at the time we had no difficulty in identifying the fact that all 20 had been referenced by HMRC, often a very long time previously. However, it is again argued in the closing submissions.

65. HMRC then relied on the decision dated 15 September 2014 in *Data Select* v *HMRC*[4] where the appellants application for further particularisation was refused. Of course, as Mr Bridge points out that is not binding on us.

66. It was not a case cited to us as, of course, it was issued after the date of the Hearing in this case but the Upper Tribunal in *Universal Enterprises (EU) Limited v* HMRC[5] ("Universal") stated at paragraph 100 that:

> "100. In our view HMRC pleaded the matter appropriately, and it is apparent that Universal fully understood the case that it had to meet, recognising that the burden of proof lay with HMRC. In particular, what was pleaded required HMRC to satisfy the *Kittel* test. It may be that evidence suggests that Universal was itself a participant in the fraud or that it was engaged in a conspiracy would ensure that the *Kittel* test was met. The *Kittel* principle is, however, a principle of the EU VAT system and we do not consider that it requires HMRC to plead either fraud or conspiracy as part of their case. Assuming that HMRC is able to produce evidence sufficient to support its case on the application of the *Kittel* test to the civil standard, Universal would need to respond essentially by showing that there was in the circumstances a reasonable basis for its transactions so that it would be impossible or unsafe to conclude that the *Kittel* test was satisfied. Plainly HMRC having satisfied the FTT that the contra-traders were fraudulent and that Universal's transactions were connected with fraud, Universal failed to displace the further conclusion that it had actual knowledge of the fraud."

We are bound by that decision and although our decision on the pleadings was taken without the benefit of that analysis, it succinctly articulates the basis for our decision.

67. The appellants relied heavily on *Davis & Dann* stating that paragraphs 45-47 were of particular importance. The Upper Tribunal found that the FTT had erred in

---

[4] LON/2008/0762

[5] [2015] UKUT 311 (TCC)

law "…by going beyond HMRC's pleaded case and arriving at findings of fact and a conclusion on the facts which was not supported by the evidence". We agree with the proposition in paragraph 45 that "…it is for HMRC to demonstrate on the balance of probabilities that the only reasonable explanation for the circumstances in which the Appellants' transactions took place is that those transactions were connected to fraud….and in particular it was for HMRC to produce the evidence to make good its case." That case turned on its own facts, as do these appeals.

68. In any event, as at the date of issue of this decision, the Court of Appeal has issued its further decision allowing the appeal from the Upper Tribunal. Our decision is not predicated thereon since we have not invited submissions from parties thereon and the delay in issue of this decision is not attributable to the parties.

69. Our view was, and is, that HMRC had pleaded *Kittel*, they had outlined the parameters in that context, the nature of MTIC fraud had been explained and witness statements with exhibits extending to approximately 20,000 pages had been served so the appellants, who have been represented throughout by lawyers with considerable experience in MTIC cases, knew or should have known the parameters of these appeals. Indeed that is evident from their own pleadings, witness statements and exhibits.

70. We do not accept the assertion in Closing Submissions that "At no point … was a specifically pleaded case and any inference sought to be drawn put in clear terms to Mr Ghazi and to Mr Sheth". Mr McGuiness very properly, and bluntly, put it to both gentlemen that they knew that all 36 transactions were connected to fraud. He also put it to Mr Ghazi that "the deals were contrived". Even had he not done so, we point to paragraph 81 of *Universal* where the Tribunal makes the point that: "The fact that they may not have been asked directly whether they knew of the fraudulent nature of the transactions does not vitiate the FTT's conclusion based on their evidence that they … did know of it".

Our task is to establish whether or not on the evidence adduced, HMRC have established that the *Kittel* test is met.

HMRC's arguments

71. HMRC submit that Aircall and AEL should have known that their transactions were connected with fraud by reason of the information available to them and the lack of precautions taken (which could be reasonably required of them) to ensure that the transactions were not connected with fraud. The basis for that assertion is to be found at paragraph 51 of *Kittel* which reads:

> "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 …".

Burden of proof and Evidence

Burden of Proof

72. The burden of proof rests on HMRC. Mr Bridge argued that that was a difficult matter for the Tribunal because, although it was a matter of agreement that it is the civil standard, all innocent possibilities have to be discounted. We agree with Lady Hale at paragraph 34 in *S-B Children* that the simple civil standard is on the balance of probabilities:

> "34. This issue shows quite clearly that there is no necessary connection between the seriousness of an allegation and the improbability that it has taken place. The test is the balance of probabilities, nothing more and nothing less."

Further, in that context, at paragraph 147 of *Sunico* Mrs Justice Proudman rejected the argument that:

> "HMRC's case 'piles probability on probability' with the effect that the standard of proof … becomes a very high one indeed. The Court has to decide a number of issues of fact, deciding each issue on the balance of probabilities. What the court does not do is say that if there are three issues to be decided and each is decided as to a 51% probability, the probability that they have all been surmounted is very small indeed, half of a half of a half."

73. HMRC must demonstrate that the appellants knew or should have known that their transactions were connected with fraud. It is not enough that the circumstances of the taxpayers transactions might reasonably lead the appellants to suspect a connection with a fraud and nor is it enough that the appellants should have known that it was more likely than not that the transactions were connected with fraud.

74. The test is whether on the balance of probability the *only* reasonable explanation for the circumstances in which the transactions took place is the connection with fraudulent evasion. In that regard Mr Bridge challenged the "only reasonable explanation test" arguing that the domestic "only reasonable explanation test" has far wider scope and application than the "objective factors requirement" under EU law and the latter should be preferred.

75. We agree with the Upper Tribunal at paragraph 19 in *GSM Export (UK) Ltd (in administration), Sprint Cellular Division Ltd (in administration) v HMRC*[6] when it confirmed that the requirement as to the taxpayer's state of mind squarely remains "*knew or should have known*" and that the reference to the "*only reasonable explanation*" is merely a way in which HMRC can demonstrate the extent of the taxpayer's knowledge, that is to say that he knew or should have known of the connection with fraud. That is established by looking at the objective factors.

76. As far as objective factors are concerned, Mr Bridge's stance was that there are no objective factors and those upon which HMRC rely to infer knowledge are too

[6] 2014 UKUT 0529 (TCC)

broad and not relevant. We disagree and have considered all of the relevant circumstances.

Circumstantial and hearsay evidence and the approach to be adopted

77. It is the case that in these deals the appellants never purchased directly from a defaulter. In our view, HMRC can therefore only succeed, if at all, by relying on circumstantial evidence. Mr Bridge repeatedly argued that a lot of the evidence was not only circumstantial but also hearsay.

78. It is obvious to us that HMRC's very large task in amassing the evidence of defaults will involve input from numerous Officers. We might doubt third or fourth hand evidence where it is asserting something improbable. Where however it appears to have been provided efficiently and professionally, and where it strongly indicates a familiar pattern consistent with fraudulent defaults, we reject the notion that we should dismiss such indirect evidence.

79. Mr Bridge argued that under EU law the Tribunal can only consider the matter on a transaction by transaction basis. The implication of that is that the Tribunal cannot consider anything other than the direct facts of each transaction itself and therefore the Tribunal cannot rely on circumstantial evidence in the round.

80. We noted and respectfully agree with the Court of Appeal's comments in *Dadourian Group International Limited v Simms*[7] at paragraph 89

> "… At times [counsel] came close to suggesting that fraud can only be established where there is direct evidence. If that were the case, few allegations of fraud would ever come to trial. Fraudsters rarely sit down and reduce their dishonest agreement to writing. Frauds are commonly proved on the basis inviting the fact-finder to draw proper inferences from the primary facts …".

81. In *Mobilx,* Moses LJ stated at paragraphs 84 and 85, having quoted from Clarke J in *Red 12* as cited at paragraph 47 above:

> "84 Such circumstantial evidence … will indicate that a trader has chosen to ignore the obvious explanation as to why he was presented with the opportunity to reap a large and predictable reward over a short space of time.
>
> 85 In so saying I am doing no more than echoing the warning in HMRC's Public Notice 726… In that Notice traders were warned…to take heed of any indications that VAT might go unpaid. A trader who chooses to ignore circumstances, which can only reasonably be explained by virtue of the connection between his transactions and fraudulent evasion of VAT participates in that fraud and, by his own choice, deprives himself of the right to deduct input tax."

82. We annex at Appendix 4 relevant excerpts from Notice 726.

---

68. [7] [2009] EWCA Civ 169

83. The Tribunal can and did consider hearsay evidence. The fact that evidence is hearsay is simply a question of the weight to be attributed to that evidence by the Tribunal. We have explained our findings at some length.

84. We are bound by the decisions in *Mobilx* and *Red 12*. Mr Bridge says that this Tribunal is not bound by the law of precedence as CJEU decisions override Court of Appeal authorities. No CJEU authority was presented to us which prohibited the Tribunal from considering circumstantial evidence or following Mobilx and Red 12. Newey J in *S&I* at paragraphs 13 to 19 makes it very clear that "It is therefore incumbent upon us to follow the interpretation of the law which the Court of Appeal adopted in Mobilx". We have.

85. For the avoidance of doubt we have considered, in respect of each individual transaction, whether or not the appellants has met the conditions for input tax entitlement in respect of that particular transaction but we can and must consider the whole picture, including circumstantial evidence when deciding whether in respect of each individual transaction the conditions for input tax recovery have been met.

86. In these appeals there are a number of other issues on which we heard argument as to the sufficiency or quality of evidence and in particular in relation to:

(i) the validity of deal logs or sheets, and

(ii) issues as to whether invoices are required to establish connection.

87. Since we are dealing with numerous defaulting traders, who in many cases also appeared in the deal chains as buffers, we fully expected there to be some gaps in the "tracing" evidence concerning deal logs and invoices.

88. Mr Bridge's case is that the Tribunal should not consider the deal sheets to be reliable evidence unless supported by the underlying invoices. They are hearsay evidence at second or third hand as a number of different Officers, who were not called to give evidence, compiled the deal sheets by looking at the various invoices and purchase orders.

89. What are the deal sheets? HMRC's procedure was that an individual Officer charged with responsibility for a particular trader, whose trades were suspected of forming part of an MTIC chain, made entries on HMRC's electronic data storage system (the electronic folder) itemising the trader's purchases and sales in considerable detail, including the date, the amount, the item, the invoice number etc. In compiling a deal sheet an Officer would access the entries on the electronic folder and build up a deal sheet which would show the trail for any one consignment of goods from one trader to another. In some cases the deal packs would trace the chain of goods back to an acquirer, and where information from Customs authorities in Europe was available, the chains can and do go beyond the UK acquisition. Similarly, the chains would show the despatch by the broker to an EU customer, and where information from European Customs authorities is available, the deal sheet might show subsequent sales too.

90. Of course deal sheets are not primary evidence but they are evidence of fact as they are a representation of the primary evidence. Furthermore, of course, the evidence obtained from Officers in other EU countries relies on the primary evidence available to them, and that is never available yet the evidence is valid.

91. As we indicate above, we are entitled to rely on inferences drawn from primary facts.

92. In *Sunico* Mrs Justice Proudman opined on the reliance on deal logs which in that instance were the companies' own deal logs. In particular she stated at 132:-

> "132. There is no proper basis on which to conclude that deal logs are bound to be inaccurate or are inherently unreliable of the record of a sale, although the court must of course be vigilant to check that deal logs are consistent – whether corroboration is required, and how great the measure of such corroboration, will depend on the circumstances".

93. Mr Bridge argued that the deal sheets with which we are dealing were not created by the parties to the deals, unlike in *Sunico*, but they were created by HMRC Officers after the event. We accept Mr McGuiness' cogent argument that the deal logs or sheets, whether created by HMRC Officers, buffers or any party to a transaction are all derived from the same source material. All of the parties have had these deal sheets for many years. We found the Officers who gave evidence to be wholly credible and all of them were completely transparent in saying what they had or had not done themselves. We have considered each and every one in the light of all of the surrounding circumstances.

94. Mr Bridge argued that the Tribunal cannot be satisfied that there was a connection to fraud unless all of the invoices for all of the chains which made up the alleged chains are produced because otherwise it cannot be demonstrated that overall no VAT was accounted for to HMRC. At paragraph 136 in *Sunico* Mrs Justice Proudman stated:

> "136. Further, the court does not have to find matching invoice or purchase numbers. Its task is to decide whether the claimant has made out its case on the balance of probability. Thus the court can properly rely on evidence of dates, quantities or prices showing likelihood that the deals matched the transactions."

95. It is self-evident that unless there is a tax loss there can be no fraudulent tax loss. We certainly do not accept that those invoices must be produced to prove connection.

96. We have explained in each contested deal why we have, or have not, accepted the evidence and whether or not it suffices.

General

97. We point out that in evaluating the evidence we agree with Mrs Justice Proudman in *Sunico* at paragraph 29 where she states:

> "29. Accordingly, and in the absence of any expert evidence, much in this case turns upon my assessment of the documentary evidence in the light of the parties respective analysis of it. As I

> have already noted, to the extent that the witnesses expressed their opinions on the documents they discussed I have discounted their evidence."

We have also adopted that approach.

98. We observe, that although undoubtedly the legal burden rests on HMRC to show that the only reasonable explanation for the transactions was that they were connected with VAT fraud we agree entirely with Judge Barlow at paragraph 48 of *Megtian v HMRC*[8] where he states:

> "48. The legal burden of proof does not alter throughout the proceedings. However, the evidential burden shifts. Once a party has produced enough evidence to satisfy the legal burden the other party is obliged, not because of any rule of law but in order to succeed in the appeal, to produce evidence to refute the other party's case so far as possible."

99. We make it explicit that our task is not to conduct a review of whether HMRC's decisions were reasonably made in the light of the material held by HMRC at the time of those decisions but rather to assess whether in the light of the evidence produced to us, HMRC have proved that on the balance of probabilities the *Kittel* test has been met. We make that point since the focus of cross examination was why Officers came to the view that they did at the time.

100. Accordingly, the arguments deployed for the appellants to the effect that there were errors in the original decision letter such as in regard to the appellants allegedly banking with FCIB or the suggestion in cross examination that Officer Brownsword was simply "ticking boxes" in accordance with policy directives are not relevant. There is no single determining factor and we have weighed all of the evidence in the balance including the volumes of unchallenged evidence that was produced. For the avoidance of doubt, although not all of the evidence was referred to in the course of the Hearing, we confirm that we have nevertheless looked at evidence that was not challenged.

101. In his opening Mr Bridge argued that the judgement in *Unistar* was potentially of some importance. We agree with Judge Porter at paragraph 120 where he stated that "As a result it is quite possible for exporters … together with counterparties, to be entirely innocent parties in a chain of supply which includes, at a remote stage of the chain, an intending defaulting trader".

102. Our starting point is the appellants' consistent argument that they have been innocent dupes and the victims of others whom they now concede have perpetrated, and or been involved in, fraud. Mr Ghazi made his position very clear to the effect that it was not that the due diligence had been lacking but rather that the appellants had been duped.

103. At the heart of these appeals there lies a diametrically opposed stance by the parties. Mr Bridge has repeatedly argued that the 2005 appeal not only vindicated the appellants and gave them faith that their method of trading was perfectly in order but also that the trauma associated with such a trial would have ensured that they would

[8] 2008 UKVADT 20894

have taken care to avoid any involvement with any form of fraud. He pointed to Mr Sheth and Mr Ghazi as being family men (and we were told that they are related by marriage) of good character who would have had a lot to lose by any such involvement and that it was "inherently implausible" that they could have been knowingly involved.

104. By contrast the HMRC Officers and, in particular, Officer Brown argued that it was precisely because AEL had been through the 2005 appeal that that was why "A number of the usual indicators of MTIC fraud cannot be found" and that matters had been deliberately engineered in that way. Of course, as we indicated above, the Officer's opinion is just an opinion and is therefore discounted.

105. Both arguments are subjective. The test for us is to look at the objective factors and the whole circumstances. That is what we have done.

Was there a tax loss in each of the deals?

106. The Schedule of Issues dated 19 December 2013 lodged by the appellants in compliance with Direction 6 of the Directions, made it explicit that Aircall accepted that there was a tax loss and a connection thereto in deals 8-10, 16, 18-27 and 31. In the Overview Tax Loss Schedule annexed to the appellants' Closing Submissions it was accepted that there was also a tax loss and a connection thereto in Deals 5, 6, 11 and 35. By that stage the appellants had challenged the connection to tax loss in Deal 10 on the basis that there was no assessment. For the reasons set out at paragraph 63 above, we find that there is no requirement for an assessment provided that the loss is otherwise established.

107. There was no challenge to the existence of tax losses *per se* in the remaining deals other than the assertion that there can be no tax loss in the absence of an assessment and that that assessment should be linked to the deal in question. We will therefore consider the question of tax losses in the remaining deals together with connection.

Connection to the fraudulent evasion of VAT

108. Aircall have challenged connection with respect to 11 deals subject to the appeal on the grounds that there are missing invoices with respect to a link(s) in the deal chains, namely Deals 1, 3, 4, 7, 12, 14, 17, 28, 29, 30 and 32.

109. They have challenged connection on the basis of "discrepancy with assessment" in Deals 1, 2, 15, 17, 33 and 34.

110. They challenged connection on the basis of "no assessment" in Deals 10, 13, 30 and 32.

111. As far as Deal 13 is concerned the appellants argues that it appears that RK is not actually a defaulter.

112. As we indicate above Aircall accept that HMRC have established that Deals 5-6, 8-9, 11, 16, 18-27, 31 and 35 are connected with fraudulent evasion of VAT. The details are:-

Deal	Supplier	VAT	Defaulter
5	Phone City	£ 54,600.00	Goodluck
6	Phone City	£ 54,600.00	Goodluck
8	New Order	£ 73,010.00	Wildtower
9	Cobra	£ 21,000.00	Skywide
11	Cell	£ 86,625.00	Computec
16	Cobra	£ 10,815.00	Skywide
18	Wizard	£ 20,825.00	Skywide
19	Elite	£109,375.00	Eclipse Windows
20	Cobra	£ 25,375.00	Skywide
21	New Order	£ 56,000.00	Computec
22	New Ora	£106,750.00	Computec
23	New Ora	£ 39,000.00	Computec
24	New Ora	£ 11,672.50	Computec
25	Sound	£ 42,000.00	Computec
26	Cell	£ 76,125.00	Computec
27	Phone City	£ 45,080.00	Computec
31	e-tel	£ 52,150.00	Sweetlime
35	Letting	£ 62,300.00	DBP Trading
	TOTAL	£947,302.50	

Connection and assessment

113. As far as our approach is concerned, we were satisfied that the evidence of the HMRC Officers was honest, straightforward and reliable. They stated what they did not know. Where there was insufficient information to trace the chain of supply we had to determine whether it was reasonable to infer that acquisitions came from the sources identified in the deal sheets. In a legitimate transaction there would be no reason for a buffer to conceal its source and we were satisfied that the fact that HMRC was unable to trace some of the chains in their entirety speaks for itself and clearly indicates that the trader(s), such as, for example, Stock Mart in Deal 28 deliberately acted as a blocking trader by failing to provide records to HMRC and thereby preventing it from tracing the chains in full.

114. Further, if we take the example of Deal 28, in our view the fact that the schedule of sales was provided by Stylez rather than HMRC is not material. HMRC required that information, not for these appeals but in order to reconstruct Stock Mart's missing records; that seems as sensible and as proportionate a measure as any.

The Disputed deals

Deal 1

115. This deal concerned transactions in 1000 Nokia 7610. The defaulting trader was Attic Attack and the deal sheet discloses that on 3 April 2006, the chain for the 1000 Nokia 7610 was Attic Attack>The Phone Shop at a unit price of £117.15>Cobra at £117.50>Eurostar at £119. On 4 April 2006 Eurostar>Aircall at £119.50 and Aircall>Cell Avenue at $220.50 (ie £125.77). The freight forwarder was Paul's. In both Deals 1 and 2 payment was made in dollars and because both parties quoted different rates it is not certain what conversion rate was used (none was specified in the documentation). The difference is not material. The mark-up was approximately 6% in Deal 1.

116. It is accurate to say that there was no invoice exhibited for the sale from The Phone Shop to Cobra but as long ago as 2011 Officer Launder (and Officer Brownsword) exhibited a purchase order, pro forma invoice, stock allocation, delivery note and stock release all dated 3 April 2006 and the FCIB payment instruction dated 4 April 2006. We find that there was such a sale on 3 April 2006. All are consistent and the goods, the quantity and the price are all clearly identified.

117. It was established in the course of the Hearing that the assessment for the tax loss did include Deal 1 and it was identified in the schedule exhibited by Officer Brownsword. We are satisfied that the connection is established.

Deal 2

118. The defaulting trader is again Attic Attack. The deal sheet discloses that on 5 April 2006 for 662 Nokia 7610 the chain was Attic Attack>Silverline at a unit price of £116.15>to Cobra at £116.50. Cobra split the telephones into 510 telephones which were sold at £118.50 and 152 telephones which were sold at £118 both to Eurostar. Eurostar then sold the 510 to Aircall at £120 and the 152 at £119.75 on 4 April 2006. Aircall sold all 662 to Cell Avenue on 7 April 2006 at a unit price of $222. The freight forwarder was Paul's. The mark-up was approximately 5.5% (see Deal 1).

119. The deal sheet describes the first buffer as "Silverlink" but that is a typing error by Officer Brownsword. We have checked the VAT registration number quoted in his witness statement and compared it with Officer Launder's exhibits and the company is Silverline. The FCIB evidence confirms that. The same applies wherever "Silverlink" appears in the deal sheets.

120. The appellants simply argue that there is a discrepancy with the assessment. Again the defaulting trader is Attic Attack, there is an assessment and a schedule and the deal chain is clearly identified in the same schedule as in Deal 1. Accordingly, we find that the connection is established.

Deal 3

121. The defaulting trader is Flooring Centre and the deal sheet discloses that on 3 April 2006 for 1100 Nokia 8800 black telephones the chain was Flooring Centre>Evolution at a unit price of £697.60 > Reems at £698>Crescent UK Ltd at £698.50> TM at £699>London Mobile at £699.50. On 5 April 2006, London Mobile>Aircall at £700 and on 6 April 2006 Aircall > World at £749. The freight forwarder is Edge. The mark-up is 7%, a gross profit of £53,900.

122. It was argued for the appellants that there was a lack of connection as there was no invoice connecting Flooring Centre and Evolution. When Mr Bridge asked Officer Brownsword about that he explained that Flooring Centre had been deregistered and all that had been available to him was the spreadsheet that he had exhibited. He was not aware of the origin of the spreadsheet. The spreadsheet showed that on 3 April 2006, on invoice 92, Evolution had purchased 1100 Nokia 8800 black telephones at a unit price of £697.60. The gross value of the transaction including VAT was £901,648. It also identifies the assessment date which was 21 April 2006.

123. He had also exhibited a letter dated 21 April 2006 from HMRC to Flooring Centre stating that an assessment was currently being raised based on information obtained during their visit on 6 April 2006 and a schedule was annexed. He did not exhibit the schedule.

124. Officer Edmead spoke to that visit and confirmed that a Trading Summary spreadsheet was compiled by the HMRC Officers and in her witness statement dated 6 February 2013 she exhibited the assessment which was dated 21 April 2006 and the schedule. That schedule clearly identifies the same information as that spreadsheet. Clearly the VAT on the sale to Evolution was included in the assessment. It is also clear from another exhibited Trading Summary spreadsheet that on 3 April 2006 Flooring Centre itself had purchased the said telephones on invoice 2017 from Sweet Storm (a Portuguese trader) at a unit price of £696.85. We accept that the connection is established.

Deal 4

125. The defaulting trader is CT Co and the deal sheet discloses that on 6 April 2006 for 370 Nokia 1600 telephones the chain was CT Co>to Stylez at a unit price of £28.85>Westpoint at £29.05>AZ at £29.25>Cell at £29.50>Aircall at £30. On 10 April 2006, Aircall invoiced Cell Tell at £33.50. The invoice to Cell Tell was dated 10 April 2006 but the Ship on Hold by air instructions and the CMR were dated 6 April 2006. Accordingly, this must have been a back to back transaction. The mark-up was 11.66% and the gross profit £1,295.

126. This was a split deal with Deal 14 where two batches of Motorola telephones (910 Motorola C113 and 420 Motorola C118) were also all purchased by Stylez on the same invoice number 213 and by Westpoint and Cell on the same invoice numbers. The only difference is the customer. The freight forwarders were Point until Aircall used Hawk.

127. Officer Patterson spoke to his witness statement wherein he had exhibited the spreadsheet prepared by him headed "Known Sales Invoices April 2006". Items 8, 9 and 10 were dated 6 April 2006 and the invoice number was 0213. The goods described were 910 Motorola C113 and 420 Motorola C118 at a unit price of £11.85 each and 370 Nokia 1600 at a unit price of £28.85. He had prepared the schedule based on evidence taken from other spreadsheets held on the HMRC electronic folder system. As was, and is, so often the case when preparing such schedules, he had not had sight of the original documents so there is indeed no primary evidence of the connection. However, his evidence was clear and unequivocal.

128. Officer Patterson referred to and exhibited an assessment dated 21 July 2006 as did Officer Brownsword. Unfortunately, in the Hearing we looked at the exhibit of Officer Brownsword which was not complete. When writing this decision, on checking Officer Patterson's exhibit, we can see that the assessment is in the sum £16,733,445.77 and the total of the sales disclosed on the accompanying schedule is precisely the same figure so, although regrettably the VAT period covered by the assessment is not specified on the face of the assessment, we can see from the detail in the schedule that it covers sales from 3 to 11 April 2006. The schedule is in identical terms to the spreadsheet prepared by Officer Patterson. Given the consistency of the totality of the evidence we find that the connection is established.

Deal 7

129. The defaulting trader is CT Co and the deal sheet discloses that for 1800 Nokia N90 on 11 April 2006 the chain was CT Co> Stylez at a unit price of £262.80. Stylez > Trade Smart at £263>Cell Trading at £263.50>Aircall at £264. On 13 April 2006 Aircall invoiced Globalfone at £281. However, the purchase order and Ship on Hold Instructions were dated 12 April 2006. The freight forwarder was Point. The mark-up is 6.43%, a gross profit of £30,600. (There is again a spelling error as the first buffer is described as "Styles" Ltd but it is Stylez and the same applies elsewhere in the deal sheets).

130. This is very similar to Deal 4 in that a transaction on 11 April 2006 for 1800 Nokia N90 at a unit price of £262.80 between CT Co and Stylez is identified in both the spreadsheet and the schedule attached to the assessment. Further there is a release order from CT Co at 7.04am on 12 April 2006 to Stylez for 1800 Nokia N90 and that is addressed to Point who were the freight forwarder identified at every other stage.

131. There was also a question mark about the transaction between Stylez selling to Trade Smart. Officer Brownsword had exhibited the purchase order from Trade Smart dated 11 April 2006 to Stylez for 1800 Nokia N90 at £263 and it was marked as authorised. There was in addition a Supplier Declaration signed by Stylez on 11 April 2006 and sent to Trade Smart by fax the following day. It specifies the unit price of £263 for 1800 mobile telephones and stipulates Stylez' invoice number 0270. That is the invoice number in the Known Sales Invoices spreadsheet referred to in paragraph 127 above.

132. We find that the connection is established in respect of both transactions.

Deal 10

133. The defaulting trader is Wildtower and the deal sheet discloses that for 1000 Nokia 7610 on 26 April 2006 the chain was Wildtower>Jos at a unit price of £118.50>Letting at £119>Aircall at £120 and on 27 April 2006 to Raduga at £127. The freight forwarder is Hawks. The mark-up is 5.83%, a gross profit of £7,000.

134. Mr Bridge argued, correctly, that no assessment had been raised encompassing Deal 10. Officer Mody, who was the "defaulting officer" for Wildtower spoke to how, having been approached by Officer Brownsword in September 2010, he had been able to trace Deal 10. Wildtower had been hijacked and in the normal course of events an assessment would have been issued to a "Taxable Person Purporting to be Wildtower". The time limit for so doing had passed but the Officer issued a letter to that entity notifying the default. There has been no accounting for the tax due. In any event there are other outstanding tax losses of in excess of £7 million so nothing would be recoverable. We find that there is an undoubted tax loss and that the connection with fraudulent tax losses has been established.

Deal 12

135. The defaulting trader is GPA and the deal sheet discloses that on 26 April 2006 (which is an error for the reasons set out below and should be 25 April 2006) for 838 Sumsung D600, the chain was GPA>Cobra at a unit price of £141.45>Cobra>Wizard at £142.50. On 25 April 2006, Aircall bought 838 at a unit price of £145.50 and sold 830 to DRT at £155. The remaining eight phones were sold retail in the UK by Aircall. The freight forwarder is Hawk. The mark-up is 6.52%, a gross profit of £6,721.

136. There is no invoice between GPA and Cobra.

137. Officer Merriman who was the Officer responsible for GPA was not called to give evidence and his witness statement was unchallenged. GPA did not submit VAT returns for the period 03/06 or its final period of 1 April 2006 to 25 May 2006 yet in that period it had sold goods including mobile telephones resulting in losses of marginally less than £14 million.

138. HMRC had collected documentation from Hawk on 25 April 2006 which showed that GPA had been dealing in significant quantities of mobile telephones. Included in that documentation and exhibited by Officer Merriman was an allocation notice from GPA to Hawk stating that 833 Samsung D600 would be delivered to the warehouse and it should be accepted on GPA's behalf and allocated to Cobra. That allocation/release instruction was signed by Hawk on 25 April 2006.

139. On 1 August 2006 HMRC wrote to GPA intimating that further information had been received regarding sales which had not been declared and enclosing a Notice of Assessment in the sum of £4,346,650. Attached to that assessment was a schedule. That schedule had been compiled by HMRC Officers dealing with GPA's customers. That schedule discloses that there were five sales to Cobra on invoices 28, 49, 50-52. Invoice 51 dated 26 April 2006 was for 838 Samsung D600 telephones at a unit price

of £141.45. That letter, assessment and schedule were exhibited by Officers Brownsword and Merriman.

140. We find that the connection is established.

Deal 13

141. Before commenting on the detail in this deal it is appropriate to summarise the position in regard to Operation Apparel since it is alleged that Deals 13 and 32 were connected with the fraud that was there uncovered.

Operation Apparel

142. Operation Apparel was included in matters that Mr Bridge sought to have excluded, see A in Footnote to this decision, and it was not. In Closing Submissions he again argues that since he says it was not pleaded it cannot be fairly relied upon. The evidence in this matter was the subject matter of Officer Kerrigan's witness statements dated 16 July and 17 October 2013 and admitted at the Hearing on 16 September 2013. Mr Ghazi commented thereon at length in his third witness statement dated 19 December 2013. As we make clear in the Footnote that evidence was served as soon as it became available. Further, the replacement evidence of Officers Bradshaw, Grace and Mendes on this topic was ultimately admitted by agreement, see G in the Footnote to this decision.

143. Operation Apparel concerned a very substantial criminal investigation of MTIC fraud. Covert surveillance devices were deployed in premises in Glasgow and Manchester and from those covert audio and video recordings extensive transcripts were prepared. 184 search warrants were later executed. Computers and other documents were seized and examination thereof identified the fact that there was evidence of a criminal team operating within the grey market for mobile telephones. It was established that at the outset of a number of chains of transactions, goods were brought into the UK from Europe and third party payments then made to bank accounts held by what was described as the "Strong European" or "Catcher" since it "caught" payment from the "Third Party Payer".

144. The goods passed along a chain including those traders that were identified as being in the team. They then went through another group of traders who were said to be connected with, but not directly in the said criminal team. In excess of 1,000,000 documents were seized and that together with the audio and video recordings enabled the investigators to compile spreadsheets of the businesses identifiable as forming part of the criminal team. There was then a group of traders who were outwith the spreadsheets but were deemed to be under the control of the overall scheme.

145. Lastly, there are another group of traders including Unistar Group, HT Purser Limited and Aircall who transacted with these companies. For the avoidance of doubt, notwithstanding the protestations of Mr Bridge, we are clear that HMRC have never suggested that Aircall were knowingly part of that operation. Mr McGuiness made it explicit that he was certainly not asking Mr Ghazi whether or not he had been

in a criminal conspiracy with any of those traders identified by name in the transcripts; the only reason he was asking was because the names appeared on the transcripts from the covert tapes in Operation Apparel.

146. One item seized during that operation was a laptop containing 72 spreadsheets. Forty-five of those spreadsheets are referred to as "Queens Court spreadsheets". Each spreadsheet contains a number of transaction templates and each template represents part of an MTIC deal chain up to and including what is described as the "Number 5" which is the fifth UK trader. No trader after the fifth UK trader, including the broker and its supplier, is specified in those templates. Of those 45 spreadsheets four had been identified to contain templates that are alleged to be linked with Aircall but two of those are not the subject matter of these appeals.

147. Officer Bradshaw's evidence covered six deals involving Aircall of which two were the subject matter of this appeal, namely, Deals 13 and 32. Aircall is not named in the transaction templates. However, the traders at the start of the deal chains are specified together with the type and quantity of goods traded and the buying and selling prices. The buying and selling prices were set by formulae and that price would be a fixed figure, not a percentage.

148. Officer Bradshaw confirmed in cross-examination that there was no evidence from Operation Apparel indicating that Aircall had had any contact with any of those companies identified as forming part of the organised fraud. On re-examination, however, he confirmed that in regard to a deal which does not form part of this appeal, namely Aircall Invoice No. 22749, Aircall's supplier is Chahal & Sons. One of the telephone transcripts of a Mr Siddique identifies Chahal & Sons as being what he called "our Number 5's". In the spreadsheet involving Aircall, Chahal & Sons is at Number 5 as is Dualite.

149. In that telephone transcript Mr Siddique lists a number of traders who "are our Number 5's" that "should all be exchanged…on that foreign deals" and said "so we only control the line up here from the, ehr, importer, ehr, the catcher, yeah, to the filter Number 4".

150. HMRC argue that the clear inference is that the rest of the chain must be controlled by others whereas Mr Bridge disagrees. On balance it seems to us to be more likely than not that there must be an element of control since otherwise the whole scheme would be put in jeopardy. That control might be as tenuous as knowing that traders in the rest of the chain would turn a blind eye or not ask relevant questions. What is beyond doubt is that Mr Bridge is correct in saying that there was widespread fraud within the UK market with the involvement of organised criminal gangs.

151. There was evidence in the files uplifted in the raid on Aircall that a number of the parties referred to in the covert recordings for Operation Apparel had made approaches to Aircall. Mr Ghazi conceded that Dualite and Megantic had undoubtedly contacted Aircall and a trade application form had at least been partly completed for Megantic. There had been a course of trading with Chahal & Sons over a period although Mr Ghazi was not sure how extensive that had been.

The detail of Deal 13

152. The defaulting trader had been identified as RK and the deal sheet discloses that on 27 April 2006 for 1300 Nokia 6230 telephones the chain was RK>Emmen at a unit price of £106.55> Princeways at £106.75> New Way at £107>Aircall at £108>Cell Tell at £114.50. In every instance there is quoted an invoice number. The freight forwarder at all times was Hawk. RK, Emmen and Princeways had FCIB accounts. The mark up was 6.01%, a gross profit of £6,500.

153. We heard from Officer Harry in regard to RK. She was taken to the invoice from RK to Emmen which was numbered 402 and had been produced by Officer Brownsword. She confirmed that she had never had sight of that.

154. She was very clear that at the time she prepared her witness statement the only information she had had in relation to the 1300 Nokia telephones was the release note which referred to invoice 402 and RK's bank statement which also referred to invoice 402 in respect to the payment from Emmen and both of those could be traced to the deal log. By contrast she could not explain why she had said in a 2008 email in the exhibits that invoice 402 "actually appears in May and relates to different goods but … would have fallen somewhere between 368 and 372 for which I have no invoices". In our view, that email made no sense on any level. We have discounted it.

155. On the balance of probabilities we find that since we have the numbered invoice from RK, the release note dated 27 April 2006, the purchase order from Emmen and the bank statement not only is the deal log emphatically corroborated but the connection between RK and Emmen is made.

156. Officer Harry was quite clear and fair in confirming that the Notices of Assessment to RK relating to the period 04/06 related to Masterpiece Technology and that no assessment was ever raised in connection with RK's supply to Emmen. Her evidence was that in general RK had acted predominantly as a buffer trader and that two assessments had been raised against RK for unpaid output tax of £405,049. RK were involved in 113 transactions between 3 April 2006 and 19 April 2006 and in 110 of those they were supplied by another UK supplier. The remaining three have not been identified. Her view, and, of course it is an opinion, and therefore not evidence, was that if HMRC had been able to trace Deal 13 beyond RK then on the balance of probability that would have commenced with a defaulting trader.

157. We have to decide whether there was a defaulting trader and whether there was a tax loss. Officer Bradshaw confirmed Officer Kerrigan's evidence that Deal 13, involving Aircall's invoice number 2284, mirrors the transaction template found in the Queen's Court spreadsheets seized in Operation Apparel in almost every particular.

158. The supplies took place on the same date. The freight forwarder in both is Hawks. As far as the fifth UK trader (Princeways), and this as far as the operation Apparel template goes, the description of the goods being 1300 Nokia 6230, the buying and selling prices (are identical) as are the margins achieved by the different

parties (where available). The only differentiation, and we do not consider it to be material, is that in the template the "Third Party Payer" is named as Fonedealers Limited whereas in Deal 13 it is RK.

159. We then have the evidence of Officer Mendes, which confirmed that Officer Bradshaw's statement did not include the FCIB tracing that Officer Kerrigan had conducted in regard to the transaction templates that appeared in the spreadsheet seized as part of Operation Apparel. Officer Mendes has conducted an analysis which is illuminating. The flow of funds from New Way (outwith the FCIB banking system), through Princeways and Emmen to RK Brothers is identified. On 2 May 2006 RK paid Sunico (the Strong European) the sum of £155,350 with a narrative "MP/402 1300 x 6230". Of course MP/402 is the RK invoice number and Deal 13 is a transaction in 1300 Nokia 6230.

160. We consider this evidence to be very powerful corroboration as to not only the accuracy of the tracing but also to the fact that the deal is connected with fraud.

161. Mr Bridge argued that RK Brothers was not actually a defaulter and that no assessment had been raised. He is right in that the defaulter in MTIC terms in this chain is not obviously RK but we agree with Officer Harry and looking to the totality of the evidence in this matter, the fact that the invoice and link from RK's supplier to RK cannot be traced is not surprising. We find that it is extremely probable that if it were found the link could be made. There is no assessment but the Operation Apparel evidence makes the connection to the fraudulent evasion of tax. On the balance of probability, looking at its trading history in 2006, the unpaid VAT assessment in the sum £409,376 and particularly because RK made that third party payment to Sunico defined in those terms we find that there will have been a loss of tax. That was the point of the Operation Apparel deals. We find that the connection is established.

Deal 14

162. We refer to our findings in regard to the deal chain in Deal 4 and find that the tax loss is established. The deal sheet discloses that in this Deal each of the transactions was in two parts being 910 Motorola C113 and 420 Motorola C1128. The chain commencing on 6 April 2006 is exactly the same as in Deal 4 with the only difference being that Aircall's customer was Almashrig and the date for that sale was given as 13 April 2006 which was the invoice date.

163. The appellants suggest that this was not a back to back deal. In their own exhibits for this deal, nothing at all relating to Almashrig was produced for Deal 14. However, in their exhibits for Deal 4, and in HMRC's exhibits for this deal, there is an Aircall pro forma invoice dated 6 April 2006. We find that it was a back to back deal. As with Deal 4 we find that the connection is made.

Deal 15

164. The defaulting trader is again Attic Attack. Mr Bridge argued that there was a discrepancy with assessments. In fact, it was established in the course of the Hearing that Deal 15 was included on the assessment exhibited by Officer Brownsw**o**rd as, on

21 May 2008, HMRC wrote to Attic Attack with a reduced assessment (having seized further information) and the schedule attached thereto includes Deals 1, 2 and 15. There is a minor discrepancy therein insofar as the unit price is described as £144.65 whereas it was in fact £145.85. Accordingly, the VAT is understated by £315. There remains a tax loss. We are satisfied that the connection is established.

Deal 17

165. The defaulting trader is Apollo and the deal sheet discloses that on 11 April 2006 for 1644 Motorola A1000 telephones and the chain was Universal >Apollo at £233.85>Gara at £234.60>Seymour at £235>London Mobile at £234.50>Aircall at £235. On 12 April 2006 Aircall sold the telephones to World at £250. The freight forwarder was Edge. The mark-up was 6.38%, a gross profit of £24,660.

166. The appellants challenged both connection and assessment. Officer Mandalia gave very clear and straightforward evidence in regard to the assessment for the period 01/03/06 to 23/04/06 in the sum of £23,880,467. The schedule of purchases and sales supporting the assessment (and it came to the same total) makes it clear that on 11 April 2006 Apollo had sold precisely that number and make of telephones at that price to Gara. The invoice number for the purchase is 3300. The seller is noted as Macdelta but the entries in the 10 immediately preceding lines above that entry show the seller to Apollo as being Universal. Looking at the totality of the evidence for this deal, since it is elsewhere established that Universal sold to Apollo, we find that on the balance of probability that was simply a clerical error. We find that there is not a discrepancy with the assessment.

167. Officer Brownsword had exhibited the chain transaction sheet (CTS) but that is exactly the same as the deal sheet which we were given. Undeniably that identifies the invoice number (617) and date, the type and quantity of goods, unit price and the FCIB payment details including the account number, date and amount. We take the view that those details populating the spreadsheet are consistent and reliable particularly given the correlation with the number of handsets of that type traded on that day.

Deal 21

168. As we indicate at paragraph 106 above the Schedule produced with the appellants' Closing Submissions stated that it was accepted that this deal was connected to the fraudulent evasion of VAT. However in closing submissions it was argued that because there were errors in the assessments that were raised there was no evidence of tax loss. As we have indicated elsewhere the lack of an assessment is not fatal. We accepted the clear evidence of Officer Patterson that there was a tax loss of approximately £1.5m.

Deal 28

169. The defaulting trader is Stock Mart and the deal sheet discloses that on 10 May 2006 for 1000 Nokia 7610 the chain was Stock Mart> Stylez at a unit price of

£115.30>Trade Smart at £115.50> Cell at £116>Aircall at £116.50. On 23 May 2006 Aircall sold the telephones to Metric Trading Co at £123.50. The freight forwarder was Point. The mark-up was 6%, a gross profit of £7,000.

170. It was alleged that HMRC had failed to prove connection to a fraudulent tax loss due to there being no invoice between Stock Mart to Stylez. Officer Williams made it clear that Stock Mart had failed to produce any records to HMRC and for that reason assessments had been raised.

171. In order to raise assessments to best judgment, the Officers then concerned had ingathered information from such sources as they could access including freight forwarders. We have an Allocation and Release document dated 10 May 2006 headed up "Stock Mart Limited" and that instructed the release of 1000 Nokia 7610 telephones to Stylez. That was obtained by HMRC from the freight forwarders. Of course the values are not disclosed thereon. Stylez furnished HMRC with a schedule of sales which they had compiled headed "Stockmart – Stylez Sales". Officer Williams clearly identified therein an entry for 10 May 2006 showing a sale on purchase order 0517 of 1000 Nokia 7810 telephones at a unit price of £115.30.

172. There is also an assessment in the sum of £52,308,540, calculated as at 28 August 2006, exhibited to Officer William's witness statement and that schedule is annexed to the assessment. Officer Brownsword also exhibited the same assessment and schedule. Officer William's evidence was clear that the outstanding deal and the VAT of £20,177.50 is included in the unpaid assessments and therefore we find that the connection is established. The fact that the schedule was not compiled by HMRC is irrelevant. It was produced by that taxpayer at the request of HMRC. We find that the connection is established.

Deal 29

173. The defaulting trader is Regal and the deal sheet discloses that on 10 May 2006 for 6400 Nokia 6681 the chain was Regal>Zenith>at £154.45>New Ora at £154.70>Aircall at £155. Aircall split the telephones into one batch of 3,000 and one of 3,400 selling both to Mobile on 12 May 2006 at a unit price of £164. The freight forwarder is Humber. The mark-up is 5.8%, a gross profit of £65,600.

174. The appellants argued that there was a lack of connection as there is no invoice between Zenith and Regal. Officer Brownsword had exhibited a purchase order number 0146 dated 10 May 2006 for 6400 Nokia 6681 at £154.45. A signed supplier declaration from Zenith dated 11 May 2006 was exhibited together with a pro-forma invoice from Regal to Zenith specifying the freight company being Humber and for the same quantity of goods at the same unit price in both cases. Officer Roberts also spoke to these exhibits.

175. The deal log for Zenith showing purchases from Regal was also exhibited and those telephones are identified showing also the onward sale to New Ora. The sales invoice from Zenith to New Ora number 0146 and dated 10 May 2006 is produced and refers to the onward sale at £154.70.

176. Further both Officer Brownsword and Officer Ruler produced the FCIB analysis showing the payment from Regal to Zenith and then to New Ora. Officer Ruler established that Regal and Zenith used the same IP address. We find the connection is very clearly established.

Deal 30

177. The defaulting trader is the hijacked trader company Cyberweb and the deal sheet discloses that on 16 May 2006 for 1100 Nokia 9300i the chain was Cyberweb> ATB Enterprises (UK) Ltd for an unknown price> Reems at £273.50>TM at £274>London Mobile at £274.50> Aircall at £275. On 17 May 2006 Aircall sold them to World at £293. The freight forwarder is Edge. The mark-up is 6.54%, a gross profit of £19,800.

178. The appellants alleged lack of connection due to missing invoices and no assessments. The only evidence of the connection produced for HMRC was that from Officer Dean which was derived from Edge's preliminary stocks movement report showing that on 16 May 2006 there had been an allocation from Universal to Cyberweb of 1100 Nokia 9300i and then an allocation from Cyberweb to ATB Enterprises UK Limited of the same telephones. In our view that does establish that there was indeed a sale albeit we do not know at what price. The connection is made.

179. Officer Dean asserted that there had been a tax loss but it was not proportionate to issue an assessment because he had not been aware of the connection until 17 September 2013, which was seven years later. We do accept that there was a tax loss and for the reasons set out above the lack of an assessment is not fatal.

Deal 32

180. The defaulting trader is ICM. It is argued for the appellants that there are missing invoices and no assessment. This related to a transaction involving 1500 Nokia 7610 mobile telephones in June 2006. This was the other deal which it was alleged was linked to Operation Apparel.

181. It was put to Officer Shorrock that there were no invoices between the various companies. The Officer explained that they did not have the physical evidence but that the Officer investigating Sundial had traced all the deals and that had been passed to the Officer investigating ICM. Spreadsheets had been compiled by those Officers and the deal sheet compiled from that. Those spreadsheets were not exhibited although the Officer had the final one with him.

182. The deal sheet in this case discloses that on 7 June 2006 the chain for the 1500 Nokia 7610 was ICM>Subbuma at a unit price of £102.50,> Sundial at £103.40>Emmen at £103.50> Diginett at £103.70,>New Way at £104. New Way then sold 1300 to Aircall at £105 and the follow up day, 8 June 2006 Aircall sold the 1300 to Cell Avenue at £11.50. The mark-up was 6.19%, a profit of £8,450.

183. In fact the purchase order from Cell Avenue was dated 7 June 2006. Accordingly we find that it was a back to back deal.

184. Officers Bradshaw and Mendes, and indeed Officer Kerrigan, spoke to the transaction template saved with the title "June 7th" mirroring the deal chain involving Aircall's invoice 23001 which is the invoice in Deal 32. As with Deal 13 the description and quantities of the goods are identical as are the order of traders, the buying and selling prices and the margins (where available). The only differences are that again Fonedealers has been replaced, by, in this case, Sundial and the selling prices for ICM and Subbuma.

185. The examination of the FCIB bank account for Sundial, which is the Third Party Payer, shows a bulk payment dated 9 June 2006 to Intertech which is the Strong European. The FCIB evidence shows that Sundial and Intertech used the same IP address which, in this context, can only mean fraud. The analysis of the FCIB records shows the flow of money from Diginett to Emmen and then to Sundial.

186. It was alleged that there was no link between ICM, Subbuma and Sundial. We note that on 5 May 2011, HMRC intimated to the Liquidator of ICM that on 7 June 2006 Subbuma had purchased 1500 Nokia 7610 telephones but that, having due regard to the prescribed time limits, HMRC would not be issuing an assessment. The deal sheet for Sundial retained in the electronic folder clearly showed the purchase from Subbuma at £103.40 and the sale to Emmen at £103.50. Officer Shorrock confirmed that no assessment had been raised in this instance because it was out of time. There was simply a tax loss notification dated 5 May 2011. That identified a tax loss of £26,906.25 in regard to this particular deal on 7 June 2006. Further, Officer Mendes identified the tax loss because of the third party payment by Sundial.

187. Officer Bradshaw had exhibited Subbuma's purchase and sales listings and that identified the said purchase at a unit price of £102.50 on 7 June 2006 and an onwards sale to Sundial on the same date at a unit price of £103. Officer Bradshaw's exhibits had indicated that Sundial was not a defaulter but rather a missing buffer. In the documentation obtained and exhibited it can be seen that they had purchased 1500 Nokia 7610 at £103 and the schedule shows that the same telephones were then sold to Emmen for which there is documentation.

188. Looking at the totality of the evidence and for the same reasons as in Deal 13 we find that the connection is established.

Deal 33

189. The defaulting trader is E Hogan. We had the oral evidence of Officer Lee which clarified his witness statement which involves the sale by Aircall of 1949 Nokia N70 telephones. The appellants do not dispute the tracing of the deals but simply argue that there was no conclusive evidence of tax loss because of "Discrepancy with assessment". The Officer's evidence was very clear, and we accepted it, that:-

(a) the original assessment in the sum of £2,758,596 had included the two purchases of 1000 and 949 Nokia N70 and that can be clearly identified in the schedule which he had produced from the records given to him by Mr Hogan,

(b) that assessment had incorrectly disallowed the input tax of £1,089,417.85 reclaimed by the hijacked 1st 4 Reports Ltd, and

(c) the notice of amendment of assessment which he had then issued dated 17 December 2007 in the sum of £1,669,178 rectified that error and was a valid assessment. It includes the output tax generated by the sale at the beginning of the supply chain leading to the broker Deal 33 of Aircall.

Deal 34

190. The Defaulting trader was Phone City and it was argued that there was a discrepancy in assessment. In his witness statement Officer Edwards stated that "It is my understanding that the input tax claimed by Aircall International Limited in the relevant periods can be traced back to a tax loss occasioned by Phone City Limited." He went on to confirm that the transaction involving 2000 Nokia N91 on which there was VAT of £102,322.50 that is the subject matter of Deal 34 had been included in the assessment exhibited.

191. Unfortunately the schedule which should have been attached to that was not exhibited (and was one of the items that HMRC sought to have admitted during the Hearing – see I in the Footnote to the Decision). All we had therefore was the Officer's assertion that he knew that it was included because he had seen the spreadsheet which had been prepared by another Officer and it showed all of the transactions in the period including this one. Clearly it had been intended to produce the schedule and indeed Mr Bridge conceded that it was an "accidental" omission. We found the Officer entirely credible and accepted that the schedule would have included this transaction.

192. We note further that the director of Phone City was disqualified for a period of 12 years on the basis that the misconduct identified was that:- "He, in the period from 28 February 2006 to 26 July 2006 caused or allowed (Phone City) to undertake a method of trading … which resulted in VAT monies owed to HMRC in excess of £33m, which remains unpaid at the date of the liquidation.". There were "… sales in excess of £225m including VAT in excess of £33m." Phone City's transaction in Deal 34 was on 26 July 2006. In addition we have the evidence of Officer Ruler very clearly identifying the payments to and from Phone City in respect of the said 2,000 Nokia N91 telephones.

193. Obviously it would have been better if the schedule had been produced but looking at the totality of the evidence we find that on the balance of probability the connection to tax loss is made.

Deal 36

194. This was contested on the basis that there was no connection or tax loss in AEL's chain. There is not and there was no suggestion of any such tax loss. HMRC's assertion is that this is a contra deal.

195. In Operation Rosary, Officer Marshall has established that on 31 May 2006 Airphone purchased 5500 Nokia 8800 mobile telephones from Future on three invoices, one of which was for 2000 telephones. All 5500 phones were sent to Israel

but the said 2000 were allegedly repatriated to the UK because the Israeli purchaser ("KTM") had not paid for them (and others). In fact this consignment actually consisted of, at most, 1974 telephones being the amount that the Administrator for Airphone confirmed were held in stock as at 26 September 2006 and that is the number confirmed in the inspection report as at that date.

196. Officer Brown's evidence was that her understanding was that the Directors of Airphone had been arrested in August 2006 and an interim order for insolvency granted, albeit that did not become effective until October 2006.

197. In the first instance, on 29 September 2006, Aircall purchased a batch of 1065 and 837 telephones and the purchase price was paid in full. At some stage later on 29 September 2006, the 837 telephones were removed from the deal and the 1065 sold to Sunico.

198. AEL never took physical possession of the goods.

199. We heard from Officer Clifford in regard to Future, which was alleged to be the contra trader. The remaining witnesses were not called. Officer Clifford gave very clear evidence and was meticulous in confirming where she had no knowledge and she did not speculate. She had been involved in the preparation for the criminal trial where the two directors of Airphone pled guilty to a revised charge of fraudulent trading in January 2014. She also pointed out that all of the key personnel in Future and its sister company were convicted of VAT fraud and 15 individuals received custodial sentences totalling in excess of 70 years.

200. Mr Bridge challenged Officer Clifford on the basis that Deal 36 could not meet the contra-trading construct because neither KTM nor Airphone had paid for the goods and therefore it could not have been a pre-ordained scheme. Officer Clifford was very clear that a number of companies with whom Future had traded owed Future substantial amounts of money. Indeed, the total at the time she wrote the statement was £61,133,025.65. The debts were not invoice specific so she could not confirm whether Airphone themselves had paid Future in respect of this deal but of that sum Airphone certainly owed Future £4,116,196.25.

201. It was her opinion, and of course we exclude opinion evidence but it is our view also that, it was bizarre in terms of normal commercial trading to have such sums of money outstanding since it would not be commercial practice to release telephones without payment within 28 days. She was quite adamant that there was a contra-trading scheme at which Future was the heart and all traders including Aircall within the scheme had a part to play. She was not asserting that when Future sold to Airphone, Aircall were involved and indeed she went so far as to say she had no idea how they became involved or whether indeed they had simply turned a blind eye to the deal they were being offered. She did confirm that there was no evidence of any communication between Aircall and Future.

202. The evidence of all of the Officers in regard to Future and the contra trading was reliable, the chains of supply had been accurately traced such that each of the

transactions in the period, whether buffer or broker, were connected to the fraudulent evasion of VAT. We are satisfied that Future acted as a contra trader in the transaction involving AEL in Deal 36.

Summary

203. It can be seen that we have found that there is a connection between all of the appellants' deals and the fraudulent evasion of VAT.

FCIB

204. Neither appellant banked with FCIB. Although Mr Bridge argued that that was a positive indicator that the appellants were not involved in MTIC fraud, all that we take from this is that it is not a negative factor and as such find it to be entirely neutral. We are certainly not persuaded by his assertion that HMRC should answer the question as to why the appellants did not have an FCIB account if they knew of the fraud. By no means all of those involved in MTIC fraud banked with FCIB and, in particular, Sunico never banked with FCIB and yet has been found to have been deeply involved in MTIC fraud. On a similar note we consider that the appellants continued banking with Barclay's Bank is also an entirely neutral factor. Any argument on Barclay's decision to continue to allow that banking, if there was such a positive decision, is mere uninformed speculation.

205. Mr Bridge did not require the evidence of Officer Letherby and although we had the witness statements, the reports were not lodged in process.

206. In his first witness statement Officer Ruler had analysed nine transactions using the information from the Dutch server which did not include timings and IP addresses. In his second statement he had had access to the Paris server and that did include timings and IP addresses. He re-analysed four deals and analysed a further three. Officer Ruler directly analysed the money flows in relation to 12 of the deals involved in this appeal, namely Deals 1, 8, 11, 12, 20, 24, 28, 29, 30, 31, 32 and 34. Deal chains 23 and 24 were identical with Aircall invoicing both together and being paid for both together. The analysis of Deal 24 includes Deal 23 so, in fact, 13 deals were analysed. In six of those 13 deals Officer Ruler demonstrated that monies could be shown to circulate. Circularity was established in Deals 8, 11, 23, 24, 29 and 34. Obviously since Aircall, Elite and Sunico did not have FCIB accounts monies could only be traced being paid to or received from them.

207. Having heard the evidence of Officer Ruler and seen the evidence that in approximately half of the deals analysed there had been a circular flow of funds, Mr Ghazi acknowledged the circularity in regard to Deals 8, 11, 23, 24, 29 and 34. He argued that in every case it had simply been a coincidence that Aircall had been able to source precisely the quantity of telephones required and sell them to someone who required precisely that amount although with the benefit of "hindsight it's emerged a different picture". He conceded that if a counter-party with whom he had done business offered telephones and at the same time another counter-party wished to buy the same quantity, and the same model "it probably would" have struck him as suspicious.

However, he said that in regard to specific quantities that would not have been a matter for him since he did not deal with trading.

208. Mr Bridge conceded that there was no issue on the timings and the IP addresses. It has been established that the same IP addresses were utilised in, for example, Deal 24, where Computec, Zenith and New Ora were identified as using the same IP address. A similar position arises in other deals such as Deal 29 where Regal and Zenith use the same IP address.

209. It is very clear that a number of traders were using the same IP address (and therefore must have been using the same "modem" as described by Officer Ruler) and further that money moved very quickly. An example is Deal 34 where money passed through traders allegedly in Beirut, Poland, France, UK, Holland and back to Beirut in 4 hours and 36 minutes in 12 transactions, including the monies passing through Aircall who did not have an FCIB account.

210. Officer Ruler established that the transfer of funds in Deal 29, had commenced with Overseas Trading Limited ("Overseas") on 12 May 2006 12:51:01 with Aircall receiving the funds via a buffer and its customer Mobile within 15 minutes. Aircall paid out the funds on Tuesday 16 May 2006 at 15:09:16 and the funds reached Overseas at 16:09:26 that afternoon. He established that the money was moved in seven transactions in less than that one hour with three traders making part payments and the remaining full payments within eight or nine minutes.

211. Similarly in Deal 24 (and 23) the funds commenced with Overseas on 4 May 2006 at 12:54:03 and travelled in a circle in seven transactions in two countries returning to Overseas' account at 17:33:03 that afternoon. In that 5 hours the longest gap was where Aircall received its funds from Freitex and paid its customer 2 hours and 1 minute later.

212. Even if it is accepted that Mr Ghazi was anxious to pay his suppliers, the speed with which these funds were transferred means that every other trader must have been waiting for the funds in order to act so expeditiously and in our view that points to contrivance.

213. It became clear that the EB numbers did not necessarily follow on from each other and Officer Ruler could not comment thereon. It was suggested that Officers Letherby and Mendes could perhaps clarify matters. Officer Mendes clarified the position in regard to the EB reference. It is triggered when a participant goes into the FCIB account but the payment may not actually be made until sometime later when the authorised signatory goes into the account and authorises the payment. He was unable to comment on multiple users of IP addresses. In passing, we observe that it is known to the Tribunal that Officer Letherby, who was not called to give evidence as his reports were not in dispute, makes it explicit that it is highly unlikely that the same IP address could be accessed by multiple users coincidentally. With or without Officer Letherby's evidence we find that multiple use of IP addresses in quick succession is a very strong indicator of fraud.

214. We note the evidence of the circularity of payments culled from the FCIB accounts. Albeit, Officer Ruler was only able to analyse a sample of deals due to pressure of work, we find as fact that in all of the deals where it was possible to fully trace the movement of funds there was evidence of circularity. It was Officer Ruler's opinion that there was circularity and that that demonstrates contrivance. We have discounted opinion evidence. However, having examined the evidence we find that there was circularity and we do find that it demonstrates contrivance.

215. That circularity alone certainly does not show the probability of actual knowledge and we cannot be certain that it covers all of the transactions since only a sample were analysed but on the balance of probability that seems fairly likely since many of the same traders appear as counterparties or buffers in the other deals. However, in our view, it does tend to show a collusive and conspiratorial course of conduct consistent only with the purpose of the transactions being to defraud the Exchequer rather than to deal on commercial terms at arms-length.

216. Lastly, it is appropriate to refer to Mr Ghazi's evidence about circularity at this juncture. His initial reaction having heard the evidence was that it was simply a matter of coincidence but on reflection he thought that it was not coincidence and with the benefit of hindsight: "…it does look like there were people involved who knew, but we certainly did – had no idea".

Evidence of Officer Stone

217. Mr Stone agreed that he had not been directly involved with these appeals and that his evidence related to MTIC fraud in general. He confirmed that the market had effectively collapsed after the reverse charge was introduced in June 2007. The reverse charge puts the onus on the customer to account for the VAT he has been charged by his supplier. Mr Bridge suggested to Mr Stone that the collapse in the market in mobile telephones from May/June 2006 was because HMRC had adopted a general policy to stop making repayments and to insist on extended verification on all traders dealing in mobile telephones, whether they were involved with MTIC fraud or not. Mr Stone denied that there was any such policy. We do not accept that there was any evidence of such a policy.

218. The primary impact of Mr Stone's evidence was his outright rejection of Mr Bridge's repeated assertion that fraud was not possible in the reverse charge environment so it was relevant that Aircall continued to trade in the same manner before and after the imposition of the reverse charge. As we point out at L in the Footnote to this decision:-

> Cross examination of Mr Stone had elicited the, surprising to Mr Bridge, statement that "…my recollection again is that they are trading in the same manner except they are using the reverse charge and the tax losses are in the other Member States…it also points to the fact that they could still be involved in fraud".

At no stage have HMRC even suggested that Aircall knew or ought to have known of any connection with MTIC fraud after the periods with which we are concerned.

219. Mr Stone confirmed in his evidence that it was perfectly possible that a trader could conduct both legitimate and fraudulent transactions.

Evidence of Mr Fletcher

220. Mr Fletcher appeared as an expert witness called by HMRC. Although Mr Bridge called into question the extent of his expertise, Mr Fletcher seemed to us to be a reliable and knowledgeable witness who was very clear that he was not prepared to speculate about matters not within his knowledge or expertise. We accepted his evidence where it was relevant to these appeals.

Grey Market

221. Mr Fletcher's analysis was conducted in order to consider the reasonableness of the market share of the appellants within the context of the grey market, and therefore, Mr Sheth's fourth and fifth witness statements and Ms Reed's witness statement came into focus. Although Mr Fletcher's evidence was hotly contested in anticipation it really had limited impact on our decision which does not turn on the grey market *per se* or the appellants' share thereof. Indeed, ultimately very few contentious issues arose out of any of the evidence on the grey market.

222. We do not rehearse at length that evidence since, as was conceded in the course of the Hearing, much of what was in Mr Fletcher's witness statements was generic in terms of MTIC and indeed has been referred to at length in many reported MTIC appeals so will be well known to most readers of this decision. Mr Fletcher accepted that there was a very vibrant, lively and perfectly proper market in the UK for the grey trading of mobile telephones because there was no manufacturer in the UK. Obviously, all mobile phones are imported into the UK whether by the white or grey market. The appellants conduct all of their trade in the grey market.

223. He was not prepared to estimate a figure for the size of the grey market and nor did he know the numbers of phones sold into South Asia or Africa from the UK. He did not know whether telephones would end up in Africa having been channelled through Dubai.

224. GfK Data relates entirely to retail sales and therefore does not include sales by the appellants. It is accepted by all parties that the wholesale market exists only to supply telephones which are subsequently retailed. Therefore, Mr Fletcher looked at that data to consider the volume and nature of probable trading of the appellants. He stated that "It is reasonable to make the assumption for the purpose of these calculations, that the phones were retailed in the market to which they were wholesaled by the appellant." In that context he had excluded GfK data, where available for example in regard to Hong Kong and Singapore.

225. He calculated the monthly market share for each model of handset that was traded in by the appellants including the trades in these appeals. It was in Mr Fletcher's opinion unusual for the European (plus UAE) market share of any one distributor company to exceed 5%. He provided a detailed analysis and we noted in

particular that in two instances the appellants' transactions exceeded the total addressable market and that therefore those transactions were implausible. Overall his view was that in 10 deals, which are the subject matter of these appeals, the market share was within reasonable parameters but in another 17 those parameters were exceeded. He made it explicit that no inference should be drawn as to circularity or otherwise of any trade based on that analysis.

226. We noted and accepted his view that to execute successful arbitrage trade on the margins achieved by the appellants would be "very difficult in this market". However, we accept also that it is not impossible. In the context of arbitrage, Mr Fletcher considered Deal 36 to be two separate deals being the attempt by Future to sell the phones to an Israeli customer and then the sale by Airphone to Aircall and he said that these have the characteristics of arbitrage trade save that they involve Nokia phones in two different geographical regions.

General

227. He made the very valid point that traders would be looking for the best price available from customers and suppliers. Therefore counterparties will find each other through the mechanisms of the market to strike the best possible deals and that means that deal chains would be expected to be as short as possible and in particular would not be formed of the same parties. We wholeheartedly agree.

228. He conceded that value can be added without changing the nature of a product, indeed it could be added by simply making the product available to someone even in a situation where the retailer subsequently made a loss.

229. Mr Fletcher stated that he understood that it is against UK safety regulations to sell phones to the UK market which have a two-pin plug, they must be converted to a standard three-pin plug or provide a conversion plug and comply with the UK Plugs and Sockets etc (Safety) Regulations 1994. Mr Bridge relied on that to support the argument that the appellants could and did alter telephones (see below).

230. Mr Fletcher informed us that the sale of Nokia 6276 cannot have been intended for use in Europe since the phone was designed for use in networks that are not found in Europe. Similarly the Nokia 8801 was designed for use in the Americas and therefore it does not work on all of the mobile phone networks in Europe because of the frequencies. The Nokia 8800 was designed for Europe as opposed to the 8801 which was expressly designed for the north American market. We accepted that as fact and that was put to Mr Ghazi who described them as saleable commodities so therefore that was not relevant. It begs the question as to why there would be a market in Europe given the transport cost thereafter.

Overview of Mr Ghazi's evidence

231. Mr Ghazi was the principal witness for the appellants. We found him to be an articulate and intelligent witness. He gave evidence over a long period and was

patient, urbane and charming in face of what must have seemed like endless interruptions for legal argument.

232. Although his evidence was lengthy, inevitably it was repetitive and there were several key themes to which he returned frequently so they are worth highlighting, namely

(a) the appellants had knowledge only of their immediate counterparties,

(b) the appellants' decision to trade with their counterparties was predicated almost exclusively on personal relationships with the controlling minds of those counterparties,

(c) in general due diligence on suppliers, and the focus was on suppliers rather than customers, consisted of a site visit and sight of letters of introduction, Certificate of Incorporation, Certificate of VAT registration, bank details and Redhill checks,

(d) the appellants almost exclusively dealt with those whom they (through their traders) knew and they relied on those individuals' or those companies' industry reputation,

(e) although site visits to suppliers were usually conducted at some stage, no records were kept,

(f) no record was kept of any verbal alterations to contracts or of verbal reports on inspections or Veracis reports,

(g) although the appellants now know about the extensive fraud in their deal chains, they had had no knowledge or means of knowledge of such fraud at the time.

The appellants

Overview

233. Aircall was incorporated on 11 February 1998 and registered for VAT on 28 February 1998. Aircall UK Limited was incorporated on 27 December 2000, was registered for VAT on 17 May 2002 and changed its name to Aircall Export Limited (ie AEL) on 26 June 2002. Both companies filed VAT returns on a monthly basis.

234. Both appellants operated in the trade of wholesale mobile telephones. Aircall had a UK arm distributing telephones and accessories to retailers in the UK.

235. Aircall continues to operate in the wholesale trading of SIM free mobile phone handsets, IPads, televisions and electronic games consoles.

236. It is not clear when AEL ceased trading. Mr Ghazi said that it ceased trading in or around October 2007. Certainly, the last VAT return received was for period

09/07. However, further central assessments have been raised by HMRC for 12/07 to 12/08 inclusive and the debt outstanding to HMRC totals £511,969.69. It was compulsorily deregistered for VAT with an effective date of 25 March 2009.

237. Mr Sheth explained that AEL had originally been incorporated in order to take advantage of the VAT factoring facility offered by the bank but that offer was not adopted. Thereafter, albeit he conceded that there was no need for two companies, Mr Sheth stated that the two companies continued to trade, where one of the companies had established a relationship with a particular supplier or customer. That was confirmed by Mr Ghazi but was not borne out by the facts. Both companies are noted to trade with the same companies. For example in 09/06 Officer Brown's unchallenged evidence was that AEL traded with Almashrig, Elite, New Way, and Sunico quite apart from Aircall amongst others.

Personnel

238. Mr Neegum Sheth has been working in the wholesale trading of mobile telephones since approximately 1998 and prior to that was an accountant with clients in the wholesale electronic sector.

239. Both appellants had the same principal directors, Mr Sheth who was, and is, the Managing Director and Company Secretary of Aircall and Pradeep Travadi who was the finance director of both companies from 10 October 2003 until 2 July 2007. Mr Sheth's wife was the other director of both companies and Company Secretary of AEL but she was described as playing little or no part in the businesses.

240. Mr Sam Ghazi, together with Mr Travadi, was predominantly responsible for due diligence processes, customer services and transaction logistics.

241. The head of export transactions, Ms Lonegan, left the companies in 2007 with Mr Travadi to join a company in UAE. Ms Lonegan and Mr Travadi were the witnesses for AEL in the 2005 appeal.

242. Mr Sheth confirmed that he treated both companies as one and stated that he drew only one salary. We have no hesitation in finding that both companies were indeed treated as one (see our findings on Deal 36).

243. The staffing of the two companies was interchangeable and from 2002 to 2007 the appellants employed approximately 25 full-time and part-time members of staff. Of those staff approximately six concentrated on wholesale export deals and six or seven sold directly to predominantly high street retailers at which time they had approximately 700 customers. The staff were under the control of Messrs Sheth, Travadi and Ghazi.

244. Mr Sheth was not directly involved in the day to day negotiations of the transactions which are the subject matter of the appeals. However, he did have involvement in that, in his words, he tried "to overlook it as much as possible" and he approved all deals going ahead.

245. Although it was originally argued for the appellants that it was not clear who in their corporate bodies were alleged to have known or ought to have known of the connection to fraud it was clear from the witness statements for the appellants that it was not disputed that it was Messrs Sheth, Travadi and Ghazi. However, it transpired towards the end of the Hearing, when Mr Sheth gave evidence, that a Mr Acar, although not with day to day involvement, was also a controlling mind (see below).

246. In assessing the knowledge of the appellants through Mr Sheth, Mr Travadi and Mr Ghazi we only took account of information known or which could or should have been known to them during the relevant period.

Ownership of Aircall and AEL

247. In Officer Brownsword's first witness statement in 2011 he stated that Mr and Mrs Sheth were shareholders in Aircall. He exhibited a report from Companies House dated 2010 which did not include shareholder detail.

248. Mr Sheth's first witness statement dated September 2012 opened with the words "I am Managing Director and a shareholder of…" Aircall and AEL. At paragraph 18, he then went on to state "My wife and I …are 100% shareholders in the company."

249. In April 2013, amongst other matters HMRC served on the appellants the 2006 and 2007 accounts of Aircall. The formal application for admission of that evidence was dated 27 June 2013 and made it explicit that those accounts were in conflict with Mr Sheth's statement. On 29 July 2013, in the final paragraph of his second witness statement, Mr Sheth corrected paragraph 18 and confirmed that it was only AEL that was owned by him and his wife. He stated that his friend Zafar Acar whom he had described in the first statement as investing £250,000 in the business had in fact owned 49% and Marker International ("Marker") owned 4%. Although that may be a correct statement as at 2013, it was not the case in the period up until 2006.

250. In fact the accounts, for every year up until and including those to 31 August 2005, disclose at (a) under the heading "Related Party Disclosures" that "The company is controlled by Marker International Limited, a company incorporated in Turkey which owns 53% of the issued share capital."

251. It transpires that Marker is a Turkish company owned by Mr Acar and two friends. Accordingly, both Mr Sheth and his wife were, and are, minority shareholders in Aircall. He went on to say that he had explained Mr Acar's involvement in the company in his first witness statement. For the reasons set out below we find that he certainly had not explained the full involvement. Mr Sheth confirmed in cross examination that Marker had been the majority shareholder from incorporation until it sold 49 shares to Mr Acar in 2006. Marker was a pharmaceutical company.

252. In addition, we find it highly improbable that Mr Sheth is correct when he stated orally that it was not HMRC's application which had prompted that alteration.

Telesis, Mr Acar and Marker

253. Mr Sheth's evidence was that Aircall was initially established to buy, either in the UK or Europe, telephones to be sent to a Turkish company called Telesis which was owned and operated by Mr Sheth's friend Mr Acar who was active in the telecommunications market in Turkey. Initially, Aircall sourced the telephones but Telesis purchased them. Effectively, Aircall was commissioned by Telesis to buy precisely the telephones that Telesis required at the prices specified by them. They were paid a commission. Thereafter the arrangement changed.

254. Although Mr Sheth said in his witness statement that Mr Acar invested approximately £250,000 in Aircall to help establish the business, in fact, in his oral evidence he stated that Telesis did so. (Mr Sheth had invested approximately £25,000 in Aircall.) He confirmed that Telesis was owned by Mr Acar and two colleagues and the same three Turkish gentlemen owned Marker. The £250,000 transferred from Telesis was treated in the books of Aircall as an unsecured loan but it was designed to fund Aircall so that it could purchase stock for Telesis.

255. Mr Sheth's evidence was very vague but on the telephones sold to Telesis, Aircall would retain 30% of the profit that they made and the balance of 70% would be passed to Mr Acar. One of Mr Acar's staff was employed by Aircall. Mr Sheth's evidence was that the 70/30 split continued only for a very short period. The loan was repaid quickly from profits. The loan of £250,000 had been repaid to either Telesis or Mr Acar by no later than August 2002. The repayment is not clear in the accounts.

256. It is difficult to see how the relationship between the appellants and Mr Acar could possibly be described as a legitimate arms-length commercial endeavour. Mr Acar seed funded the appellants and then he provided high value informal loans with no written terms. He and his company, Marker, received 53% of the share of the profits in the appellants by way of dividend payments from Aircall.

257. Apparently, on 28 April 2006 Marker sold 49 of those shares to Mr Zafer Yilamz Acar for £200,000. Mr Sheth was asked to explain why a share transfer document had been found in Aircall's office during the raid for Operation Apparel. He said that he had known about the share transfer and that perhaps the document had been left there by Mr Acar when he came to the office. He visited Aircall three or four times a year.

258. When writing this decision we noted that there were in fact two stock transfer forms seized in Operation Apparel, one purports to be a signed transfer of 49 shares to Mr Acar for £200,000 and dated 28 April 2006. However, it has not been stamped and therefore in the absence of duty having been paid the transfer would not be valid. Furthermore, there is a second stock transfer form signed by the same transferor in favour of Mr Acar and dated on the same date but not disclosing the consideration, the name of the registered holder or the number of shares. It too is not stamped.

259. Nevertheless, there is evidence that £106,000 was paid to Mr Acar by Aircall on 2 June 2006. Mr Sheth suggested that that was part of the dividend payment in that year and therefore the transfer had been completed.

260. Mr Sheth made it clear that because Mr Acar had no shareholding in AEL he endeavoured to ensure that Mr Acar could obtain "dividends" from, and profit from, the trade in AEL so inter-company accounts were adjusted accordingly. The detail remained very vague. We did not find his evidence in regard to Mr Acar or Marker convincing other than that at all relevant times they have had considerable input, financial and otherwise, to the appellants.

The inter-company transactions

261. It was argued for the appellants in regard to transactions between Aircall and AEL that the evidence would reveal that "**if** there were transactions between them, they were zero transactions…it was simply goods transferring ownership at zero cost between businesses owned by the same people". Mr Sheth was very clear that the only trade between the two appellants was where a customer had established a relationship with one company but the stock was held by the other and in that instance the stock would be transferred at "nil profit". Mr Ghazi stated that "…a transaction…occasionally happened, but there was no profit or mark-up between the two companies". In fact that simply was not the case.

262. Firstly, the transactions transpired not to be at nil profit or zero cost. We had an exhibit from Officer Brown which showed the detail of a number of transactions between the two companies in October and November 2006 showing margins per phone ranging between £0.50 and £3.70. Mr Sheth could not explain why that might have happened.

263. On looking at Aircall's accounts, when writing this decision we note that for example in 2004, under the heading "Related Party Transactions" the following is recorded (and the highlighting is ours):

> "(c) N Sheth and S Sheth have material interests in Aircall Export Limited … both of which are incorporated in England. During the year, the company had the following related party transactions which were carried out on a **normal commercial** basis:-

Name of company	**Nature of transaction**	**2004** **£**	**2003** **£**
Aircall Export Limited	Sales	235,867	84,440
Aircall Export Limited	Purchases	2,087,901	6,377,197
Aircall Export Limited	Management income	1,164,890	610,135"

264. In the accounts for 2002 we note that the comparative figures for 2002 and 2001 for sales are £4,812,050 and nil and for management income £110,594 and nil

respectively. The only other breakdown is in the 2007 accounts which state that "The following transactions took place with Aircall Export during the year:" and then gives the comparatives for 2007 and 2006, namely purchases of £1,265,500 and £237,620, sales of £21,975 and nil and management charge of £398,249 and nil respectively.

265. None of that sits well with the suggestion that there were minimal transactions between the companies or Mr Sheth's response to Mr McGuiness that "There were **some** occasions" when there would be intercompany transactions "a lot later", approximately three to five years after AEL was established. Mr Sheth could not explain why, in 2003, with a turnover of £9,011,658, £6,377,197 was attributable to AEL.

266. Although the submissions and witness evidence served for the appellants did not suggest any significant level of trade between the appellants, clearly, for a number of years, starting no later than when AEL registered for VAT in 2002, there was significant trade between the two companies.

267. Mr Sheth suggested that in 2003 the reason Aircall had a very low turnover, indeed described as "fallen through the floor" since it fell to £9,621,793 from more than £136 million, might have been because the turnover was in AEL and the majority of trading and sales might have been done in AEL. Officer Paterson's oral evidence was helpful in that context. The account of the visit on 6 August 2002 reported that HMRC had been told that Aircall was to "concentrate on small retail wholesale only, all large deals would be put through the associated 'export' company". That was later confirmed to be with effect from 1 October 2002. On 2 June 2003 the Officers recorded that all bulk sales of phones were being put through AEL. Mr Paterson explained that the supplies of those goods were made by Aircall to AEL. At a visit on 23 August 2004 Mr Ghazi reported that AEL was to be wound up and all imports would be put through Aircall. That explains the transactions referred to above.

268. HMRC had recorded in regard to a visit on 14 October 2004 that Aircall was "changing strategy" and that "all transactions will now be going through this company, the 'Export' registration will remain registered but will be dormant in case of further changes in directions". That is wholly unsurprising since the 2005 appeal related to periods 01/04 and 02/04. What is surprising is that Mr Sheth and Mr Ghazi did not offer that explanation and that both Mr Sheth and Mr Ghazi repeatedly tried to make it clear that there was little or no trade between the two companies and what there was, was at zero profit.

Financial information and Aircall's Report of the Directors and Financial Statements for the years ended 31 August 2002 to 2012

269. We did not have the benefit of the accounts for AEL.

270. The appellants themselves had made the application for the accounts for Aircall for the years ending 31 August 2002 to 2012 to be lodged in evidence, albeit 2006 and 2007 had been lodged by HMRC (see item K in the Footnote to this decision). We had Mr Ghazi's evidence stating that there were no loans and that dividends were not large so, notwithstanding Mr Bridge's protestations, it was certainly relevant to look at the accounts in some detail.

271. Looking at the accounts for 2002, in the Notes under the heading "Creditors", it is clear that at the year end the debt to Marker had increased by £48,300 to £99,222. When that was put to Mr Sheth he said that "over the years Telesis, Mr Acar or Marker has – we have had loans from them if needed … so it was probably a loan that was received from Marker that was owed at that date". Mr Sheth confirmed that Aircall had a facility that in addition to the £250,000 which had been provided by Telesis, Aircall could borrow further sums from Marker, Telesis or Mr Acar.

272. Whilst we accept that we were looking at "old history" nevertheless Mr Sheth's evidence in regard to the accounts was ambiguous at best. He was asked why an £800,000 dividend had been paid in the year ending August 2003 and he suggested that it might have been done under advice (and having consulted with Mr Acar) but that a possibility was that he might not have been on PAYE in that year. For the reasons we set out below that is inaccurate.

273. Mr Sheth had considerable difficulty in explaining why in 2003 when the turnover was slightly in excess of £9 million more than £6 million of purchases had been through AEL. The costs of sales in that year were in excess of £8 million. He could not explain why, having said that the only reason for using the two companies was where a particular client had a particular relationship with either of the appellants there would be sales of that magnitude between the two appellants. He simply cannot think why that had happened.

274. In that year approximately £124,000 was injected into the company by Marker.

275. The Tribunal asked Mr Sheth why when he said that all of the overheads would have been in one company, Aircall, the management charge in that year was only £610,135 but of course the overheads had been more than that. He simply said "… it was a proportion of it …".

276. In 2004 it is clear that of a turnover of slightly in excess of £6 million with costs of sale of just under £5 million, more than £2 million worth of telephones had been purchased from AEL. At that stage the management income charge was £1.16 million.

277. The 2005 accounts are even more illuminating. The turnover leapt from just in excess of £6 million to slightly more than £59 million and the turnover attributable to geographical markets outside the UK had gone up from 10% to 35%. Although there is a profit for the year after taxation of £292,000 a dividend was paid of £49,000 and the directors loan fell from £110,000 to £23,000 and Marker were repaid approximately £95,000 in addition. At that juncture the balance between Aircall and AEL changed and there was a trade debt to AEL of £457,000.

278. Mr McGuinness took Mr Sheth through those accounts. We have briefly summarised some of the salient details from each year as follows:-

Year	Turnover	Dividends	Profit/Loss	Amounts owed to Marker	Amounts owed to AEL
2001	92,246,611		353,428	(40,922)	0
2002	136,961,349	110,000	429,186	(99,222)	695,088
2003	9,011,658	800,000	132,363	(223,222)	469,746
2004	6,138,736		84,932	(223,222)	56,861
2005	59,307,710	49,000	292,174	(127,971)	(457,794)
2006	86,249,308	289,577	(317,325)	(41,017)	(7,638)
2007	4,602,487		(211,286)	(29,017)	(262,312)
2008	5,902,758		(399,697)	(29,017)	(236,738)
2009	44,003,230		411,677	(280)	(172,925)
2010	37,680,604		(45,097)	(280)	(185,664)
2011	65,020,460	132,000	146,560	(5,560)	(185,636)
2012	74,331,476		(241,833)	(5,560)	(185,636)

As can be seen Aircall remained indebted to AEL after the latter appellant ceased trading.

279. In every year those accounts disclosed debts due by Eastwoode Homes which was a property company owned by Mr Sheth and his wife. In the years 2008 to 2012 the average amount owed at the end of any year was approximately £53,000. In the years 2001-2007 the minimum was £98,523 in 2004 and the maximum £192,324 in 2007.

280. From the information disclosed in the accounts we find that there is no obvious correlation between the level of intercompany sales and purchases and the management charge but that is perhaps explained by the "adjustment" to compensate Mr Acar since he had no holding in AEL.

281. In the years 2006 to 2012 in five years there were operating losses and two years there were operating profits. Aircall was technically insolvent every year from 2006 to 2012.

Loans and Dividends

282. Mr Ghazi has been employed by Aircall since 2001. In contrast to Mr Ghazi's clear statement that "In our case there was no loans involved whatsoever…Mr Sheth …didn't take a large amount of dividends" in fact, as can be seen, not insignificant dividends had been paid and there were loans. Mr Sheth and his wife owned 24% and 23% respectively of Aircall and he confirmed that logically they would have received those percentages of the dividends. There were no amounts showing as payable to Mr and Mrs Sheth in the related party disclosures to the accounts to suggest that the dividend to the Sheth's had not been declared but not paid. Furthermore in every year there was a balance outstanding to Marker.

Loans

283. Mr Sheth confirmed that the loan arrangements were very informal and they had the facility to be able to draw down further funds at will from Telesis or Marker. There was nothing in writing and there may, or may not, have been small amounts of interest paid. If there was a cash flow issue then a loan, whether short or long term would be drawn down.

284. Mr Sheth ultimately conceded that, in summary, Aircall had been supported by loans from Mr Acar and his companies over the entire period and latterly also by loans from friends and family.

285. We simply do not accept the argument that the appellants "never had an offshore loan".

286. Further in regard to loans, as Mr Ghazi had exhibited the decision in *Unistar*, we referred him to paragraph 65 in *Unistar*. That reads as follows:-

> "65. Mr Spurgeon also produced an internal financial statement, which Group kept in relation to loans made to Aircall to help them purchase the stock which Group subsequently purchased. Mr Spurgeon explained that one of the reasons for keeping a close and trusting relationship with his suppliers was to assist the informal short term funding which was required from time to time. The practice resulted in substantial sums of money being loaned. The loans were made in the form of advanced payment for goods that UGL were going to acquire from Aircall but which Aircall had not at that time purchased. These were never treated as payments on account as Group did not want to be in a position where it had agreed to buy the phones before it had sold them. It did, however, wish to help Aircall out, so that Aircall could purchase the products, by paying Aircall for the goods in advance. The payments were treated as loans and converted to payments when the goods were eventually purchased … We note from the account that Group appears to have made advanced payments by way of loans and deals 2, 5 and 8 of period 04/06 over the 25 days amounting to £859,439.65."

287. As we note elsewhere, in 04/06 in the deals with which we are concerned, Aircall released goods of a value totalling £1,222,500, without having received payment and yet, at the same time was seeking loans from Unistar.

288. We note from the Aircall bank statements that in the months of March, April and May 2006 there are several million pounds worth of receipts from Unistar Group companies and there is no record of that to which they relate. HMRC had identified a handwritten note on one of Aircall's bank statements indicating that there was a loan outstanding to Unistar of £790,000 as at 18 May 2006. That is correct and the bank statement indicates receipt of that sum on that date. However, we also note three receipts on 16 May 2006 totalling in excess of £2 million and on 9 May 2006 the sum of £530,807.50.

289. That is consistent with the exhibit of HMRC's template compiled by Officer Brownsword where he recorded that on 5, 8 and 11 May 2006 Mr Ghazi had written to Unistar requesting four loans totalling £1.634 million. That template had been disclosed by HMRC in compliance with Direction 3 of the Directions.

290. Mr Ghazi was asked about the loans from Unistar and he said that when Aircall was short of funds they would ask their customers if they could make an advance payment or deposit. Unistar was the only company which insisted that it was treated as a loan. In fact in respect of the deals with which we are concerned we note that a deposit was requested only once in respect of Deal 14 on 6 April 2006 and that was explained as being required because it was an unknown customer. As we note, in any event, it was not paid timeously.

291. Both Mr Sheth and Mr Ghazi said that Unistar were extremely helpful and extended credit on a regular basis. Patently, Aircall were in receipt of very significant loans from Unistar. Since Unistar was a competitor that seems unusual to say the least. Further there is no evidence of any formal documentation for these substantial loans.

Dividends

292. We did not accept Mr Sheth's suggestion that the reason for the substantial dividend in 2003 was that he had been advised that he would be better off drawing his salary as a dividend. If one analyses the operating profit one can see that the directors emoluments in 2003 had risen by in excess of £13,000 from the previous year to £117,452. The only two directors were Mr and Mrs Sheth since Mr Travadi only became a director in October 2003. In any event 53% of the dividend went to Marker. By most standards, at that time, it was a very large dividend and it is surprising that he had no recollection.

293. As can be seen from the table set out above the dividends paid, overall, were not insignificant given the profits (losses).

Control of the appellants

294. On being asked about the substantial dividend paid in 2003, Mr Sheth confirmed that Mr Acar was "a vital member of the team" and therefore he would have consulted him on major decisions such as the decision to continue trading after the extended verification. He would have consulted him about, eg, the dividend of £132,000 in 2011 which might have been paid at either his or Mr Acar's request.

295. In cross examination Mr Sheth conceded that the appellants and Mr Acar were "50/50" or equal partners and although he did not consult him on a day-to-day basis he could not and did not make decisions without consulting him. He stated that he still plays a role today, albeit not so active. Clearly therefore at all times Mr Acar was one of the controlling minds of Aircall and indeed AEL together with Messrs Travadi, Sheth and Ghazi. Indeed Mr Sheth told the Tribunal that matters were organised such that "Mr Acar was fully aware of what was happening and would have received his rewards, if there was any …". Regrettably that is the extent of our information on Mr Acar.

296. We find that, at very best, both Mr Sheth and Mr Ghazi's evidence in regard to the structure, funding operation and control of the appellants was simply dissemblance.

Bank accounts

297. Both appellants always held and used their Barclays Bank accounts for receiving and making payments. They never held a bank account with FCIB.

298. The accounts for Aircall and AEL were allegedly kept separately. We do not unequivocally accept that. We find there was not necessarily a delineation between the banking arrangements for the two companies but we have no detail.

299. It is clear from Officer Marshall's unchallenged evidence that in the course of Operation Rosary, CHAPS transaction prints were obtained that related to AEL's Deal 36 and as we make clear above Aircall actually paid a significant part of the purchase price.

Overview of contact with HMRC and the Deals in that context

300. The 36 broker deals which are the subject matter of these appeals were conducted over five months. In the case of Aircall there were 20 deals in period 04/06, 11 in period 05/06 and two in each of period 06/06 and 07/06. In those 35 broker deals the appellants bought goods from 12 different suppliers and sold to a total of 16 customers.

301. On 14 June 2006 HMRC intimated to Aircall that period 04/06 was to be subjected to extended verification. On 27 June 2006 a similar letter was sent in regard to period 05/06. Accordingly both of those letters had been received before Aircall embarked upon the deals in period 07/06.

302. On 16 August 2006, Aircall's premises were raided by HMRC under a search warrant issued on 9 August 2006 in the Manchester City Magistrates Court and business records were uplifted from the premises. Those records were returned to Aircall a few weeks prior to 26 September 2012 when Mr Ghazi signed his first witness statement.

303. When the records were returned to Aircall an employee, Miss Tongat signed for the return of the records. Those records are detailed over 13 handwritten sheets and each item has been individually ticked. Mr Ghazi repeatedly told the Tribunal that not everything had been returned but he could not positively identify that which he alleged had not been returned other than that copy diaries had been returned rather than originals.

304. Although all the documentation had been signed for by Miss Tongat he said that he did not expect that she would have checked before signing as he would not have done so himself. We find that odd since the appellants had had experience of previous court proceedings and were aware of these proceedings. Further Mr Ghazi stated at paragraph 81 in his first Witness Statement dated 26 September 2012 that the documentation seized in the raid had been returned "a few weeks ago. We are still going through these documents to locate anything that be relevant …". We find that, had there been deficiencies in what had been returned, it would have been expected that that would have been identified prior to cross-examination in this Hearing.

305. In Deal 36 AEL purchased goods from Airphone and sold to Sunico in the last deal to be challenged. By that time, 29 September 2006, Aircall had not only received the verification letters for the first two periods but on 31 July 2006 they had received a letter intimating that the period 06/06 was to be subjected to extended verification.

306. On 34 occasions between September 2001 and March 2006 HMRC had issued notifications to Aircall regarding deregistered suppliers of mobile telephones ("Veto letters"). Between 1 and 21 September 2006, 13 Joint and Several Liability warning letters were sent to Aircall informing it that 13 separate deals relating to six different suppliers had commenced with a defaulting trader. Those suppliers were Cell, London Mobile, New Ora, New Order, New Way and Phone City and the total VAT on Aircall's transactions in those deals was well in excess of £800,000.

307. A further 10 letters were also sent in the next few weeks in relation to Cell, Eurostar, London Mobile, New Ora, New Way and Phone city. The total VAT on Aircall's transactions in those deals was in excess of £520,000. HMRC now argue that all 35 of Aircall's broker deals can be traced back to 19 defaulting traders. We annex at Appendix 5 extracts from the Joint and Several Liability and Veto letters.

308. On 2 May 2007 HMRC wrote to Aircall intimating that the period 07/06 was to be subject to extended verification.

309. HMRC visited the appellants' premises on 36 occasions prior to 2006 and Officer Brownsword reported that in more than 30 visits the risk of MTIC fraud was discussed. Specifically on 25 July 2005, Officer Bhabra emailed Mr Travadi regarding due diligence and providing a link to the HMRC website for further information. Mr Ghazi conceded in his witness statement and orally that there had been many visits from HMRC Officers and MTIC risk had frequently been discussed. He described the relationship as good.

310. We had difficulty with Mr Ghazi's oral assertion in regard to the extended verification letters that having spoken to "a few of our counterparts in the UK and they have said they received these generic letters as well" he took the view that because the appellants trusted their suppliers they had no real cause for concern. In our view the 2005 appeal alone should have flagged such letters as an issue.

311. We were similarly underwhelmed when Mr Sheth said that when a Veto letter was received, such as the one for Deal 21, dated 13 September 2006 where the supplier was New Order and the customer Sunico, although he would have asked his suppliers if VAT had been paid (there was no other evidence of that), he would not have spoken to Sunico although he conceded that "…it might have been the correct thing to do". Of course, AEL went on to trade with Sunico in Deal 36 two weeks later. We do not accept the argument in Closing Submissions that because the Veto letters did not relate to the appellants' counter parties that reinforced the appellants' belief that fraud in the market place was not as extensive as it was and did not relate directly to them.

312. Lastly, one major point of contact with HMRC was the 2005 appeal, which was by no means the first time that the appellants had been made aware of MTIC fraud.

The 2005 appeal

313. Firstly, this was a decision following a two day Hearing on preliminary issues rather than a full substantive Hearing.

314. We note that that Tribunal in the 2005 appeal pointed out that "The existence of a missing trader is evidence of fraud". That is relevant in the context of the 13 Joint and Several Liability letters issued to Aircall before Deal 36. Those should have caused very considerable alarm. The numerous Veto letters should also have triggered alarm since if a business could not be verified it might be missing. As we point out that does not seem to have registered with either Mr Ghazi or Mr Sheth who considered these to be "generic" or "blanket" letters.

315. The 2005 appeal by AEL related to a refusal of input tax claimed for the periods 01/04 and 02/04 on the basis that the supplies were not economic transactions as they formed part of a carousel fraud in which the appellants was an innocent and unknowing participant. As with these appeals the burden of proof lay with HMRC therein described as "Customs".

316. In that Hearing the Tribunal heard evidence from Mr Travadi and Ms Lonegan for the appellants. In particular Ms Lonegan spoke to knowing various parties including the controlling mind of Sunico. At paragraph 7 the Tribunal observed that the appellants was "… in the difficult position that it knows about only the purchase and sale transaction that it entered into and has no means of finding out about other steps in the alleged carousel fraud". The Tribunal accepted that it was only Customs who could obtain information about the other steps in the alleged carousel fraud.

317. Customs had originally argued that Sunico was one of the ringmasters but no evidence was produced by Customs in regard thereto. The Tribunal pointed out at paragraph 22:

> "(… it is odd that they allege Sunico to be the 'ringmaster' but are not willing to allege fraud in order to obtain the banking information), they could have asked the Danish authorities to obtain the information from Sunico. We regard the missing information on … Sunico … as something that Customs should have attempted to find out if they wanted to show that the transactions in Deal 3 was a carousel fraud".

318. The onus of proof lay entirely with Customs. It was in that context that the Tribunal found that there was no evidence of any involvement in fraud by Sunico having made it clear (at paragraph 8) that they saw a distinction between, as in that case, failing to try to obtain information, as opposed to trying and failing. In passing, the Tribunal observed that Sunico had been involved in receiving third party payments which, of course, is one of the features of MTIC fraud albeit Customs had failed to try and obtain full information about that.

319. Another crucial aspect of that decision related to Hawk. One week before that appeal started Customs served a CD which when printed out contained 5,200 pages of documents relating to Hawk. The covering letter noted that there had been criminal proceedings concerning persons related to Hawk and "I understand that one of the points that arose during this hearing was the reliability of documentation obtained from Hawk …". The

service of such extensive information immediately before the Tribunal led the Tribunal to exclude the evidence but nevertheless it was in the hands of the appellants and patently considered since they were awarded costs for considering same.

320. We enquired of Mr Ghazi and Mr Sheth whether these findings and observations by that Tribunal had given them cause for concern in regard to either or both of Sunico and Hawk. Mr Ghazi simply stated that they had seen no reason to stop using Hawk as freight forwarders since they knew them and Mr Sheth said that he had, of course, discussed the outcome of the Tribunal Hearing with his advisers and had decided that nothing further required to be done. Hawk were the freight forwarders in 11 of the deals with which we are here concerned.

321. The Tribunal set out the detail of the deal chains in the three deals in dispute pointing out that: "…it is possible that some of these transactions are fraudulent…". The Tribunal went on to "infer" that a number of traders in each of the deals were connected in the fraud and that one or more of them was the "ringmaster" in each of the deals.

322. The findings in fact that are relevant to these appeals are:

(i) AEL had traded with Mobile for 3 or 4 years and Ms Lonegan had met the director, Mr Schmitt on many occasions.

(ii) AEL had an established trading relationship with Sunico for at least 4 years and Ms Lonegan had met the owner on several occasions.

(iii) The usual trading model was for a purchase order to be received from Sunico or Mobile and suppliers would then be contacted by Ms Lonegan whereupon she would place an order with the chosen supplier. When the transaction was complete she would fax Hawk and ship on hold to Sunico, invoice Sunico and pay the supplier.

(iv) It had been argued by HMRC that both Sunico and Mobile were "ringmasters" but HMRC produced no evidence in that regard for either. Customs did make enquiries about Mobile from the German tax authorities but did not obtain a reply.

(v) Sunico and Mobile did receive third party payments.

(vi) "There is no evidence of any involvement in the fraud by Sunico or Mobile…and we find that they are not connected with fraud."

323. In summary, that Tribunal found that HMRC had comprehensively failed to discharge the burden of proof having not even attempted to obtain certain information about Sunico from the Danish authorities. Whilst of course AEL did succeed in the appeal it was in a context where their counsel had actually argued that there was not even a need for a Hearing. Crucial factors were the lack of evidence in regard to payments to Sunico and Mobile and the excluded evidence about Hawk.

324. We find that the appellants should not have had reason to consider that they were vindicated in terms of their trading model or trading parties. On the contrary

they should have been concerned about the nature of the trade with which they were involved. In particular, they should have had very, very grave concerns about Hawk. The fact that Mr Sheth states that Hawk are still trading today does not mean that the appellants should have not taken particular care in their dealings with them immediately after the 2005 appeal. We note with interest that one of the Tribunal's findings about Sunico and fraud was that it was well known to AEL, exhibited at the CeBit exhibition and "…it is still in business." Of course it is now well established that Sunico has been deeply involved in fraud.

325. Mobile was AEL's customer in deal 1 in the 2005 appeal, and is also the customer in Deal 29 in these appeals. Furthermore, the then controlling mind of Mobile, Mr Schmitt apparently moved to Freitex which is the customer in Deals 6, 11, and 22-24 in these appeals. Given the unproven allegations in the 2005 appeal, at a minimum, great caution should have been expected when dealing with these two customers.

Freitex

326. It is appropriate to deal with Freitex at this juncture. Freitex did have an FCIB account and that would have been known to the appellants and, as they well knew, that was one of many indicators of MTIC fraud. Had due diligence been done it would have disclosed that the partner and sole shareholder was a Mr Olaf Gotthal and his mother was the general manager.

327. In his witness statement Mr Ghazi said that Aircall first started trading with Freitex in or around 2001 and in oral evidence he said they had traded since 2005. However, Freitex was only VAT registered on 9 March 2006. Although the company had been incorporated on 26 April 2001 with a business activity of dry cleaning the accounts disclosed little or no turnover. In the period February to April 2006, however, sales of around €2 million suddenly passed through the firm's accounts. Freitex received supplies from various UK firms in the period April to June 2006 and the invoices showed mobile telephones and navigation systems of a total value of around €100 million.

328. Aircall did no due diligence other than checking the VAT number for Freitex. Mr Ghazi told the Tribunal that:

> "Jurgen Schmitt is our contact in Freitex … and when he moved over to Freitex, we continued dealing with him because we had history of prior dealings".

329. Mr Ghazi was adamant that because Mr Schmitt was known to him and others in Aircall it was reasonable to have traded with him as he had a good reputation in the industry. He conceded that:

> " ..if we had looked into Freitex…then of course we wouldn't have possibly dealt with them at the time…But …we had this gentleman who was respected and traded for many years with a history behind him."

330. The documentation produced by the appellants (Deals 6 and 11) carried the name Olaf, not Jurgen Schmitt and Mr Ghazi himself was involved in Deal 11 but he told us that he had no recollection of speaking to anyone at Freitex. We were not persuaded by Mr Ghazi's explanation that the name on the documentation was essentially irrelevant.

331. Far more pertinently when drafting this decision, we had cause to look at the documentation for Deal 29 which involved Mobile. Mr Ghazi did not exhibit any documentation from Mobile but the purchase order exhibited by Officer Brownsword states twice that it comes from J Schmitt. That is after Deal 11 and clearly Mr Schmitt had not moved from Mobile by then.

332. Lastly the German authorities in their response to an enquiry from HMRC stated "It is open to question whether any goods are actually involved in the transactions, ie the invoices may be totally bogus or whether the goods did actually exist but were delivered by another method, route. According to the accused's statements no goods existed". The accused is Olaf. That was put to Mr Ghazi and he said that as far as he was concerned he thought that the goods had definitely existed "unless the whole thing has changed".

333. Clearly, Freitex was undoubtedly fraudulent. In our view, the appellants should have been alerted by the tenor of the 2005 appeal, they should have done some basic checks on Freitex and they did not. At best, without the evidence that Mr Schmitt remained at Mobile, they turned a blind eye but in light of that evidence, it seems clear that they did deal with Olaf, as the documentation shows, and that therefore they knew that Freitex was fraudulent.

Overview of the structure of a deal

334. Mr Ghazi confirmed that back to back trading was the preferred trading model in order to avoid speculating in the market and purchasing goods without first having found a customer. Aircall continues to trade on that basis where possible.

335. The appellants argue that they have always traded in the same manner, having seen no reason to change after the 2005 appeal. Mr Ghazi had cited Deal 20 in his witness statement as being typical of the steps involved in any transaction. For these purposes Aircall is deemed to include AEL.

336. In his witness statement he confirmed that although every transaction was tailored to the particular requirements at the time Aircall would negotiate the main commercial terms of the deal by telephone in regard to supplier, quantity, price, model specification, customer, selling price and delivery terms and they would then send a purchase order to the supplier. Once those terms had been agreed the supplier would instruct the freight forwarder to allocate the goods to Aircall within the confines of the freight forwarder's warehouse.

337. At the HMRC visit on 17 September 2008 he told the Officer that the reason for that was that it was secure and insured. That was repeated in his witness statement but there was no evidence of that, nor of the assertion that the goods were covered by the freight forwarder whilst in transit. If that had been the case that would obviate the

need for the appellants to have insurance cover at all, yet they alleged that they had substantial cover.

338. Occasionally, Aircall would instruct the removal of the goods usually by one of their employees, to another freight forwarder. Once the goods were allocated then the freight forwarder or inspection company would be required to inspect the goods for Aircall. On receipt of confirmation that the goods were as ordered, and that would be done either by way of inspection report or verbal confirmation, Aircall would either telephone or fax the supplier confirming that all was in order.

339. At that stage the supplier would send their purchase order. Aircall would send a "Ship on Hold" instruction to the freight forwarder and the stock allocation document to the freight forwarder to whom the goods were being transported in anticipation of them receiving the goods. Once the stock reached its destination, and following a satisfactory inspection by the customer's agent, then Aircall would expect to receive a phone call from the customer confirming that they were content. The customer would then pay Aircall and they would pay their supplier and send an instruction to release the stock.

340. In fact, the evidence is that deals did not always proceed in this manner.

341. Specifically, although the trading model was predicated on the basis that goods were never released until the customer had paid Aircall and the freight forwarder had told Aircall that the supplier had released the goods to Aircall, it was put to Mr Ghazi that goods had been released prior to payment in a number of instances. Mr Ghazi then said that, on occasion, a commercial risk would be taken.

342. On a number of occasions Aircall's suppliers had released high value goods permitting them to be shipped abroad prior to payment by the appellants. One example is Deal 3 where Aircall had paid London Mobile £904,750 including VAT and was selling the telephones on for £823,000. The outbound freight ticket for the goods was dated 22:40 on 5 April 2006 but the payment to London Mobile was not until 6 April 2006. London Mobile had a retention of title clause. Mr Ghazi's only explanation was that it was all within the control of the freight forwarder and he assumed that they would have told London Mobile and Aircall would probably have requested a Ship on Hold facility. There was no documentation evidencing any Ship on Hold authorisation in any of these deals.

343. Of course, we have no information in regard to any due diligence that London Mobile, or any other supplier, may have completed on Aircall but the most recent accounts which were available at the time of this transaction were Aircall's accounts for the year to 31 August 2004. Those are unlikely to have given any comfort to London Mobile for a transaction of such size since it disclosed a trading profit of only £84,932 and shareholders' funds of marginally in excess of £200,000.

344. It was conceded that, depending on cash flow, in some situations, such as when trading with Dubai, the supplier might be paid first and the goods released before payment was received from the customer.

345. There are four deals where it has been identified that Aircall released goods prior to receiving payment from its customers. Those four deals are as follows:-

(a) Deal 9 – Goods to the value of £127,000 were released to Ameer in Dubai on 25 April 2006 and Aircall was only paid £125,000 and only on 5 May 2006. Further Aircall had issued Ship to Hold by air instructions to Hawk on 13 April 2006 and the CMR shows that they were indeed shipped on that date. Aircall paid Cobra on 13 April 2006.

(b) Deal 13 – Goods to the value of £114,500 were released on 27 April 2006 but Cell Tell in Dubai only paid Aircall on 4 May 2006. Aircall instructed Hawk to Ship to Hold by air on 27 April 2006 and the CMR discloses that that was done. Aircall paid its supplier New Way on 28 April 2006.

(c) Deal 19 - Goods to the value of £665,000 were released on 27 April 2006 but the customer Simfree only paid Aircall on 5 May 2006. On 26 April 2006 Aircall had instructed Interken to Ship to Hold by air and the CMR discloses that that was done on 27 April 2006. Aircall only instructed payment to its supplier Elite on 5 May 2006. Elite's invoice dated 26 April 2006 carried a retention of title clause. Aircall's Aged Debtor Analysis (summary) as at 2 May 2006 shows the debt due by Simfree as £665,000. Mr Ghazi could give us no information about due diligence for Simfree nor details of any trading history. Mr Sheth said that there was a "close relationship" with Simfree and he had visited them. As with the other "Dubai" companies there was limited due diligence and no records thereof.

(d) Deal 31 - Goods to the value of £316,000 were released on 22 May 2006 but payment was received on 23 May 2006. Aircall only paid its supplier e-Tel £200,000 on 23 May 2006 and the balance of £150,150 was paid on 24 May 2006. AFI Logistics confirmed that the goods had been shipped to Hong Kong on 16 May 2006. We also note from Officer Brownsword's exhibits that e-Tel instructed AFI to release the goods to Aircall on 16 May 2006 notwithstanding the fact that they had not been paid.

346. Mr Sheth said that he would authorise release if a cheque was lodged with the freight forwarders. We noted the explanation that it was safe to release goods before payment in Dubai because of the draconian laws in regard to bounced cheques but we were not persuaded. In any event the time gap with the Dubai payments is longer than it takes to clear a cheque. He then said that the cheque was merely surety and that payment would be by bank transfer. We find that release of such high value goods without payment, having already incurred shipping and other costs, to be quite extraordinary and lacking in commercial validity.

Retention of Title, length of Deal Chains and Shipping on Hold

347. Aircall had a retention of title clause as did a number of their suppliers. In Aircall's case it was simply to the effect that legal title remained with Aircall until full and final payment was received.

348. In Deals 8 and 21 the invoice from New Order intimates that New Order banks with FCIB, that the stock has been sourced and sold in the UK and identifies the freight forwarder. It then goes on to say:-

> "Once you the buyer pays us New Order Trading Limited and we then pay our supplier, the transaction will be deemed as complete. You the buyer will be responsible for all inspections of the goods before you make any payments.
>
> All goods remain the property of New Order Trading Limited until all monies have been paid in full."

349. Obviously that is a very clear retention of title clause but in Deal 8, the customer Sunico paid Aircall on 26 April and the goods were released to Sunico yet Aircall only paid New Order on 27 April 2006. In Deal 21, everything happened on 3 May 2006.

350. This is an extraordinary retention of title clause which does not appear to have perturbed the appellants in any way. Clearly if New Order did not pay its supplier then title could not pass to Aircall. That should have been totally unacceptable in any normal commercial environment.

351. Clearly there is the obvious problem that Aircall had no information about whether or not New Order would pay its supplier so it was quite a risk to sell on without that confirmation. If Aircall ultimately could not obtain title from New Order, then not only would the onward sale to Sunico "fall through" but Aircall would have incurred all the expenses of inspection, shipping etc. Further it is explicit that New Order would only pay its supplier after Aircall paid it.

352. In our view the New Order clause was so draconian that it should have been an unacceptable commercial risk. It is also relevant that the limited due diligence on New Order meant that Aircall knew only that they had traded with them for two years, they knew the people and that they were VAT registered but they knew very little else and certainly nothing about their financial viability or credit rating.

353. New Order was not the only supplier to make it clear that it had not imported the goods. The documentation makes it explicit that Eurostar and New Way also did not import. Therefore the appellants should have been aware that at a minimum those deal chains would have involved five traders. That should have given cause for consideration why Aircall could achieve such a healthy profit on export and why the goods which were Eurospec were even being traded in the UK.

354. The length of the deal chain is also relevant in regard to retention of title. Since retention of title clauses were common, as was pointed out in Closing Submissions, it would be reasonable to assume that New Order's supplier would also have had such a clause and if it was in the same terms as that for New Order the problem would be intensified. Even a basic retention of title (or Romalpa) clause poses potential problems.

355. Of course with a retention of title clause it is possible to "ship on hold". Mr Ghazi agreed with the Tribunal that the risk to which Aircall was exposed when shipping on hold included the cost of repatriation, the loss of profit, the physical costs of sending out and bringing back, the costs of resale, inspection, and insurance. Incidentally, there is not one example cited of that happening, which seems extraordinary.

356. Mr Bridge is correct in stating in Closing Submissions that "…the very purpose of a Romalpa clause is to enable release of goods prior to payment" but what that means is that any commercially minded trader seeing such a clause has to take a calculated risk if releasing goods to a customer before ensuring that payment has been made in full. That falls to be evaluated in light of the whole circumstances of the transaction in question. Where shipping abroad it seems to us to be a considerable risk.

357. In our view, the terms of each sale as to the passing of title to the mobile telephones traded do not bear close commercial scrutiny in the context of a series of contracts where title is contracted to pass to a customer on receipt of full payment by the selling trader, but the selling trader does not have title under its purchase terms until it has paid in full for the goods, which it is not in a position to do until it receives payment from its customer. The risks of default or other commercial failure seem not to be recognised or provided for in such terms.

Insurance

358. It was argued for HMRC that there was insufficient evidence to show that the goods were adequately insured for the appellants' commercial purposes. On 27 October 2006, the appellants' solicitors did produce to HMRC a cover note, issued on 28 March 2006, issued by Wellington Syndicate Services Limited ("Wellington") to Nacora Insurance Brokers Limited ("Nacora") covering both the appellants for 12 months from 2 February 2006. Mr Ghazi had already provided that to HMRC at an HMRC visit in June 2006.

359. On 30 January 2007 when Hassan Khan & Co wrote to HMRC confirming that there was no contractual document between Nacora and Wellington they indicated that in order to avoid any further doubt about the insurance position, Nacora was in the process of having a letter drafted from Wellington to confirm that there was a policy of cargo insurance in favour of the appellants. That has never been produced.

360. HMRC have been asking for evidence of payment of insurance premiums since 2006. The cover note and two of the appellants' internal Sage accounting printouts are effectively all that has been produced. In particular, the appellants have not exhibited any banking evidence to show payment for the period subject to the appeal or copies of the Excel spread sheets that were apparently sent to Nacora detailing the value and location of shipments.

361. Mr Ghazi's oral evidence was to the effect that he was sure that the premiums would have been paid, that invoices were generated after he sent Excel spread sheets with the detail and value and location of shipments having verbally intimated any

deals which involved countries or financial limits which were outwith the parameters of the cover note. He said that Nacora were extremely flexible in terms of both payment and credit.

362. Essentially, Nacora knew that the appellants' solicitors required confirmation as to the extent of the insurance and they wrote to them on 13 November 2006. That letter confirmed that the cover note was in effect the policy document.

363. The cover note stipulated that the limit for any one conveyance or place was £600,000 and in relation to Deals 3, 19, 22 and 34 the goods exported were valued in excess of that figure. The letter of 13 November 2006 does not suggest that the £600,000 limit could be exceeded in any circumstances.

364. Although on the face of it in Deals 10 and 16 where the goods were shipped to Singapore there was not cover, we do accept that the cover note does make provision for voyages outwith the permitted territories to be covered at rates to be negotiated.

365. We find on the balance of probability that voyages outwith the permitted territories might have been covered, subject to negotiation, but that contracts with a value in excess of £600,000 would not have been covered.

366. We do not accept HMRC's argument that the appellants' apparent 60 day credit terms in regard to the insurance premium due for the period 23 March 2006 to 28 June 2006 would have expired in August 2006. On the contrary, the invoice for that was issued only on 31 August 2006 and therefore the 60 days would not have expired by the date of the printout (25 October 2006).

367. Since it is evident that payment was not always made within the 60 days and the 60 days had not expired the print outs neither point to payment having been made or not. If the premium was indeed paid at some stage then, in our view there would have been a limit in respect of the four deals outlined above and it may also be that voyages to Singapore were not covered.

368. In the decision letter at number paragraph 4 under the heading "Factors linking Aircall International Limited with the identified tax losses" HMRC stated explicitly

> "despite requests from HMRC … Aircall … has provided no evidence that the goods being purchased and sold were adequately insured. This means that the goods purchased and sold in the periods under review might not have been covered by any form of insurance prior to, or at the time of warehousing. Thus, if the goods were to be lost, stolen or damaged in transit there might be no way that it would be able to recoup any loss. If there was no insurance in place then one reason for not taking out adequate insurance would be that it knew that the transactions were contrived and thus no matter what happened to the goods this trader would obtain payment."

369. The appellants can have been in no doubt about the necessity to establish

(a) that there was a policy of insurance in place,
(b) the precise terms of that policy, and
(c) that payment of the premium had been timeously made.

370. The first two points have been established but of course if the premium was not paid then the policy would be null and void.

371. Mr Sheth was quite candid on the subject of insurance and said that there was much debate as to whether or not it was desirable to have insurance given the significant costs involved but he said that Mr Travadi had insisted on full cover. He would have expected that the premiums would have been paid.

372. We noted from Mr Ghazi's witness statement, where he refers to the Officers' witness statements which make it explicit that the cover note does not provide sufficient evidence that there was in fact extant cover, Mr Ghazi simply stated that they split the consignment for shipping or telephoned Nacora arranging cover. On the evidence that we have, the consignments were certainly not split in Deals 3 and 19 and in Deals 22 and 34 the instructions to the freight forwarder do not ask that the consignment be split. There is only one CMR for Deal 34 and that suggests that there might have been a split but that is supported by no other evidence.

373. As with almost everything else there is no evidence of any telephone calls or emails specifying any variation. We find that to be wholly surprising if this was a commercial arrangement and there was any variation. Most car owners and householders who have insurance ensure that the details and any amendments are kept securely.

374. In his witness statement Mr Ghazi goes on to say that Nacora ceased providing the appellants with insurance cover in 2007/08 and that for a period of approximately 12 months until November 2009 a commercial decision was taken not to have insurance cover due to the cost notwithstanding a no claims record until that point. Since that time, he states that they are insured with a different company that he named. It was not noted at the time but that is in sharp contrast with his very clear evidence in cross examination that in 2014, they still had the same policy with Nacora. Mr Sheth simply referred to being "still with the current insurance company now" which Mr Bridge submitted was Nacora. Clearly it was not.

375. It is also not consistent with Mr Ghazi's statement during a visit from HMRC on 17 September 2008 in relation to the disputed deal for AEL that there was block insurance with Nacora.

376. As long ago as 2010, the Statement of Case for AEL at paragraph 30.5 and the Statement of Case for Aircall at 33.3–33.5 both made it explicit that insurance was a very live issue.

377. It is difficult to understand why the question of payment has not been explicitly addressed by or on behalf of the appellants if the evidence was available.

378. In our view, on the balance of probability, the evidence was not available. In writing this decision, of course, all relevant evidence had to be assessed in the round. On 10 July 2014 in cross-examination Mr Bridge took Officer Brownsword to the appellant's accounts for the year to 31 August 2006 and pointed to a payment of

£67,181 for insurance. He put it to Officer Brownsword that it had been unfair for him to have suggested that there had been no insurance premiums paid for the relevant period.

379. In point of fact, when we look at the two Sage accounting printouts produced by the appellants' solicitors we find two invoices received in the accounting year to 31 August 2005 for the period September 2004 to May 2005 totalling £30,153.15. There is then an invoice covering the period June to September 2005, which straddles the accounting years, in the sum of £15,070.61 and that was shown as paid in January 2006, four months after the end of the period insurance. The total for insurance in the accounts to 31 August 2005 is £45,339.

380. There is then an invoice dated 6 April 2006 in the sum of £35,205.74 for the period October 2005 to February 2006 and that was shown as paid on 4 May 2006, again after the period of insurance. An invoice in the sum of £25,485.56 was issued on 31 August 2006 for the period March to June 2006. There is no evidence of payment of the latter invoice.

381. When we then looked at the accounts for 2007 and 2008 the total sums payable by way of insurance were £256 and £1,342 respectively. Given the lack of evidence of the receipt of insurance premiums by the brokers or insurers, we are not satisfied that insurance cover, at the level one would expect, was in place at the relevant times.

382. Whilst we accept that the decision to insure goods is a matter of proportionate commercial risk, nevertheless the appellants argued not that they had decided to take that risk but rather that they had appropriate insurance in place but for the reasons set out above we find that not to be the case.

IMEI numbers

383. Apart from a spurious argument that HMRC refer to "serial numbers" and not IMEIs, when of course that is really what an IMEI is and HMRC repeatedly referred to IMEI under that heading, it was argued that we should not consider IMEI numbers as they were not part of the pleaded case. They were and we made that point at the outset when considering the Application on pleadings. They are referred to on page 2 of the Decision attached to the Statement of Case and in Officer Brownsword's witness statements. They are also referred to in correspondence between the parties and, of course, Mr Ghazi refers to them in his witness statements.

384. We noted the record of an HMRC visit in 2005 where it was recorded that HMRC were told by Mr Travadi that 100% IMEI were obtained. Obviously they were not and we recognise that Mr Ghazi doubted that Mr Travadi would have said that.

385. What is certain is that those that were obtained were simply retained on a spreadsheet attached to an email and either forwarded to customers or filed. Mr Ghazi saw no value in IMEI numbers in 2006 and no suppliers were asked to provide same.

386. Initially, Mr Ghazi advanced an ingenious, if odd, suggestion that one of the reasons that they were not kept was because the spreadsheet could become corrupted. He moved away from that and argued that at that time he had been unable to identify a robust manner of dealing with IMEI numbers.

387. It was not noted at the time of the Hearing but that is difficult to reconcile with his statement at paragraph 13 of his second witness statement that, although IMEI numbers were not kept for export deals, unless requested by customers, they were retained for UK distribution to retailers as they had had numerous problems with the return of telephones so they needed to verify them.

388. Accordingly, clearly, it was understood that it was an effective method of checking telephones.

389. On cross-examination Mr Ghazi said that the caveat in Letting's terms and conditions which reads to the effect "If you have not requested an IMEI clearance you automatically waive your right to reject goods on the grounds of IMEI's" .did not suggest to him that IMEIs had an important role. That does not sit well with Aircall's use of IMEI's for their retail trade.

390. Mr Ghazi's suggestion was that they did not need IMEI numbers for export deals because Aircall relied on looking at the packaging in order to check if there were Customs marks to ensure that goods were not being carouselled and of course he relied on the integrity of the suppliers. He said that he had "no idea" of checking IMEI numbers until 2009, which we find to be extraordinary.

391. We find that the lack of use of IMEI numbers is particularly surprising in the context of the record of the meeting with HMRC on 17 September 2008 where it is recorded that Mr Ghazi, in the presence of Mr Sheth, stated

> "…explained that goods were held by Freight Forwarders [FF] and there wasn't any guarantee that the exact goods held for their business would be sent to their indicated customers as the FF could mistakenly send similar goods held for another customer. … (HMRC Officer) expressed his surprise that such a thing could happen as it in effect defeated the purpose of having serial numbers and IMEI numbers."

Although that is well after the dates with which we are concerned the Officer's view states the very obvious. It was not a new concept in 2008 and if the appellants had such problems they certainly should have been using IMEI numbers. Incidentally, the record of that meeting states that Hong Kong and Dubai customers never sent faulty goods back. That is curious.

392. IMEI numbers would be a valuable tool because:

(i) If the appellants' customers claimed in respect of faulty or missing goods it would give vital details.

(ii) It is the only unique identification of a particular telephone and gives the make and model.

(iii) If the appellants had required their suppliers or freight forwarders to supply the numbers in a searchable format it would have been a resource to identify circularity and therefore fraud. They did not.

393. Mr Ghazi stated that IMEI numbers would only be requested if the customer had requested them and, although Aircall would have paid for that he said that there was no need to put the cost thereof on the invoice. That does not make commercial sense. Even if the cost was not passed on, the fact that they had been obtained would be expected to be highlighted to the customer.

394. Rather more surprisingly, in fact, IMEI numbers were obtained in 28 of the deals with which we are concerned and yet there is no evidence that any customer requested them. It was Mr Ghazi himself who requested the vast majority of those.

395. Even if they were requested orally, or by fax or email, the customers are not apparently consistent, and in our view, it would be expected that there would be an inherent consistency. We identify that discrepancy for DRT under the heading Deal Documentation. In addition, Cell Avenue, who were the customer in Deals 1, 2, 32 and 33 did not request them in the first two deals but apparently requested 100% in the latter two deals and World, the customer in Deals 3, 17 30 and 34 requested 10 % in Deal 3 but 100% in the other Deals. Similarly, Sunico, the customer in Deals 3, 8, 20, 21, 35 and 36 appears to have requested no IMEI numbers in Deal 8, 2% in Deal 20 and 100% in the other deals. We would expect companies to have a policy and to specify that on purchase orders or other documentation.

396. Mr Bridge argues that the fact that there is no evidence of requests for IMEI numbers and that different or no level of checks were requested by the customers is neither surprising nor noteworthy and does not come close to a fact from which an inference of fraud can be drawn. On the contrary we consider that both factors are relevant adminicles of evidence which fall to be taken into account in our deliberations.

397. Prior to preparation for this appeal, Mr Ghazi said that he had not been aware that all of the IMEI numbers for Deal 36 had been scanned following an instruction to the appellant from HMRC dated 6 September 2006. He denied all knowledge of that instruction. Those IMEI numbers were subsequently sent to HMRC and he said that it was not until preparation for this Hearing that he had become aware of the fairly devastating result which was that HMRC had identified that many of the telephones involved had been scanned, some of them on more than one occasion.

398. He did concede that the letter from HMRC in March 2007 was a clear indication that Aircall was trading in goods that had been scanned more than once and therefore potentially were carouselling. He accepted that it was an indicator of MTIC fraud and that it was a matter that was important but he alleged that it had not been discussed with him or Mr Sheth. The schedule of goods which had previously been scanned extends to 29 pages and significant numbers had been scanned on multiple occasions. It is, of course, relevant that the goods had been exported to Israel but that would have been on one date in May 2006 only.

399. We observe that until September 2006 HMRC simply recommended that traders monitor IMEI numbers but that recommendation changed to a mandatory requirement at that juncture.

400. The Veracis report commissioned by the appellants identified the fact that those suppliers scanned IMEI numbers. That should have alerted the appellants to the positive features of so doing. It did not.

401. We find that the lack of use of IMEI numbers is not a relatively neutral factor as implied by the appellants but that in fact a prudent businessman, faced with suppliers such as Lettings highlighting the significance of IMEI numbers, knowing of the prevalence of fraud in the market and "scarred" by the 2005 appeal would and should have taken a far more proactive stance than that taken by the appellants.

Records

(a) Diaries

402. In cross-examination Mr Ghazi said that the company did keep records of negotiations with suppliers and customers. He was referred to his witness statement which said "unfortunately, we did not keep records of negotiations with suppliers and customers due to limited storage facilities". He then qualified that by stating that "we kept a record of conversations between traders, purchasing prices and negotiations, and so on, in the form of diaries … We kept records of prices during the day in the diary. But anything that fell through, we didn't keep records of, no." When asked if the diary then had to be amended he said that unsuccessful deals would simply be deleted in terms of computerised records such as sales orders etc. The diaries produced by the appellants cannot be tied in with specific deals and lack detail.

403. He was taken to a copy of a diary entry for 26 April 2006 which Mr Sheth exhibited in his fourth witness statement stating at paragraph 18:- "These can be traced back to deal 12 of 04/06 and therefore illustrate how different price offers were obtained before Aircall finalised its deal with its supplier and customer." Mr Ghazi confirmed that the diary did not disclose the identity of the supplier or the price on sale or the quantity or indeed the identity of the purchaser. He then went on to explain that although the traders were provided with diaries there was no consistency as to what material was recorded therein and not everyone used the diaries. Further, we note that some traders only bought and some only sold and in each case both internally and externally so there is no composite record of anything.

404. In our view the diaries are of minimal value in any context and do not provide any coherent record. We certainly do not accept the argument that the diaries "confound the suggestion that the appellants trading was organised, fraudulent or contrived trading".

(b) Records for Due diligence

405. The due diligence obtained was retained in files but because the Redhill checks were done on a rolling basis those were kept completely separately. That is an obvious disjunct.

(c) *General Records*

406. As we note under the heading Deal Documentation there is very limited record of any negotiations, variation to contracts etc.

Type of trade

407. Initially Mr Ghazi told the Tribunal that Aircall did buy box broken stock, although Mr Fletcher had earlier stated clearly that, beyond an assertion by Mr Sheth, there was no evidence of that. Mr Ghazi then qualified that saying they had done so only from 2008 or 2009. Ultimately he conceded that none of the deals with which we are concerned would have included box broken stock, although he could not be 100% certain.

408. Although Mr Ghazi conceded that in economic terms it would have been most profitable to have purchased from an EU supplier and sold to an EU customer without importing the goods into the UK he then went on to say that some suppliers in Europe insisted on delivery to the home country "so whatever way I would have to have the goods delivered to me." He said that he purchased in the UK because he then could have the goods inspected the same day and ship them. At the heart of his argument was that in the early part of 2006 they had had no idea of the extent of MTIC fraud so they had bought from people that they knew and they felt safe with. They did not think that MTIC applied to them. He relied on people who were in the industry who had import/export expertise. Mr Ghazi's attention was drawn to Notice 726 and he agreed that Aircall's business model fell firmly within the parameters of that Notice but that he did not think it applied to him because he knew the people with whom he was dealing and that they had been around for a number of years as opposed to simply popping up and disappearing.

409. The appellants took the view that if they could find a market it was not a matter of concern for them as to whether or not the goods could be used in that market. Whilst we accept that from a commercial point of view it is true to say that if a customer is willing to pay the price that means that there is a market, it does not explain the margins which were apparently achieved on telephones that would inevitably face further shipping costs etc.

410. When challenged as to why some of the deals involve a mixture of two-pin and three-pin stock Mr Ghazi said that the appellants would regard the telephones as a "job lot" and because the appellants' perception was it would not matter to the customer which specification they were because they could be changed very easily and cheaply it did not make much difference. Given that the margin on UK sales was small, we find that to be relatively unlikely.

Mark up

411. There was no material difference between the mark-up or margins calculated by the parties and where we identify them we have used HMRC's figures for consistency.

412. Mr Sheth's evidence on margins was that in a UK to UK trade where not much capital was involved or the stock only had to be funded for a day or so then a return of £1 or £2 per unit would suffice because in his words "it was a saturated market". We find that difficult to reconcile with the long chains of UK buffers in almost all of the deals with which we are concerned.

413. For export purposes he had calculated that after the costs of shipping insurance, tying up of working capital with the stock and with VAT it would cost the company about 3% or perhaps 2½ to 3% so he would not export for less than 5%. Mr Sheth's view was that year on year he would be looking at a gross profit of 3 to 4% as a percentage of turnover and the net profit would probably be approximately half of that.

414. The differential between UK and export deals is thrown into sharp relief in Deal 6 on 12 April 2006 where Aircall, having purchased 7,000 telephones from Phone City at £156 per unit, then sold 2000 to Freitex at £166.50 and the remaining 5000 to a UK trader, Knighton (which incidentally also traded with Freitex) at £156.75 per unit so the profit was £10.50 and £0.75 or £21,000 and £3,500. Mr Sheth said that the shipping costs were a factor but since that was only £1,400 that still left a very substantial profit.

415. Mr Ghazi said that although they could have exported all 7000 telephones, the UK sale to Knighton occurred because Aircall could not afford to fund the export even at the greater margin. The reasoning was that they had to fund the VAT element of £191,100 on the purchase from Phone City until the repayment claim was honoured and they were short of working capital.

Knowledge of MTIC fraud

416. Mr Bridge referred us to *JDI* and we have no quarrel with that case which turned on its own facts. One fact in particular is precisely the same as in these appeals and that is at paragraph 208:

> "Clearly this is not an archetypal MTIC case concerning an inexperienced trader with no prior knowledge or understanding of the market in which he operates who seizes what is perceived to be an opportunity to make a substantial and effortless financial gain. In contrast…the directors…have many years experience in, and knowledge of, the mobile phone industry…".

417. As far as knowledge of the scale of MTIC fraud is concerned, at numerous points in the written statements and also in evidence the appellants have consistently argued that although they had a general awareness of MTIC fraud they certainly were not aware of what Mr Ghazi described as the "mechanics of MTIC fraud in the wider market place". We simply do not accept that, not least because of the 2005 appeal and the considerable contact with HMRC when MTIC and due diligence was discussed.

418. Both Mr Ghazi and Mr Sheth confirmed that they were aware of, and had read, Notice 726 and it was argued that those requirements were followed as far as it was reasonable and proportionate to do so. However, when taken to a standard Redhill letter dated 1 September 2004 Mr Ghazi fell back on his argument that because the

appellants were buying and selling to people known to them, they would not really be exposed to MTIC fraud.

419. That Notice is not prescriptive but it would be reasonably expected that the appellants should have taken every precaution which could reasonably be required to ensure that their transactions were not connected with fraud. That includes, but is not restricted to, carrying out due diligence checks on suppliers and customers.

AEL's due diligence

420. Mr Ghazi had not exhibited any due diligence in regard to Airphone. This is Deal 36. There was a Redhill check on 24 August 2006 which was a month before the deal and in our view a lot could have happened in that month. That was also not long after Aircall had been raided and Mr Ghazi knew that "…a few of our counterparties were also raided". In that context alone, we find it extraordinary that there was very little enquiry made about Airphone.

421. Mr Ghazi stated that because he had had a chat with the freight forwarder to check that the stock was available, "I didn't really need to know a great deal on Airphone itself" yet AEL knew that Airphone had apparently been unable to sell the goods and this was the first and only deal done with Airphone. Mr Ghazi said that it was decided to base the trade on discussions with the freight forwarder and the fact that Mr Sheth knew and played golf with one of the directors and the two primary directors were very well known to Aircall. The freight forwarder had confirmed to AEL that Airphone were bringing the goods back to the UK.

422. It was explained no credit checks were done on any of the appellants' customers on the basis that no credit was offered. In the context of Airphone, Mr Ghazi said "… it wouldn't have occurred to us to do a full in-depth credit check …". (Accordingly, the assertion highlighted in Closing Submissions that it had not been put to Mr Ghazi that they had failed to do a credit check is entirely inaccurate.) HMRC had accessed a credit check calculated as at August 2006 and that showed that Airphone would have been described as an above-average risk company and would be good for credit transactions to a limit of only £1,000. It had not been trading for long and the first set of accounts appeared to be overdue. It had only been incorporated on 29 October 2004. That does not sit well with the letter from AEL to HMRC on 6 August 2007 which stated "The company and the director … have been known to us for many years, and they are regular participants at the Mobile News corporate golf events". The company could not have been known to AEL for many years. Since both Mr Ghazi and Mr Sheth were experienced businessmen they certainly should have known that a director is not the company.

423. The due diligence until 2006 for Sunico appears to have been reliance on the fact that they had traded with them in the deals on the 2005 appeal and others, knew them well and it was a very large company. In 2006, probably in October, they did obtain seven pages relating to the supply of goods by Sunico but that is after the dates with which we are concerned. Further, that comprises only an undated generic "Dear Sir/Madam" letter of introduction concluding "We hope that we can begin to build …a long and

lasting relationship", bank details and a four page Terms for Sale and Delivery. That can have added little to their knowledge.

424. We are bemused and wholly unpersuaded by the very odd suggestion in Closing Submissions that HMRC had not warned the appellants not to deal with Sunico in the same way as they had sent a Veto letter to them on 10 March 2003 for another UK trader. Sunico were trading at that time. The allied suggestion that HMRC had failed to disclose any communication with their Danish counterparts is equally irrelevant.

425. We find that the due diligence was wholly inadequate not least because there was no trading history with Airphone, the appellants were aware that they and a number of their counterparties had been raided, they had received numerous Joint and Several Liability notices and their own trades were facing extended verification.

Redhill

426. According to HMRC's records employees from Aircall contacted the National Advice Service to verify VAT registration numbers on a regular basis between early 2000 and early 2005 notwithstanding the fact that Officer Birchfield had written on 30 October 2002 and 19 February 2003 to Aircall advising them to contact HMRC through Redhill.

427. The reason why Aircall were advised to use to Redhill office was because if checks were made with Redhill then if the trader became deregistered or if there was a problem such as a mismatch of registration detail, Aircall would have been informed and therefore would have been able to avoid dealing with unregistered companies or potential hijack companies. Despite that very specific advice both appellants chose to continue to contact the National Advice Service or use the Europa website to verify VAT numbers. Mr Ghazi's explanation was that "….we had a six week cycle that we would check VAT numbers, send information to Redhill or even Europa website, or even the helpline, whichever way we could get the quickest response…". Clearly a six week cycle would obviously <u>not</u> be the quickest response.

428. Mr Ghazi stated that for the six week cycle they had a template which would be issued, checking on a number of companies on the same day. However, the factual evidence was rather more inconsistent than that. There were numerous examples where there had been a check on only one company or repeated checks on the same company within a matter of days. We have seen a large number of requests which certainly were sent because there are responses. Those state: "Please can you verify this customer asap as they would like to deal with us today."

429. He tried to argue that the Redhill requests on file after the issue of the Joint and Several Liability warnings and after they were aware that the police and raided Elite (and other of Aircall's counterparties) had been generated in error as part of the six week rolling programme and may well not have been sent since they would not have been trading with those companies. We think not and in any event the checks were not made every six weeks. Some checks were made days apart and some many months apart. One example is New Order, where Mr Ghazi produced as evidence of due

diligence, checks on 25 October 2005 and 19 October 2006. That is not every six weeks!

430. There were also checks on Cobra and New Order on 19 October 2006 with HMRC replying on 28 October 2006. We also comment on New Ora below.

431. Further, as far as the six week cycle that Mr Ghazi suggested was done for checking with Redhill, Aircall had allegedly been trading with London Mobile since 2004 and yet there were only five requests for verification. There are other examples.

432. In any event a six week window is simply completely inadequate in what was described as a vibrant and fast moving market. Mr Ghazi confirmed that they continued the six week rolling check, if indeed they did so, until October 2006 and yet the Veracis report for Cobra had made it explicit that it was a negative indicator if VAT verification was not sought, ideally on every trade. That should have prompted them to change their practice. It did not.

Counterparties

433. At paragraph 13 of his witness statement Mr Ghazi stated that none of the counterparties were fraudulent. He now accepts that that is not the case. He specifically identified in that context, Letting, Cobra, New Order, Sound and Airphone amongst suppliers and Mobile, Freitex, Sunico, DRT and World Communications amongst the customers. He said that six of the 16 customers were still trading. He did not concede that his due diligence had been lacking because he had known the people involved. By contrast Mr Sheth said that Letting was one of the companies he was still happy to deal with, amongst others.

434. In his witness statement Mr Ghazi stated that Aircall did not usually trade with a company that had been trading for less than a year. When faced with evidence that there had been trades with companies which had been established for only a short period, Mr Ghazi amplified his evidence stating that where they did not know the history of the people behind a company they would insist that they had been trading for one year and they would then carry out further due diligence. Where they had previously known the personnel or they had some history of being in the industry they would base due diligence on the industry reputation of the individuals concerned.

435. Mr Ghazi conceded that they did more limited checks on customers than on suppliers because they had the benefit of the Ship on Hold process.

Due Diligence

436. The appellants' approach to due diligence can be summed up by Mr Sheth who said that he knew that HMRC's advice was that appropriate due diligence should be completed but in his view keeping the relationships going and sometimes entertaining the customer and *vice a versa* was all that was required.

437. Mr Sheth confirmed that he personally had visited Q, Ameer, Almashrig, Simfree and Cell Avenue but he had compiled no formal documentation for any of

them since the purpose of visits was to get to know the people better. Indeed, he had not asked to see any documents. He had certainly not asked to see any accounts for the Dubai customers since that was "not the done thing". Of course there are no VAT numbers to check in Dubai. As far as he was concerned due diligence was spending time with the personnel involved in the company concerned.

438. He also expressed the view that he did not know whether further due diligence would have helped since even big companies encountered fraud. He delegated much of the due diligence to his staff and in particular Ms Lonegan and the now deceased trader, Mr Kanagasabi.

439. We accept that verification of VAT numbers was routinely obtained albeit, as we point out above, certainly not necessarily just before conclusion of a deal (eg Deal 36). Mr Ghazi said that due diligence would have been done for all suppliers but there was no evidence of diligence completed for Wizard, Phone City and Sound yet the appellants purchased millions of pounds worth of goods from those traders in Deals 5, 6, 12, 18, 25 and 27. Mr Ghazi's witness statement is silent in regard to those suppliers. He argued that the due diligence would have gone missing in the raid but, for the reasons set out above, we do not accept that. If that had been the case it would have been expected that that would have been noticed, for example, when compiling his witness statement. In his oral evidence he confirmed that the individuals involved would have been known to the appellants' traders.

440. There was no evidence of any due diligence on the freight forwarders but Mr Ghazi stated that they were visited regularly. It was alleged by Mr Ghazi that an important part of due diligence was liaising with the freight forwarders to gauge their opinion of various customers and suppliers. He went so far as to argue that one possible reason for the "apparent coincidence" that suppliers and customers wanted precisely the same quantity and make of goods was because the freight forwarder might suggest a deal to either party. That seems to us to be a breach of commercial confidentiality and if it indeed happened should have been a matter of concern to the appellants.

Veracis Reports and due diligence for Cobra, New Way and Cell

441. In June 2006 the appellants received three Veracis reports being for Cobra on 13 June, New Way on 21 June and Cell on 22 June. It was indicated that verbal reports might have been received sometimes and for that reason we quote the date of visit since the reports were received after the deals were completed. We comment thereon and also set out the context being the other due diligence. Both Mr Sheth and Mr Ghazi said that the Veracis reports themselves would not be the reason that they would not trade with a company. They would look at all of the available information.

Cobra

442. The company was incorporated on 12 May 2005 but only commenced trading in December 2005 and the secretary and director were only appointed in November and

December 2005. Ms Lonegan apparently conducted the site visit and had known the director and secretary previously but no details were available as to their history.

443. The company had provided its bank details with the Bank of Scotland (the same bank as Eurostar and Cell but a different sort code) and also with FCIB. There were also copy Certificates of Incorporation and VAT registration, letters of introduction etc.

444. The Veracis visit had been on 16 May 2006. The geographic base for the suppliers is identified as being 95% UK and 5% EU whereas the geographic base of the customers is 100% UK and they sourced their products through websites. Therefore that meant that Cobra must have purchased from another UK wholesaler. Cobra were not prepared to disclose to Veracis either the terms of the trade application form or the supplier's declaration.

445. The report was not encouraging in that what were described as the positive indicators were that the director "showed some knowledge of the VAT issues" and "some due diligence procedures appear to be in place for new traders and ongoing transactions". Both statements should have given cause for concern. The negative indicators are even more alarming in that the company had only begun trading on 9 December 2005, the trading in the last quarter had been £32 million, there were only two active traders and "VAT verification should be sought ideally on every trade". At the very least, the huge turnover achieved in a very short timescale should have been investigated further.

446. It was put to Mr Ghazi that Cobra were trading more profitably than Aircall who had been trading for a number of years. He argued that Aircall had been restricted by their lack of working capital and that he did not know the extent of the working capital for Cobra. In fact, Veracis identified that Cobra's working capital was only £115,000.

447. Mr Ghazi conceded that with hindsight trading almost entirely in the UK using only websites to achieve such a turnover and an anticipated annual turnover of £128 million was not only odd but could be described as being too good to be true.

New Way

448. In this instance the site visit was conducted by Mr Ghazi and Ms Lonegan and there is no report.

449. The due diligence produced appears to have been requested in 2012 and therefore is not relevant. The older due diligence was also produced and that included letters of introduction, copy Certificates of Incorporation and VAT registration, bank details, Redhill requests in 2005 and 2007 and an uncompleted trade application form. Mr Ghazi had to concede that there was very little documentation in respect of New Way but argued that as with other traders that it was because Aircall knew and relied on the individuals involved.

450. The Veracis report is dated 21 June 2006 based on a visit on 22 May 2006. That identified the fact that the company which had previously traded at the premises

went into voluntary liquidation in 2003 but the signs had still not been altered. Mr Ghazi's primary contact, Mr Singh, had resigned as a director on 22 April 2006 but Mr Ghazi alleged that he was still working there but there is no reference to him in the Veracis report and the new director had indicated that he required external advice. There were a number of indicators which HMRC argued should have caused concern, namely:

- All transactions are wholly within the UK.
- The current director was new to the business and required assistance in regard to his due diligence.
- The most recent published accounts were for the year ended 31 October 2004 and they were qualified as were the previous accounts.
- Initial due diligence is minimal for new customers and for existing customers no regular rechecks had been carried out.

451. Mr Ghazi had not been aware that Mr Singh had resigned as a director and thought that he was still working as a trader at that time in the company. Lastly the company had only been trading since 2002 and yet had a turnover of £462million and working capital of £1 million with only between four and seven employees and it traded only in the UK which both Mr Ghazi and Mr Sheth described as providing lower margins.

452. In cross-examination Mr Ghazi agreed that minimal due diligence would be "worthless" and therefore if their transactions were connected to fraud then by definition Aircall's transactions would also be connected to fraud.

453. The deal in this transaction was on 7 June 2006 so although having asked for the Veracis report it was not yet to hand. Mr Ghazi could not recall whether he had had verbal feedback from Veracis.

454. Although Mr Ghazi said that he had not dealt with New Way after receipt of the Veracis report, that was not in fact correct. There is evidence of Redhill checks on 20 October 2006, 14 March and 11 April 2007. Mr Ghazi's explanation for the latter two checks after the reverse charge was because he wanted to ensure they were still trading lacked credibility since he claimed they knew them well. In a deal log compiled by Aircall for July 2006 the second transaction is a sale amounting to £51,230 including VAT. Furthermore, by that time the extended verification letter covering Deal 13 which involved New Way had been received. Yet notwithstanding both that and the Veracis report Mr Ghazi was adamant that he had been happy to trade with New Way because of "their industry reputation".

Cell

455. Aircall purchased products from Cell in Deals 4, 7, 11, 14, 26 and 28 and therefore were trading with them after receipt of the extended verification letters.

456. Again there was no record of the site inspection carried out by Ms Lonegan. Mr Ghazi said that Aircall had had various telephone conversations and meetings with

the director of Cell, Mr Mohammed Rasool in 2004 and built up a relationship before trading with them. That is in conflict with the terms of the Veracis report and we prefer and accept that report which is independent and unbiased. Accordingly, we do not accept Mr Ghazi's version of events.

457. An enclosure with the undated introduction letter signed by Mr Rasool and produced by Mr Ghazi stated that the company was owned by a Mr Ahmad, who remains unknown to Mr Ghazi. Mr Ghazi did not produce all of the enclosures to the Veracis report but Officer Brownsword did. If Mr Ghazi had read that he would have seen that Mr Ahmad had been Company Secretary between 17 July 2001 and 31 May 2002 and a director between 7 February 2001 and 01 February 2005. Mr Rasool had only been appointed as a director since Mr Ahmad resigned although his wife had been company secretary since Mr Ahmad resigned and a director since 13 March 2003. The Veracis report itself makes it explicit that Mr Ahmad was Mrs Rasool's brother.

458. The Veracis report is dated 22 June and relates to a visit on 14 February 2006. Mr Ghazi said that Aircall had obtained the Veracis report to enhance their own due diligence. That report states that the business was trading from a penthouse suite of a block of luxury flats, one of which is the home address of Mr and Mrs Rasool.

459. It states that Mr Rasool had been in the business for only approximately one year having worked in England until he took over from his brother in law. Clearly Mr Ghazi's witness statement was wrong about the length of the relationship with Mr Rasool and since he did not know of Mr Ahmad the relationship with Cell cannot have been that long.

460. Although the report was delivered on 22 June 2006 the visit had occurred on 14 February 2006. The report produced to us did not have any positive or negative indicators but simply stated that Cell Trading was well aware of the importance of due diligence. Mr and Mrs Rasool are the only two traders. Cell had had an FCIB account for 18 months and did not hold any stock on its premises.

461. The accounts that were produced showed a fall in turnover from approximately £24 million in 2003 to approximately £11 million in 2004, a profit in the year of £19,090 and dividend payments of £40,000. The total shareholders' funds amounted to £4,491. That cannot have given Aircall comfort in regard to Cell's ability to fund large transactions.

462. The normal terms of trading were that Cell released goods when they were paid although they did give some short term credit. In regard to the paperwork produced for the deals with which this appeal is concerned, all documentation indicated that there was no credit extended. Nevertheless, Mr Ghazi argued that it might have been varied on a deal to deal basis by verbal agreement.

General

463. As far as these Veracis reports are concerned we find that they can have given no comfort to the appellants and indeed should have prompted further due diligence

yet the appellants continued to trade with those companies and made no other enquiries.

Other due diligence

Eurostar Deals 1 and 2

464. Eurostar was the supplier in Deals 1 and 2 and although the diligence shows that they banked with the Bank of Scotland, the payments were made in April 2006 to FCIB. We observe for this deal, as every other deal where FCIB is involved, that an obvious question for a bona fide trader to ask would be "why is payment to an offshore account required?". That is not rocket science and it should have been an obvious pointer to potential fraud.

465. As with many other traders, such as Airphone, reliance was placed on the statement that Ms Lonegan had known the director of the company for some years and she would have done the site inspection.

466. The due diligence produced included a "To whom it may concern" generic letter including bank details, copy VAT registration and Incorporation documentation.

467. The trade application form which was stated as being required to be completed before any deals was blank.

468. On close inspection of the due diligence pack produced by Mr Ghazi it can be seen that it does in fact refer to two related companies trading from the same address. It was the appellants who chose to produce those exhibits. The second company did not deal in wholesale mobile telephones. Obviously until it was brought to his attention in the course of the Hearing the appellants had not realised that there were two companies. They should have done so. They should have been concerned.

London Mobile

469. In his witness statement Mr Ghazi stated that this company had been trading since November 1994. Indeed, the undated fax sending the documents for due diligence to Aircall stated that it had been trading since November 1994 and "with ten years' experience, we are sure that we can meet all your requirements". However, the Certificate of Incorporation enclosed therewith shows that the company was incorporated only on 19 September 2003 and registered for VAT with effect from 1 October 2004.

470. Again Ms Lonegan had made a site inspection for which there were no records. Mr Ghazi surmised that Ms Lonegan had had a long relationship with the individuals involved and that their fax (which was generic) was possibly simply an error.

471. Further, the banking sort code for this company was the same as for Eurostar but with a different branch of the Bank of Scotland. Mr Ghazi said that that had not caused him to ask any further questions. It should have.

472. He had also been furnished with an amended VAT registration certificate for the director of London Mobile trading as a sole proprietor, London Mobile Comms, since 24 March 1997 and the trade classification was "specialised stores not elsewhere classified". Mr Ghazi said that, in effect, he had relied on Ms Lonegan and said that she knew them well. There was evidence of a Redhill check on the sole trader in 2004.

473. The trade application form was only partially completed.

New Ora

474. In early 2006, Aircall met the director, Abdul Idrissi-Regragui who was known to Ms Lonegan who conducted the site inspection. The usual due diligence including the copy Certificates of Incorporation and VAT registration, company letterhead and banking details was obtained, as were Redhill checks. The generic letter of introduction was faxed to Aircall by New Ora on 10 March 2006 and said that it was an independent member of a successful franchise with "retail and wholesale marketing strategies". The VAT Certificate stated that its trade classification was retail of mobile phones, not wholesale. There is an uncompleted trade application form.

475. The only Redhill requests produced by the appellants were one dated 10 March 2006 (sent on 13 and responded to on 20 March) and two others in October 2006.

476. A Joint and Several letter was issued to Aircall on 5 September 2006 in respect of a deal involving New Ora and Mr Ghazi confirmed in cross examination that a decision was taken not to trade with this and other UK companies.

477. Mr Ghazi argued that the Redhill request dated 19 October 2006 was a print-off and would not have been sent, or if sent would have been sent in error as part of a six week cycle. In fact, there is a response from HMRC dated 23 October 2006. Further on 26 October 2006 there is a further Redhill letter relating to ten different companies and New Ora was one of those companies so another request must have been sent. Mr Ghazi's only suggestion in regard to why that should be happening in October 2006 if they had already decided not to trade in the UK again, was that the faxes had been sent earlier and Redhill had delayed in responding. We do not accept that.

478. Lastly, as New Ora were suppliers in four deals in May 2006, it would have been appropriate to have a more recent check than that in March 2006.

e-Tell

479. The primary point of contact in the company was very well known to Mr Sheth and another employee of Aircall. The site inspection was conducted by Mr Sheth with no records kept. The amended VAT certificate issued on 22 November 2006 appears to have been sent to Aircall on 30 January 2007 together with details of the FCIB account. Mr Ghazi denied that he was doing business with them in 2007. Initially Mr Ghazi tried to suggest that the FCIB bank details was an alteration and had been sent to all customers. However, in the transaction in June 2006 (Deal 31) the payment from Aircall had gone to FCIB.

Elite

480. The site inspection was done by Mr Sheth and again there is no report. The due diligence produced by Mr Ghazi consisted of 13 pages of company searches obtained many years later (approximately 2012) but the older documentation included the letter of introduction dated sometime after 2001, the usual copy Certificates of Incorporation and VAT registration, bank details, copy letterhead and checks to Redhill. Mr Ghazi conceded that there was very little information on the company but said that because it was sizeable there was no need for it.

New Order

481. It was clear from the due diligence that it did not import goods so it should have been obvious that the supply chain would be long. Its trade classification for VAT was "other retail not in stores" and yet it described itself as a trader/ broker involved in export.

Opal 53

482. This was Deal 25 and it was the first time Aircall had traded with Opal. The only due diligence was that the company had been known to one of the traders. Mr Ghazi said that the VAT numbers would have been checked and checks would have been made with the freight forwarder.

General

483. In most cases the due diligence exhibited established that the company in question existed and was VAT registered but little else. The appellants obtained very little independent information about its counter parties. In particular, there are no trade or professional references, accounting information or credit checks.

484. The fact that the appellants were not extending credit to its suppliers is not relevant. It should have been a matter of concern to the appellants to know that their suppliers were sufficiently financially viable to source and pay for the goods. Similarly, where exporting appropriate checks as to financial viability would be prudent given the shipping and other costs.

Trade application forms

485. Mr Ghazi was very clear that trade application forms were only completed by Aircall if companies were absolutely insistent. From the perspective of both appellants they only ever requested completion of these from retailers. As far as wholesalers were concerned they took the view that a check on the VAT numbers and freight forwarders sufficed. The due diligence produced contained many uncompleted such forms.

486. The Veracis report for Cobra indicated that the lack of trading application forms was a negative indicator and yet the appellants did not issue one to its counter-parties in respect of its wholesale deals. Furthermore the appellants did not complete or

return VAT declarations and/or trading application forms that they were sent by their counter-parties unless the counter-party was absolutely insistent. That was the evidence from Mr Ghazi on Friday 18 July but by Monday 21 July 2006 he changed his mind and said "I am pretty sure we would have filled in quite a lot of these trade application forms". There is no evidence of that. Certainly the trade application forms were not completed for London Mobile, New Ora, Letting or New Way and Mr Ghazi had no explanation for those omissions. As far as Eurostar was concerned it had said that that was a pre-condition but there is no evidence that it was completed.

Deal Documentation and commentary on those deals

487. It is argued in Closing Submissions for the appellants that the errors in the deal documentation are "…few and far between and consistent with routine trade."

488. In our view, the major problem is that in every instance, the documentation as between the appellants, their counterparties and the freight forwarders would be considered wholly inadequate by any lawyer and not fit for purpose in the event of any dispute.

489. The deal documents are in general silent as to the specification of the goods save for the make and model and occasionally the colour and on occasion even those details are incorrect. In particular, much of the documentation does not mention such matters as to whether the telephones are locked (SIM free), accessories such as batteries, chargers and manuals, or even whether the telephones are new and in their original packaging. An example is Deal 29 where New Ora and Aircall specify only the quantity, type of telephone, price in sterling and a retention of title clause.

490. In Closing Submissions, it is argued that there was no expert evidence "…as to what would be expected by way of formal agreement for these types of transaction." We do not require such expertise since we are a specialist Tribunal with extensive commercial experience. We have no hesitation in finding that the documentation between the appellants and their counterparties and the documentation elsewhere in the deal chains falls very far short of what would be expected in a normal commercial environment. Other than retention of title, it simply does not give any relevant or worthwhile protection whatsoever in the event of a dispute. That is the point of documentation in any contract.

491. Mr Ghazi repeatedly said that the terms and conditions were agreed verbally at the outset of negotiations and might be altered verbally later but conceded that they were not recorded anywhere. Although he blamed that on pressure of time he then said that everything turned on the inspections. In summary, he said everything was done either verbally or by email and on a change of server in 2008 all email traffic had been lost.

492. Generally, it seemed that almost all of the suppliers and customers were not concerned to specify important matters in the deal documents such as terms of payment, distribution of risk, or the return of goods, and they were not concerned to

specify commercially significant features of the goods in which they were trading. That should have concerned the appellants.

493. All gaps and omissions identified were simply explained as having been dealt with orally but there is no record of faxes, emails, telephone conversations etc. We agree with Mrs Justice Proudman in Sunico at paragraph 164 where she stated that:

> "164. However, the arrangements between the two companies had numerous uncommercial and contrived elements. Thus…There is nothing recorded in writing, no faxes, emails or notes of telephone conversations…"

It our view there is much that is uncommercial and appears contrived.

494. In addition to those discrepancies identified by HMRC, we have identified other problems in the documentation that also should have alerted a prudent trader or point to contrived documentation.

495. Mr Bridge argued in regard to HMRC's observations (and indeed cross examination) on what he said was Deal 3, but was in fact Deal 2, that it had not been a pleaded issue or addressed in the Officer's evidence.

496. We have already addressed the issue of the detail required in pleadings and stress that if every point of possible dispute was covered then the pleadings would run to many volumes. That is not how Tribunals work. More to the point, the documents referred to were produced by the appellants in Bundle D1 and it was argued by them that they were produced because of alleged deficiencies in the Officers' exhibits. Secondly, the exhibits having been produced, the Tribunal has the, impliedly reserved, right to consider the weight of all evidence after all evidence has been heard whether or not there was cross-examination. We draw inferences from the facts.

497. Aircall's purchase orders carried the following statement:

> "All products must be brand new with standard manufacture specification and latest version software SIM free. Original box and two pin Euro specification and CE marked 'full warranty applies'. Goods must not be previously SIM locked unless specified on the product description. The goods to be full legal title to sell the goods to Aircall International Limited, which at Aircall International discretion you may be required to produce evidence of this. Prices and quantities to be confirmed prior to delivery by Aircall International Limited. The goods must be T2 status and be free circulation. This must be declared on your invoice."

498. No invoice that we saw carried that declaration. Mr Ghazi's explanation was that they had to be "flexible" with their suppliers and that it all turned on the inspection which was often reported verbally. Of course, there is no evidence thereof. The appellants had the right to reject goods albeit they would have incurred cost. In the absence of specification on invoices etc, those costs would not be recoverable. It does not seem an attractive commercial arrangement for what were often high value goods. We note also that at a visit from HMRC on 17 September 2008, Mr Ghazi is reported as stating that only UK customers sent faulty goods back and Mr Sheth and Mr Ghazi reported having experienced problems where freight forwarders sent the wrong stock

which, unsurprisingly, upset customers. That makes the lack of specification even more extraordinary.

499. The documentation in regard to freight forwarders, shipping, inspection and, of course, insurance is scanty at best.

Deal 1

500. The invoice from Eurostar dated 4 April 2006 stated that the goods had been sourced in the UK, but were Euro Spec, included a retention of title clause but stated that risk passed on stock allocation. Accordingly, at a minimum, since Aircall were selling to the airport free zone in Dubai, there must have been six traders at least before the telephones get to an end-user. Aircall should have realised that and they should have asked how each trader could have been expected to make a profit in what was repeatedly described as a very competitive market. Mr Ghazi said that that did not concern him because he trusted his suppliers and purchasers. That was a recurrent theme. In real time in the commercial world to us that seems extraordinary given the sums of money involved.

Deal 2

501. The original purchase order is assumed to refer to 510 red and black Nokia 7610 from Eurostar in a master carton. That purchase order was subsequently amended on revised document 3 dated 4 April 2006 (being the only one produced) and a further 107 telephones (unspecified colour but Eurostar invoiced for Red/Black) in loose packaging were also purchased together with 45 loose silver similar telephones. The specification from Cell Avenue, also dated 4 April 2006 was explicit that in the first instance they agreed to purchase 510 black and red new telephones and issued a purchase order in regard thereto. An amended purchase order was then issued that day indicating that they wished 662 brand new black and red telephones with an English keypad.

502. Patently, 45 were not black and red as they were silver. The inspection report indicated that the stock packaging was not new and it related only to the 510 telephones. Mr Ghazi was unable to satisfactorily explain why he had sent a fax to the inspection company on 4 April 2006 specifying that the goods should be 662 red and black units and further he had instructed the freight forwarders on 7 April 2006 to release 662 red and black telephones. All he could say was that those were errors and everything was agreed verbally.

503. We find that the documentation is so askew and essentially irrelevant to a genuine transaction that it points to actual knowledge of fraud.

Deal 3

504. The invoice from the inspection company described the goods as being held at Hawk whereas they were actually held at Edge. Mr Ghazi said that that was a simple mistake and indeed it was because the inspection report itself states that they were at Edge.

505. Aircall's instructions for inspection put the word 'Inspect' in inverted commas but HMRC's written assertion that that meant it was not a genuine request was not pursued. We make no finding on that.

506. The instructions only specified the supplier, quantity and type of phone and that they should be black euro spec. The inspection report stated that 10% IMEI had been scanned but the customer had not stipulated that. Indeed, neither the supplier nor the customer nor Aircall on its invoice had stipulated anything other than the price, quantity, type and colour.

507. The supplier in this deal was London Mobile and we point out the discrepancies in the due diligence documentation above.

508. We note HMRC's assertion that the sole trader lost its appeal to the Tribunal, having had VAT of in excess of £20 million denied in respect of 123 deals between February and June 2006, that in all of those deals the goods had been purchased from London Mobile and that two of the buffers in Deal 3 appeared in those deals. Further TM and Reems who are buffers in Deal 30 in this appeal, where London Mobile is the also the supplier, are also buffers in this deal. Whilst all of that is accurate and undoubtedly points to the likelihood of fraud in both Deals 3 and 30 it does not suffice as an indicator of fraud by itself and it would not have been known to the appellants at the time.

Deal 5

509. The inspection instruction for "2000 Nokia 6680 euro spec Clean and unmarked in Boxes of 5" had requested a 100% box inspection and requested 100% IMEI numbers. The inspection report from Humber is of no value. It simply states that the goods, described only as "NOKIA 6680 – MADE IN FINLAND" have been inspected, are genuine and "do not seem to have been tampered with". It states that the quantities are correct yet there is no specification of any quantity. There is no evidence of IMEI numbers.

510. Humber produced similar valueless reports in Deals 6, 23, 24 and 27 albeit in those deals the quantity is specified. A report was requested but not produced in Deal 22. Even if there were verbal reports, given that no records were kept, these reports can be of only exceptionally limited commercial value to Aircall.

511. The only terms on the purchase order from Q were COD (which makes no sense since Q was in Dubai) and "Good Thru 14/4/06 Ship Via Airborne". The goods were shipped on 13 April 2006. Aircall's invoice, in this and every other deal, was silent as to payment terms.

512. We take the view that the Humber reports are mere window dressing and that that points to actual knowledge of fraud, which failing, most certainly turning a very blind eye.

Deal 7

513. The deal documentation is bizarre. In Aircall's productions their purchase order dated 12 April 2006 refers to 1800 Nokia N70 at a total cost including VAT of £558,360 and it is marked "paid". The instructions to A1 also dated 12 April 2006 referred to the N70. No inspection report was ever produced.

514. Mr Ghazi explained that the detail in the inspection request was an error, as was the purchase order. However, in Officer Brownsword's productions we find what is marked "Revised Purchase Order" and it states that it is issue 3, that the order date is 12 April 2006 and it is for 1800 N90. Mr Ghazi said that: "So those were two errors. But they normally don't look at my purchase order, these people. They just want their order stock offer signed and faxed back." We find that to be quite extraordinary and completely lacking in commerciality. In a competitive market known to have problems with fraud that should certainly have been a cause for concern for the appellants.

515. The invoice from Cell is for the Nokia N90 and is dated the previous day.

516. Cell's deal sheet in the Officer's exhibits states that the trade was Nokia N90 and Aircall was the customer on 11 April 2006. The stock allocation and release was also 11 April 2006.

517. Although Cell have a retention of title clause, not only were the goods exported on 12 April 2006 but they were released to Aircall's customer on 13 April 2006 but Cell were not paid until 18 April 2006.

518. Mr Ghazi requested 100% IMEI but there is no evidence that that had been requested and indeed no inspection report has been produced from A1.

519. Quite simply this is not documentation that would be found in a genuine deal. The only reasonable explanation is that the documentation did not matter and that the appellants knew that the deal was connected with fraud.

Deals 8 and 21

520. In both these Deals Aircall bought from New Order and sold to Sunico (indeed the only difference in the deal chains is the defaulting trader). New Order had intimated in their letter of introduction, produced as part of the due diligence, that they did not import but acted only as trader/brokers and exporters. (It is also explicit on their invoices that they do not import.) That begs the question why they sold to Aircall as they could have exported the goods themselves.

521. Mr Ghazi conceded that when dealing with New Order, he would have known that there would have been at least one UK trader before New Order and therefore the phones must have been sent into the UK by a supplier which meant that the minimum number of trades in any chain involving New Order would be five. Since Sunico was a wholesaler, at a bare minimum, the deal chain involved at least six traders.

522. Firstly, that should have raised the obvious question as to how New Order and their supplier could make a profit in the UK, which was described as a very competitive market, and secondly and more pertinently why Aircall could make a profit exporting to Sunico rather than either New Order or, if New Order continued to choose not to export, its supplier dealing direct with Sunico. It was not a small profit since the mark ups were 6.33% and 6% and the actual gross profit was £29,400 and £19,200 respectively. (It is also noted that Deal 8 was one of the deals in which the FCIB tracing showed circularity of funds.)

523. New Order's trade classification for VAT was "other retail not in stores". New Order had three UK bank accounts including dollars, sterling and euro accounts and yet Aircall paid them through FCIB. If indeed New Order never imported or exported then a legitimate question would be why they banked with FCIB.

524. We deal with the extraordinary retention of title clause under that heading.

Deal 9

525. As can be seen in paragraph 345(a) above, Ameer paid Aircall £125,000 and not the £127,000 that was due. In Closing Submissions Mr Bridge argued that the discrepancy had neither been raised in HMRC's evidence or put to Mr Ghazi in cross examination and he had a simple explanation. That was not proffered by Mr Bridge. On the contrary, the discrepancy certainly was put to Mr Ghazi on 26 August 2014. No credible explanation has been offered for the underpayment.

526. Mr Ghazi guessed that it might be because of late delivery or a discrepancy. No delivery date is stipulated in the documentation. The inspection was done before shipping and all the documentation prior to the release note, and including the CMR is dated 13 April 2006.

527. The documentation says only that the 1000 Nokia 7610 are red and black euro spec, original boxed and sim free.

528. Since payment was only made on 5 May 2006 but the goods were released on 25 April 2006, Ameer received 10 days credit. It is therefore effectively a back to back deal in that only the payment and release of the goods was after 13 April 2006.

529. The only due diligence on Ameer was that Mr Sheth had visited them and knew that it was a wholesale outlet in Dubai with some retail and that it traded with the other Dubai wholesalers. Mr Ghazi had no knowledge of Ameer beyond the fact that a recently employed trader, Mr Khurrum Sheikh knew them.

530. Mr Ghazi requested 100% IMEI but there is no evidence that Ameer requested that and there is no inspection report from Hawk.

Deals 12, 15 and 20

531. We comment on other aspects of Deal 20 below but these deals were transactions in 830, 1500 and 1000 Samsung D600 respectively. They were the only such deals. The inspection reports were produced by Hawk.

532. In Deal 12 Mr Ghazi did not request IMEI numbers although DRT was the customer in both Deals 12 and 15. Even if, as we assume he would argue, IMEI numbers were requested verbally for Deal 15, it seems very odd that DRT would do so for one transaction and not the other. In Deal 15 100% IMEI were requested by Mr Ghazi.

533. In Deal 12, DRT's purchase order specified "Chacoal grey" (sic) Central European 9 language incl GB/D/I/F/E/POR/NL/TR/AUT. By contrast Aircall's purchase from Wizard was Black Euro Spec. (Wizard's purchase from Cobra was simply Central Eurospec. The shipping instruction to Hawk specified Black 9 language Euro Spec. However, Mr Ghazi went on to state as follows:

> "**Special Instructions:**
>
> **Must be black and CE specification**
>
> **Please carry out 100% box inspection and fax the report before shipment.**
>
> **Should the goods not meet the above requirement I must be contacted before shipment commences".**

534. No inspection report has been produced.

535. In Deal 15, DRT's purchase order and Aircall's shipping instructions were in identical terms save only for the quantity in each and the IMEI numbers requested by Aircall. The inspection report from Hawk produced by Mr Ghazi and Officer Brownsword was in a slightly different format than that for Deal 20. It said that the telephones were grey and 1000 had English and Greek manuals with software in 9 languages which included Greek, which had not been specified by DRT and did not include Dutch which had been specified. The remaining 500 telephones did meet DRT's specification for software languages. However, the manuals were in Italian, German and French whereas Aircall's pro-forma invoice specified English and Dutch manuals.

536. Aircall's invoice to DRT was silent other than as to make, quantity and price but the pro forma invoice to DRT dated the day previously stated that the 1000 telephones were black with English and Greek manuals and the 500 were also black but with English and Dutch manuals, which, of course was not the case.

537. Again Aircall's purchase from its supplier, which in this instance was Lettings, specified black telephones.

538. In Deal 20, where the customer was Sunico, Aircall purchased black telephones from Cobra and Sunico did not specify a colour. Sunico did specify that the software should be Central European "(English, French, Italian, German, Spanish etc)"

539. The inspection report from Hawk exhibited by Mr Ghazi is dated 18 April 2006 for 1,000 Samsung D600. It describes the goods as being charcoal grey and with 500 manuals in German and English and 500 in Greek and the software being 500 with Central European (someone has doodled what appears to be English, Italian and Dutch next to that) and 500 being English, German, Italian, French, Spanish, Portuguese, Turkish and Greek.

540. Mr Ghazi alleged that the phones were as manufactured and no doubt they were but did they meet Sunico's specification? Half of the manuals were specified as being in Greek yet Greek was not one of the languages stipulated in the specification although perhaps it might be included in "etc". That seems unlikely since if 50% of the phones were intended for that market it would be expected that that would have been the primary language specified.

541. We take the view that it stretches coincidence rather too far to find that in all three deals involving this make of telephone, there is "confusion" in the documentation as to whether they are black or grey and what languages are involved. That points to actual knowledge fraud.

Deal 13

542. We note that the goods, valued at £114,500, were released to Aircall's customer, Cell Tell, on 27 April 2006 whereas payment was only received on 4 May 2006. Aircall had paid New Way on 28 April 2006. The gross profit on this deal was only £6,500 so after allowing for inspection, shipping and other costs Aircall were exposed to a relatively high risk if the goods were rejected or there was a default on payment. Further, that was at a point where, as we indicate above, Aircall were borrowing very significant sums from Unistar.

543. Officer Mendes established that New Way paid Princeway on 4 May 2006 being the date that Cell Tell paid Aircall, but the flow of funds from Princeway to Emmen to RK and to Sunico all occurred on 2 May 2006.

544. We note that Cell Tell, who was also Aircall's customer in Deal 4, used a different bank account in this transaction which seems slightly odd.

545. Again, no inspection report was produced by Hawk and there is no evidence in regard to the 100% IMEI requested by Mr Ghazi.

Deal 14

546. The pro forma invoice detailed in paragraph above issued by Aircall on 6 April 2006 specified payment of a 10% deposit before shipment with the balance being paid on inspection.

547. We note that the goods were shipped on 6 April 2006 and payment of a deposit of £2,113 (not £2,128) was only made on 11 April 2006 with a balance of £19,137 being paid on 13 April 2006. We observe in passing that, like Deal 4 where there was a minor underpayment of £15, there is a similar underpayment of £30.

548. The situation with the deposit not being paid before shipment does not make commercial sense, not least because Mr Ghazi informed us that a deposit was only sought where the customer was not known to Aircall.

549. It is also bizarre that at every stage in the chain the counterparties dealt in the odd quantities of 910 and 420 telephones.

Deal 20

550. This was the deal cited by Mr Ghazi as a typical deal and was a purchase and sale of 1,000 Samsung D600 phones. The invoice from Cobra to Aircall dated 18 April 2006 specified absolutely no terms and conditions and only stipulated the quantity, product, unit price and total sum due. Mr Ghazi said that the terms and conditions would have been agreed verbally prior to the deal being completed but that would not have been recorded anywhere because of the very limited timescales involved. However, the purchase order in this case from Aircall to Cobra was dated 13 April 2006.

551. As we indicate above Aircall's purchase order did specify in some detail the terms and conditions for Aircall and states that their terms and conditions must be declared on the supplier's invoice. They were not.

552. Further there are a number of other problems. As we indicate above, the purchase order from Aircall to Cobra indicated that the telephones should be black. The inspection report indicated that they were in fact charcoal grey. That report is dated 18 April 2006. Aircall paid Cobra on 19 April 2006 but the purchase order from Sunico was dated only the day following on 20 April 2006. That purchase order did not specify any colour.

553. The invoice to Sunico dated 24 April 2006 indicates only that legal title to the goods supplied remained with Aircall until payment had been received in full. There was no other specification yet Sunico's purchase order four days earlier is very detailed indeed and far more detailed even than Aircall's purchase order.

554. Mr Ghazi's core argument was that either he or Sunico could have rejected the goods if they did not match the specification that they intended and that therefore there was no need for any other information on the invoices.

555. In his witness statement Mr Ghazi said he would have paid Cobra only after Sunico had paid Aircall but as can be seen that simply was not the case.

556. This was not a back to back deal which was the preferred method of trading and there was clearly no evidence of Sunico's intentions prior to 20 April 2006 since otherwise that would have been produced

Deal 27

557. All of the documentation specifies only the type of telephone, quantity and price although Aircall's invoice does have a retention of title clause. Officer Brownsword exhibited Phone City's purchase order form and that requested Zenith to deliver the goods to Aircall's office address whereas the goods were allegedly at Humber. That clearly points to contrivance and therefore actual knowledge of fraud.

Deal 29

558. It is not clear why, where Regal, Zenith, New Order and Aircall had all transacted in 6,400 telephones, Aircall chose to issue two invoices to Mobile for 3,000 and 3,400 telephones respectively. That is even more odd since Mobile's purchase order which was not exhibited by Mr Ghazi was for 6,400 telephones. Unlike the other documentation it did have a specification. The only reasonable explanation is that Aircall was attempting to alter the perceived supply chain and therefore there was actual knowledge of fraud.

Deal 31

559. e-Tel's invoice had a retention of title clause. The deal documentation is slightly odd in that the purchase order from Sunstrike which was exhibited by Officer Brownsword states at the top that the terms are CIF Hong Kong and that payment should be by wire in sterling. However, the purchase order is denominated in dollars in every case. No exchange rate is quoted and that too is odd. It does not 'stack up' on a commercial basis. Aircall should have been concerned. They were not. That points to knowledge of fraud.

Deal 32

560. In Deal 32 the purchase order from Cell Avenue stipulates that a 100% payment is to be made of the £114,950 on 8 June 2006 but the expected date of delivery was on 9 June 2006. We note that the goods were shipped on hold on 7 June and duly released on 8 June.

Deal 34

561. The telephones were shipped to World on 27 July 2006 and the supplier Elite paid on the following day. As in all the other deals there is no evidence that Elite permitted Aircall to ship on hold prior to being paid.

Deal 36

562. The full purchase price for the original purchase (a batch of 1065 and 837 telephones the former with and the latter without warranty) including VAT, was £556,033.50. AEL made two payments to Airphone of £250,000 and £100,000 on 27 and 28 September 2006 respectively. Aircall made the third and final payment due of £206,033.50 on 29 September 2006.

563. It was in the documents seized in Operation Rosary that it had been established that Aircall, not AEL had actually paid the £206,033.50 to Airphone. Two credit notes had been issued to AEL because of the change in the purchase whereby the 837 telephones were not in fact purchased. One credit note is dated 29 September 2006 and is for the telephones plus "expenses" of £2,000 plus VAT amounting to £258,053.50 and the other is dated 2 October 2006 and is for £350 less since it did not include VAT on the expenses. Bizarrely they are on completely different headed paper. Mr Ghazi's explanation that it was a rectification because VAT had not been charged on the £2,000 does not make sense given the dates.

564. The 100% inspection report from A1 Inspections (which was for Aircall not AEL) is dated 26 September 2006 and describes the product box condition as excellent but the inspection report from Kuhne and Nagel in Denmark dated 29 September 2006 describes the boxes as slightly damaged. The goods were however accepted by Sunico. The report is for 1974 telephones although only 1963 were inspected (11 were missing) and of those, 61 were rejected leaving 1902.

565. The mobile telephones actually ultimately purchased by AEL in this deal were described in the deal documentation as having no EU warranty. A curious feature is that the further 837 telephones were described as having EU warranties. The Kuhne and Nagel inspection report for Sunico describes the 1065 telephones as having a warranty card. That does not make sense.

566. Mr Fletcher pointed out that the A1 inspection which described European and African warranties had to be wrong since Nokia issued separate warranties for different geographic regions.

567. In addition, when examining the documentation for this decision we noted that the Airphone pro forma invoice dated 27 September 2006 and the credit note dated 2 October 2006 (without the VAT), which were on the same letterhead, both had a box at bottom right which read:

> "**VAT Free Sales**
> These goods are for permanent removal from the UK to the E.U.
> Airphone Distribution VAT No. GB 850 1543 52
> *Aircall Export Ltd VAT No. GB 792 076 50*
> Goods shipped CIF to Aircall Export Ltd"

Obviously this is not a standard item on the paperwork and has been inserted. Clearly Airphone knew that AEL intended to export the goods. That is decidedly odd – there is no reason for that to be on Airphone's documentation. It also begs the question why Airphone did not export the goods and retain the profit.

568. This was the first and only deal with Airphone so the explanation that AEL would only be used where there was an existing relationship does not stand up. Further it is obvious that the deal was in fact deliberately routed through AEL albeit Aircall were intimately involved. The documentation points to actual knowledge of fraud.

Miscellaneous

Length of chains

569. All of the disputed chains of transaction taking place in the UK are long. They comprise a defaulter followed by three or four buffers and then the broker. All of the evidence points to the market being particularly vibrant and competitive and this simply does not make commercial sense. Surely buyers would seek the cheapest source of identical goods and that would tend to cut out the middle men?

570. What these chains exhibit are transactions in identical amounts and no value is added by anyone other than making the telephones available for sale. Many are back to back and in almost all of the deals with which we are concerned exactly the same quantity of telephones were being sold down the line.

571. It is inconceivable that with such long chains no one was successfully identifying the route of the demand or supply and thus able to cut out the middlemen despite the middlemen adding no value. Indeed the goods in almost every case sat in the same warehouse throughout the UK transactions. In a rational free market that makes no sense.

572. One would expect in a free market that any supplier would offer its goods to all its contacts and cut out the middleman, instead of which we can see, for example a situation where Aircall had a pre-existing relationship with Sunico and yet they sold goods to an intermediary who then sold to Sunico. This does not suggest that market behaviour was the driving force.

573. It is common sense that markets tend, in general, to act rationally. It is also clear from the evidence in Operation Apparel that five middlemen (buffers) make sense for fraudulent reasons as the purpose is to distance the broker from the defaulter.

574. Although the appellants have repeatedly stated that they knew only their counterparties, as we have pointed out in relation to specific deals that they must have known, or they certainly should have known, that their supply chains were very long as we pointed out in regard to Eurostar, New Order, and New Way in Deals 1, 2, 3,13, 21, and 32. Quite apart from those deals, since none of the disputed deal chains commenced with a manufacturer, network operator or authorised distributor and few, if any, of the customers were retailers, at a basic minimum the supply chain must have been five traders and that should have been obvious to the appellants.

575. As just one example, every time that they sold to Sunico (Deals 8, 20, 21, 35 and 36) they knew or should have known that Sunico would be on selling since it was a wholesaler, so that would be a longer chain. All of this should have raised concerns with the appellants. It appears that it did not.

576. Since we were repeatedly told that the margins in the UK market were poor, as the market was seriously competitive and saturated, it is incomprehensible that so many UK traders were found, in a very short time frame, to transact in 'odd' numbers

of telephones on very small margins. We find that the only reasonable explanation for such long chains with perfect matches for quantities of telephones can only be fraud.

Commercial rationale in the chains

577. All of the telephones originated outside the UK and were acquired in the UK by the defaulting trader or contra-trader. All of the telephones were then despatched by Aircall or AEL out of the UK to buyers who wished the goods delivered in Europe, or elsewhere such as Dubai or Hong Kong. Therefore the market for the telephones, if it existed, was largely outwith the UK. The question which immediately arises therefore is why the goods were ever purchased into the UK and why did the original suppliers not simply identify the EU market for the telephones as those buyers paid considerably more for the telephones than the UK purchasers. That simply does not make commercial sense.

Banking

578. Numerous companies featured in the deal chains in this appeal, such as Eurostar and Lettings, banked with FCIB even although in the due diligence for Aircall they had given details of UK bank accounts. HMRC argue that this is an extraordinary coincidence explicable only by the chains being artificially orchestrated for the purpose of fraud. It is easier for the fraudster to orchestrate the fraud and keep control of the funds if the funds only move between accounts held in the same bank.

579. By contrast the appellants' explanation is that the UK banks had closed the accounts of almost all mobile phone traders forcing the traders to look to foreign banks and FCIB was an obvious choice as it was known to all of the mobile phone traders. That, however, does not explain why with the exception of Sunico who banked with Jyske Bank, almost all of the non-UK based traders chose to bank with FCIB. It also very curious that almost all transactions were denominated in sterling regardless of the countries of origin or destination.

The appellants' trade after 2006

580. The appellants placed considerable weight on the fact that the appellants, in fact for most of the period only Aircall, had continued to trade following on from 2006. It was suggested that the appellants had thrived and now ran a successful business. As we point out above, Aircall was technically insolvent every year from 2006 to 2012. Since 2006 Aircall has made an operating loss in more years than it has made an operating profit and we cannot find that this demonstrates anything of note. Furthermore there is then the evidence from Officer Stone. That does not help the appellants but does not impact on the deals with which we are concerned.

581. HMRC argued that the fact that at least five of the appellants' suppliers, namely Cell, London Mobile, Eurostar, Sound and Airphone had had repayment claims denied on the basis of involvement in MTIC fraud as was the fact that Sunico had been found to be a party to an unlawful means conspiracy arising out of its

involvement in MTIC fraud. By contrast it was argued for the appellants that the Tribunal should consider the decisions in Emblaze, JDI, HT Purser and Unistar because in all of those cases those companies had been found not to be involved in MTIC fraud and there were significant similarities between the appellants in those cases and in these appeals. Further it was argued that in both HT Purser and Unistar, Sunico was a customer. We find that both arguments are fairly neutral. As we point out above we accept that it is possible for an innocent party to become unknowingly caught up in a fraudulent transaction.

582. We were not persuaded by the argument that, because HMRC had not challenged the deal referred to in paragraph 4 above (because it had been traced back to a manufacturer) where Aircall had a significant mark-up and had apparently acted in the same way as every other deal, all the other deals should be presumed to be undertaken commercially.

Conclusion

583. We have set out our findings on the multiplicity of issues raised, as we considered them in this lengthy decision. This conclusion brings together and highlights some of the more significant findings.

584. There is no dispute about the tax losses; the only dispute was in regard to connection with fraud and discrepancy with assessment. There was no dispute that Deals 5, 6, 8-9, 11, 16, 18-27, 31 and 35 are connected with the fraudulent evasion of VAT.

585. Although the transactions are not all identical, nevertheless the pattern of the deal chains is that the same parties, sometimes in the same place in the chains, appear repeatedly. Buffers make tiny profits compared with the appellants and the FCIB evidence shows some of those buffers using the same IP address and moving funds with alacrity. Some of those funds were proven to have circulated and there were some third party payments. An example involving many of these factors is Sunico, which as Mr Bridge pointed out, was linked directly and indirectly with 25 of these deals. Looking at the totality of the evidence it is highly improbable that these were legitimate commercial transactions between wholly unconnected parties.

586. We have found that all of the Deals are connected with the fraudulent evasion of VAT as we have no hesitation in finding that these Deals were connected to a contrived scheme or schemes which were ultimately designed to defraud the Exchequer.

587. Mr Sheth summed up the appellants' position:

> "The overall picture, as we know in hindsight, was tainted with fraud. We were simply in it doing what we knew, that we were buying from our trusted suppliers that we know and selling to people that had the ability to make payment for those goods."

588. If Mr Ghazi and Mr Sheth had, as they were both at pains to assert, a genuine knowledge of and trust in those they were dealing with then they must have been exceptionally naïve in that they had been deceived on so very many occasions.

589. On the contrary both gentlemen struck us as being anything but naïve and rather they are astute, intelligent and capable and clearly well informed about the sector in which they work.

590. Although it was a matter of agreement that the appellants had a good general awareness of MTIC fraud, we find that Messrs Sheth, Ghazi, and Travadi and their senior trader Ms Lonegan undoubtedly were **fully** aware of the existence and significant level of MTIC fraud in the wholesale mobile telephone trade and they, presumably with Mr Acar, took the decision to be actively involved in that trade after the 2005 appeal.

591. Mr Acar was clearly a '*deus ex machina'* about whom we know exceptionally little since, until cross examination, little information was available and the information that was available from the appellants prior to the hearing most certainly did not begin to give a remotely complete picture. We find that his role is not unimportant since he was clearly a controlling mind. Undoubtedly the appellants were controlled and financed 'offshore'. Further, the appellants have consistently been less than frank and transparent about the role of Mr Acar or Telesis.

592. We not only find that there were substantial loans to the appellants on terms that are undocumented and decidedly vague but that they deliberately tried to hide the existence and extent thereof until pressed in cross examination.

593. We find that it is more likely than not that the appellants were aware of the contrived nature of the transactions with which they were involved but that is not the test. Was the only reasonable explanation for the transactions that they were connected with fraud? We find that it was. There were many questions that a reasonably prudent businessman in this sector, especially one with knowledge of the risks that a transaction might be connected with fraud should have asked but the appellants did not.

594. The appellants should have asked themselves why the suppliers repeatedly failed to identify the demand outwith the UK and why the customers repeatedly failed to identify the source of the goods further up the supply chain, allowing the appellants to make large mark-ups. This is particularly so given that the appellants counter-parties were wholesale traders themselves and it would have been expected that the supply chains, if they were commercial, should also have included at least a manufacturer, a retailer and an end user.

595. The appellants should have asked themselves why the suppliers repeatedly failed to identify the demand in other Member States and why the customers repeatedly failed to identify the source of the goods further up the supply chain, allowing the appellants to make large mark-ups. This is particularly so given that the appellants counter-parties were wholesale traders themselves and it would have been

expected that the supply chains, if they were commercial, should also have included at least a manufacturer, a retailer and an end user.

596. The appellants should have enquired why such large number of phones with Euro spec were apparently physically being imported into the UK when the ultimate demand for them was outwith the UK.

597. We find that the appellants should have asked why the process was so easy that they were able to trade such volumes of goods and make such substantial profits with a minimum of capital and infrastructure without adding any value to them, and without even coming into physical contact with them. The appellants were acting as a remote conduit, using the facilities of a freight forwarder employed by the suppliers or nominated by its customers and with no need to fund anything other than the VAT, shipping and similar costs. It really is too good to be true and Mr Sheth and Mr Ghazi's explanation that they were protected by always trading with people they knew was not credible. The incidence of proven fraudulent behaviour by so many of these individuals is not helpful to the appellants.

598. We explored with Mr Ghazi why an exporter would make materially larger profits than the earlier participants selling to UK buyers. He argued that there was great competition in the UK markets and that the margins were very tight. That simply does not make sense since it would have made far more sense for a trader earlier in the chain to export since they all seem to have connections with each other. We find that the appellants should have asked why it was that the appellants were able to make such high mark-ups when selling the goods to customers abroad compared to the mark-ups on goods sold to UK traders. Logically, if greater profits were to be made on export, that should have been the more competitive market.

599. Another of our concerns was the extensive absence of detailed contract terms and Mr Ghazi's unconvincing attempt to claim that this omission was compensated for by email and telephone traffic. In general the product descriptions on the invoices and purchase orders issued by the appellants and other traders in the chains were generic, identifying only the model and handset and we find that it is extraordinary that the documentation does not distinguish further by reference to frequency, network configuration, warranty type, colour, required accessories, software, and language etc. The turnover for Aircall in 2005 was in excess of £59 million and in 2006 in excess of £86 million. Any prudent trader would be expected to endeavour to protect such a large business from normal commercial risks and documentation is one key such method. We find that the documentation was seriously deficient and decidedly superficial. It was completely inadequate in the general commercial world but particularly valueless in a market rife with fraud.

600. The appellants should have asked why suppliers apparently routinely permitted them to ship on hold without any credit arrangement. Further, even if it was reasonable for the appellants to ship on hold it should have been very important to the appellants to know that the supplier was financially sound and in turn had title to the goods and that the customer, in turn, was also financially sound.

601. It would be reasonably expected that the appellants should have taken every precaution which could reasonably be required of them to ensure that its transactions were not connected with fraud. That includes, but is certainly not restricted to, carrying out due diligence checks on suppliers, customers and freight forwarders.

602. Mr Bridge is entirely correct when he states that the purpose of any due diligence is to minimise commercial risk. It is for that reason that we are perplexed and surprised that the appellants obtained very little independent information about its counter parties. In particular there are no trade or professional references, accounting information or Experian or credit checks. The fact that the appellants were not extending credit to suppliers or, in general customers, is not relevant. It would be a normal if not routine precaution for any business transacting in such large sums.

603. Leaving aside MTIC fraud, the purpose of due diligence in a genuine business is to ascertain whether counterparties are legitimate, whether they are adequately resourced to conduct the relevant level of trade and to enable a trader to make informed trading decisions.

604. As we indicate above, the checks conducted by the appellants on its counter parties fell so far below what would be expected of a reasonably prudent businessman with knowledge of the risk of fraud that that is evidence that the appellants knew that the deals were not for commercial purposes, or at the very least, the deals were subject to such a degree of manipulation that it should have been obvious that this was not a genuine market.

605. Mr Bridge argued that the appellants had complied with Notice 726 "despite the fact that there was no legal obligation to do so". We take the view that the bare minimum that any trader should have done was to comply with the common sense guidance in Notice 726. The appellants did not, beyond doing only some of the recommended checks in 8.2. The only reasonable explanation is that they knew of the connection with fraud or they were turning a blind eye.

606. We take the view that although scanning IMEI numbers was not mandatory at the time with which we are concerned they should have been an important factor for a reasonably prudent trader operating in a genuine market and trading in millions of pounds worth of goods particularly where the appellants was well aware of the risk of fraud.

607. As far as Deal 36 is concerned we have no hesitation in finding that the appellants actually knew that the transaction was connected with fraud. Although the transaction was allegedly routed through AEL not only did Aircall pay part of the purchase price but the inspection was also instructed by, and presumably paid for by Aircall. That must have been a deliberate decision. As we point out the entry on Airphones credit note and pro-forma invoice must have been deliberately inserted. The only explanation for that is that Airphone knew that the goods were to be exported. That again points to a contrived scheme.

608. Our conclusion is that the *Kittel* test as to imputed knowledge is satisfied in these appeals. While certain factors are arguably indicative of actual knowledge on the part of the appellants, we have no hesitation in concluding in any event that it should have been clear to them that the "only reasonable explanation" for the nature and pattern of the disputed transactions was that they were tainted with MTIC fraud. The disputed deals do not bear the hallmarks of arms-length commercial trading. Taking all the relevant factors *in cumulo* that is the only and inevitable conclusion in this case. For all these reasons we dismiss these appeals.

Footnote to Decision

Applications

General

609. In approaching the question of whether or not evidence should be admitted our starting point was Mr Justice Lightman at paragraph 20 of *Mobile* where he stated:- "The presumption must be that all relevant evidence should be admitted unless there is a compelling reason to the contrary." HMRC relied on that paragraph and we agree with that general principle.

610. HMRC also relied on and we have adopted and followed Judge Mosedale in *Masstech* where she analysed *Mobile* and also *O'Brien* where the House of Lords gave guidance on the approach and balancing exercise to take when considering admitting evidence generally. We agree entirely with Judge Mosedale's analysis where she said:-

> "8 The conclusions I draw from these cases and from general considerations of fair hearings are as follows:
>
> - Only relevant evidence should be admitted;
> - Such evidence should nevertheless be excluded where there is a compelling reason to do so;
> - Whether there is a compelling reason to do so will be a balancing exercise the object of which is to achieve a trial that reaches the correct decision by a process fair to all parties;
> - To conduct that balancing exercise the Tribunal must consider the likely probative value of the evidence, any unfair prejudice caused to either party, good case management and any other relevant factor;
> - Unfair prejudice includes the factors listed by Lord Bingham which were particularly relevant in that case but in this case, not being a trial by jury, perhaps of less relevance. Unfair prejudice would include a party being ambushed so that it is strategically disadvantaged or put in a position that it has no time to bring evidence in rebuttal;
> - Considerations of good case management will include the need for a sanction against a party which adduces late evidence particularly where the evidence could have been produced earlier; it will recognise the desirability of adhering to trial dates and avoiding unnecessary costs."

611. Mr Bridge relied on a number of authorities including *Brayfal* which in our view was not inconsistent with the House of Lords decisions in Mobile and O'Brien as summarised by Judge Mosedale in Masstech. Simply put, we have a discretion and we take the view that it is a balancing exercise discouraging ambushes and surprises.

612. We also had in mind the provisions of Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") and that reads as follows:

"2.—Overriding objective and parties' obligations to co-operate with the Tribunal

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally."

A. The appellants application for Directions that HMRC's skeleton argument be amended and limited and evidence or argument relating to allegations not pleaded be excluded.

613. This application was refused after Hearing argument from both parties. Mr Bridge relied *inter alia* on the dicta of Lord Millett in *Three Rivers* at paragraph 184 that fraud must be "…distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence."

614. In particular, he argued that although the Statements of Case set out what the allegations about knowledge and means of knowledge are, at no point was the "…fundamental and essential allegation made that there is a overall scheme. So, in essence, what appears to be being alleged in both Statements of Case is that there is a default and that we knew about the default and exploited it; not that we were part of or party to or knew of an overall scheme to defraud."

615. In our view, that it is patently not the situation. The most obvious point is that the appellants' own Detailed Grounds of Appeal dated 25 June 2010 stated at 7.6: "..the appellant's case is that contrary to HMRC's contention in the Decision Letter, Aircall was not involved in an 'overall scheme to defraud the Revenue'".

616. The Schedule of Issues produced on behalf of the appellants in accordance with Direction 6 of the Directions intimated on the last page that neither appellant accepted that the evidence for its transactions showed that they formed part of an overall scheme to defraud the Revenue. No detail was furnished.

617. Further at paragraphs 32 and 30.2 in the Statements of Case for the two appellants respectively the point about an overall scheme is explicitly made. There are numerous other references to there being an overall scheme, including in previous Applications to the Tribunal.

618. Secondly, there were annexed to both Statements of Case both the Decision Letters and the deal chains showing the alleged connection in both the straight and contra-trading transactions. Connection to fraud can exist without knowledge of fraud so in any event the pleading requirements for fraud would not apply to the pleading of connection.

619. Evidently, HMRC do need to plead the nature of the alleged fraud since that impacts on the question of knowledge. HMRC did plead that the alleged fraud was MTIC fraud.

620. As long ago as 28 May 2010, at numbered paragraph 6 of the Decision Letter for Aircall, which of course is annexed to the Statement of Case, HMRC stated:

> "6. Aircall International Ltd has dealt directly with the following traders in the transaction chains under consideration: World Communications France Sarl; Cell trading; Globalfone Communications GmbH; Phone City Ltd; Sunico A/S and Letting Solutions UK Ltd. All of these traders have been found by tribunals to be involved in fraudulent MTIC schemes. When considered with the factors detailed above then this is yet another indicator that the transactions were a contrived scheme, which was ultimately designed to defraud the Exchequer".

621. Mr Bridge repeatedly argued that the pleadings were simply not sufficiently detailed and the Statements of Case merely set out individual specific allegations. He argued that HMRC's Opening Submissions presented an entirely new case to that set out in the Statements of Case and that some 20 new matters were raised in the Opening Submissions for the first time three weeks before the Hearing. On that basis he sought to exclude argument or reliance on those 20 matters.

622. We were able to identify all 20 issues either explicitly in the Statements of Case, including the annexes thereto, or in the witness statements which had been served. (Almost all of those witness statements had been served on 22 July 2011.) They are not new and unheralded matters. Indeed, quite apart from that which is in the Statements of Case and Decision letters, many of those matters are referred to in the witness statements of Officer's Brownsword and Brown and Mr Ghazi commented on their witness statements at length in his own witness statement.

623. HMRC referred us to Lord Woolf MR in *McPhilemy* at pages 792 and 793 and Mr Bridge endorsed that. It reads:

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that parties witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the **general** nature of the case of the pleader".

The emphasis is ours. We agree entirely.

624. We have no hesitation in finding that HMRC did formally plead the appellants' knowledge of MTIC fraud, alleged failures in due diligence, dealing with wholesalers, lack of formal contracts, lack of insurance, margins, specification of goods and that Aircall had dealt directly with traders who have been found to have been involved in fraudulent MTIC schemes and that the transactions were connected to fraud. All of the other matters identified are to be found in the other evidence served.

625. We find that the general nature of the case, which is that HMRC plead that both limbs of *Kittel* are met and in regard to AEL that the fraudulent transaction was via a contra-trader, are clearly set out in the Statements of Case with Decision Letters attached. The parameters are established and the witness statements are numerous and voluminous.

626. Mr Bridge argued that the evidence in regard to Future, Sunico and Operation Apparel were new and should not be relied upon. At the Hearing on 16 September 2013, Officer Kerrigan's witness statement was admitted. (Officer Kerrigan has retired and Officers Bradshaw, Grace and Mendes' evidence replaced Officer Kerrigan's evidence.) In the Notice of Application to admit Officer Kerrigan's evidence it was stated that:

> "3. The statement of Officer Kerrigan relates to a criminal investigation named Operation Apparel which was conducted by the Respondents into a group of persons who appeared to control and orchestrate a complex MTIC fraud. The statement provides details of the overall investigation and exhibits materials uplifted and identified during the course of the investigation that have direct relevance to the transactions in issue in the appeal.
>
> 4. Officer Kerrigan has identified and analysed 4 transactions in issue in the appeal which also feature in the criminal investigation. The existence of an organised fraud of which the Appellants' transactions formed part, has direct relevance to the determination of both to the connection of the Appellants' transactions to fraud and the knowledge or means of knowledge of the Appellants…
>
> 8…The evidence has been served as soon as it has become available."

627. Further the witness statements of Officers Parsons, Medcroft and Needs were also admitted at that Hearing and had been clearly described in the Notice of Application served on 27 June 2013 as relating "…to defaulter traders in the broker chains of contra trader, Future Communications and relate to the one Aircall Export deal in VAT period 09/11".

628. As we indicate above Sunico was very clearly identified as being relevant in the Decision Letter which formed part of the Statement of Case. There was correspondence between the parties in regard to the relevance of Officer Ogburn's production of the High Court decision in Sunico. HMRC made it clear in that correspondence that the reasons for the reliance on the information about Sunico was explicit in the Statement of Case and the witness statements. It is clear to us that from the outset HMRC intended to argue that Sunico were part of an overall scheme to defraud the Revenue. It is not a new suggestion.

629. At Direction 6 in the Directions, Judge Short directed that by 14 December 2013 the parties must set out the agreed matters in dispute. In our view, HMRC's Opening Submission is simply a summary of and commentary on the evidence that was served a long time ago. Arguments were advanced based thereon. It raises arguments that might have been reasonably anticipated and in our view there is nothing new that could not reasonably have been anticipated from the previous conduct of this appeal. Any application to exclude that evidence should have been made by no later than December 2013.

630. Whilst the Statements of Case were not particularly detailed, we find that bearing in mind the detail of the allegations contained in the numerous witness statements served, neither appellants can have been in any doubt about the allegations made against them. Accordingly, we refused the application.

B. *Fourth Sheth witness statement*

631. The verbal application to admit this witness statement late was granted of consent.

C. *Second Fletcher witness statement*

632. In terms of Direction 4 of the Directions, Mr Sheth's fourth witness statement required to be served by 1 December 2013. Both parties were awaiting a decision in *Edgeskill* and in correspondence it was agreed that the witness statement would be served by 7 April 2014. Without explanation for the delay it was served on 11 June 2014. It raised a number of points about the operation of the grey market in mobile telephones arising from Mr Fletcher's first witness statement. Mr Bridge confirmed that it was intended to respond to the first Fletcher witness statement with which Mr Sheth had considerable disagreement. HMRC immediately put the appellants on notice that Mr Fletcher would prepare a response and the second witness statement dated 4 July 2014 is the result.

633. Mr Bridge vigorously opposed the admission of that evidence albeit it was conceded that all of the data which was in the appendix to the witness statement was already in the bundles and the only new material was the percentage figures and Mr Fletcher's analysis.

634. Of course this evidence was served extremely late being on the last working day before the commencement of the Hearing. However, it is a 37 page document

commenting in detail on Mr Sheth's witness statement. It was instructed as soon as Mr Sheth's statement had been served and produced extremely quickly. Mr Sheth's witness statement runs to 21 pages and 84 paragraphs of commentary on Mr Fletcher's first witness statement. The only reason for the very late service of Mr Fletcher's witness statement was because of the very late service of Mr Sheth's witness statement. Had that been lodged by 7 April 2014 then no doubt Mr Fletcher's witness statement would have been lodged a great deal sooner.

635. In those circumstances we granted the application to admit that witness statement subject to the appellants' right of reply.

D. *Costs*

636. Mr Bridge sought an award of costs relating to Mr Fletcher's second witness statement. As with all other applications for costs in this matter we have deferred consideration of that and refused to grant the application.

E. ***Mr Sheth's fifth witness statement***

637. The application to admit this witness statement, which answered John Fletcher's second witness statement, was granted of consent.

F. ***Mary Jane Reed***

638. The application to admit this witness statement, which was in answer to Mr Fletcher's second witness statement, was granted of consent.

G. ***Replacement evidence***

639. HMRC had lodged an application for leave to rely on the following witness evidence:

(a) John Grace re Operation Apparel
(b) Anthony Bradshaw re Operation Apparel
(c) Terence Mendes re Operation Apparel
(d) Stephen Marshall re Operation Rosary
(e) Susan Roberts re Defaulter Regal
(f) Chris Martin re Defaulter ET Global (in reference to Future)

640. There was extensive debate about this witness evidence which HMRC described as replacement evidence and which was strongly opposed by Mr Bridge. Ultimately, after much discussion it was agreed that there would be no challenge to the admission of the evidence from Officers Roberts and Martin on the basis that they were simply corrective and in the case of Officer Martin, adopting the two statements of Officer Coelho who was no longer available.

641. It was eventually agreed that the witness statements of Officers Grace, Bradshaw and Mendes should be admitted under deletion of paragraphs 157, 163, 165 and the last two bullet points of paragraphs 184 and 200 of Officer Bradshaw's

evidence. It was conceded that those deleted paragraphs were the only new evidence and that all other matters, although articulated differently, had previously been in Officer Kerrigan's witness statements. We proceeded utilising Officer Kerrigan's statements and the new Officer's statements in tandem.

642. Mr Bridge remained opposed to the admission of Officer Marshall's evidence in regard to the outcome of Operation Rosary. However, he had conceded that it was not factually controversial and indeed it was freely admitted by everyone that the outcome of Operation Rosary was well known to anyone versed in MTIC matters. The other aspect of Officer Marshall's evidence was that since Operation Rosary dealt with AEL's supplier Airphone in Deal 36 the statement expanded upon the background to that entity. It was argued for HMRC that the statement clarified the evidence given by Officer Brown. It was conceded verbally that that clarification, for what it was worth, could be elicited verbally.

643. It was only in January 2014 that the two directors of Airphone pled guilty to fraudulent trading and were sentenced to two and two and a half years respectively. In fact, in his witness statement, Mr Ghazi had commented on the fact that Officer Brown had not confirmed whether or not Airphone's directors had been found to be or had pleaded guilty to the alleged offences. Clearly the statement and exhibits of Officer Marshall only became available after the conclusion of the trial in Operation Rosary. It is patently relevant and we therefore decided to admit the evidence.

644. We observe that although Mr Bridge had argued that there had been an unfortunate delay in serving this evidence yet the evidence having been admitted Mr Bridge said that "So I embrace that evidence and say that it is actually if one analyses it carefully, so that is the new evidence from Kerrigan and the replacement witnesses and from Mrs Ogburn, it actually assists the appellants in this case considerably".

H. ***Costs relating to replacement evidence***

645. As with all other costs we are not prepared to grant any application for costs at this juncture.

I. ***HMRC's application dated 18 July 2014***

646. This was an application for leave to rely on a bundle of deal documents and one assessment schedule. That application was made on the tenth day of the Hearing. It was vigorously opposed by Notice dated 20 July 2014. It has been explicit since the appellants served their Schedule of Issues in December 2013 that connection with a fraudulent tax loss was at the heart of the appellants' arguments, albeit there was absolutely no detail about any specific issues. The parties were on notice in terms of the Directions that new evidence would not readily be admitted.

647. Mr Bridge argued that the documents had not been exhibited but Mr McGuiness, taking that point, stated that the documents spoke for themselves and could have been exhibited by the Officers. That is the point and those Officers had

already given evidence and been discharged. In our view, this application was made far too late. The time to have considered these matters was when the witness statements correcting errors and omissions were compiled.

J. *Objection to reliance on a document prepared by Hassan Khan & Co which had been seized during the raid on Aircall's premises on 16 August 2006.*

648. Mr Bridge argued that the document should have been "blue bagged" following the raid because it was subject to legal professional privilege. The document had been served in Officer Brownsword's sixth witness statement dated 28 October 2013 and had been clearly identified therein. Mr McGuiness took Mr Ghazi to it in cross examination on 17 July 2014 and Mr Bridge objected. The document had been seized during the said raid and it was entitled "Hassan Khan & Co, Client Private Briefing 17 May 2006."

649. HMRC produced two authorities, namely *R v Tompkins*[9] and *ITC Film Distributors and Others v Video Exchange Ltd & Others*[10]. The parties were agreed on the general legal principle that the general proposition is that once a document is in the possession of another party or is out in the open then the privilege is lost and if it is relevant it is admissible. However, Mr Bridge argued that although *ITC* confirmed the decision in *R V Tompkins* it was stated that "…but that case proceeded on the footing that the document in question they had came into the possession of the prosecution fortuitously. The relevance of possible impropriety was not discussed". Mr Bridge's view was that since the document had been found following the issue of a search warrant under Section 8 of the Police and Criminal Evidence Act, clearly the document should have been "blue bagged". That had not happened and therefore there had been a breakdown in the proper management of handling of a document which on its face was properly privileged and should have been the subject of proper treatment as a privileged document. We have absolutely no evidence as to precisely what had happened after this document, together with the million or so other documents seized in Operation Apparel, was released to HMRC. We decided that there was no impropriety, that the document had been released into the public domain and that it should be admitted in evidence. Mr Bridge requested a full reasoned decision in regard to propriety. At that juncture Mr McGuiness said that he did not insist on the documentation being led in evidence and withdrew. There is therefore no requirement for a reasoned decision since it has no import in this appeal.

K. Accounts for Aircall from 2002 to 2012

650. The appellants' unopposed application to admit the statutory accounts for these years was granted.

651. However, when Mr McGuinness cross–examined Mr Sheth in regard to the accounts for the years 2002-2012 Mr Bridge argued that it was procedurally unfair to do so because it had not been foreshadowed in any of the witness statements or

[9] Court of Appeal 67 Criminal Division 181

[10] (1982) Ch D at 431

pleadings and the accounts for AEL had not been exhibited. We agreed with Mr McGuinness that if the appellants did not think that the accounts which had been exhibited presented the true and full picture then that was a matter for the appellants themselves. It was the appellants who had exhibited the accounts and who considered them to be relevant.

652. We took, and take, the view that since the appellants argued that the accounts were relevant, as they show how Aircall had traded before and after the period under appeal, then it was wholly appropriate for Mr Sheth to be cross-examined thereon.

653. We were not persuaded by Mr Bridge's secondary argument which was that the accounts in the earlier years were distanced from the period which was under appeal, but also that "…it has already been the subject of another Tribunal decision, the trading in 2004". There is absolutely no evidence that the 2005 appeal considered the question of how AEL was funded. Furthermore, the accounts with which we were concerned were for Aircall and that certainly was not considered in the 2005 appeal.

L. ***Veto letters in regard to traders in other European countries and letter from a letter from HMRC dated 4 April 2014 about the deregistration of 12 customers in the period March 2012 to January 2014***

654. Cross examination of Mr Stone had elicited the, surprising to Mr Bridge, statement that "…my recollection again is that they are trading in the same manner except they are using the reverse charge and the tax losses are in the other Member States…it also points to the fact that they could still be involved in fraud". Some days later, in cross examination of Mr Ghazi, Mr McGuiness produced to him some Veto letters which Mr Ghazi stated that he recalled seeing (and some he did not). He also produced a letter which referred to a meeting on 31 March 2014 with an Officer at which meeting Mr Ghazi recalled that there had been discussion about the fact that some 30% of Aircall's customers had gone missing in a period of two years and that represented 32.2% of its deals. There had also been discussion about due diligence and the continuing existence of MTIC fraud in Europe since not all States had introduced the reverse charge.

655. After lunch, Mr Bridge firstly made an application for a detailed explanation of the relevance of those documents and the cross examination, closely followed by a suggestion that he might thereafter be seeking unspecified Disclosure and that he might ask for "more serious consequences". That was not specified but he suggested that it might be that the Hearing would have to be aborted.

656. We were wholly satisfied that HMRC had laid the foundation for the cross examination. It was the appellants who had chosen to submit and call evidence in support of their contention that the recent trading history of Aircall was relevant and suggested that they had at all times been bona fide traders. The full picture in regard to Aircall's trading in recent years was known to Aircall and that included that meeting and those letters, when the decision to argue that their recent trading should be taken into account.

657. In our view, and we said so at the time, the letters added little if anything to what had been elicited from Mr Stone in cross examination and what had been loosely

referred to by Officers Brown and Brownsword. On reflection, the following day Mr McGuiness intimated that looking at matters pragmatically, he would not resist the application for return of the letters. We do not accept Mr Bridge's argument that HMRC had not previously produced any evidence or suggestion of fraudulent trading after 2006. That is not the point. The appellants have consistently argued that they cannot have had a connection with fraud in 2006 because they continue to trade today. It was the appellants who raised the spectre of fraud more recently.

658. We had the argument from Mr Ghazi when he had heard the incontrovertible evidence about circularity, including Deal 8 where 1400 telephones had quickly passed through numerous traders, that the reason it looked like a coincidence that exactly the same number of telephones could be so quickly traded was because the freight forwarders could give what might be described colloquially as 'the nod" to potential purchasers and sellers.

659. We find that to be an assertion which simply 'screams' possible fraud.

M. ***Mr McGuiness objected to re-examination of Mr Ghazi relating to a deal where the input tax had not been denied, but which had not been raised in cross examination.***

660. After debate, Mr McGuiness' very pragmatic and helpful suggestion that Mr Bridge seek leave of the Tribunal to open that line of questioning and then the Tribunal could take a view on it was rejected by Mr Bridge. Yet again I referred to Rule 2 and granted leave *ex proprio motu.*

661. 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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 09 JUNE 2016

APPENDIX 1

Principal Dramatis Personae

Airphone Telecom Ltd (“Airphone”) Buffer in Deal 17
Alvarado Mobile Phones L.L.C. (“Alvarado”) Aircall’s customer in Deal 19
Ameer Phone L.L.C. (“Ameer”) Aircall’s customer in Deal 9
A-Z Mobile Accessories Ltd (“AZ”) Buffer in Deals 4 & 14
Cell Avenue L.L.C. (“Cell Avenue”) Aircall’s customer in Deals 1, 2, 32, 33
Cell Trading UK Ltd (“Cell”) Aircall’s supplier in Deals 4, 7, 11, 14, 26 & 28
Cell Tell Middle East L.L.C. (“Cell Tell”) Aircall’s customer in Deals 4, 13, 18
Cobra Communications Ltd Aircall’s supplier in (“Cobra”) Deals 9, 16, 20 and Buffer in Deals 1, 2, 12, 15, 18
Diginett Limited (“Diginett”) Buffer in Deal 32
DRT Vertriebs GmbH (“DRT”) Aircall’s customer in Deals 12, 18
Edge Logistics Limited (“Edge”) Freight Forwarder in Deals 3,17 & 30
Elite Mobile plc (“Elite”) Aircall’s supplier in Deals 19 & 34, Customer in 2 Acquisition deals for Deal 36
Emmen Communications Ltd (“Emmen”) Buffer in Deals 13, 31 & 32
Euro Star Telecomm UK Ltd (“Eurostar”) Aircall’s supplier in Deals 1 & 2
Evolution Maintenance and Support Ltd (“Evolution”) Buffer in Deal 3
e-tel (uk) Ltd (“e-Tel”) Aircall’s supplier in Deal 31
First Curaçao International Bank (“FCIB”)
Freitex GmbH & Co KG (“Freitex”) Aircall’s customer in Deals 6, 41 & 22-24
Future Communications UK Limited (“Future”)
Gara Technologies Ltd (“Gara”) Buffer in deal 17
Globalfone Communciations GmbH (“Globalfone”) Customer in Deal 7 & 26
Hawk Freight Forwarder in Deals 4, 8,9,10,12,13,14,15,16,21 & 34
Humber Freight Limited (“Humber”). Freight forwarder in Deals 5, 6, 22,23 &27
Interken Freighters (UK) Ltd Ltd, (“Interken”) freight forwarder in Deals 32 & 34
Jos (UK) Ltd (“Jos”) Buffer in Deals 8, 10 & 21
Letting Solutions (UK) Ltd (“Letting”) Aircalls supplier in Deals 10 & 15
London Mobile Communications Ltd (“London Mobile”) Aircall’s supplier in Deals 3, 17 & 30
Mobile World GmbH (“Mobile”) Aircall’s customer in Deal 29
New Ora Ltd t/a Phone City (“New Ora”) Aircall’s supplier in Deals 22-24, 29
New Order Trading Ltd (“New Order”) Aircall’s supplier in Deals 8 & 21
New Way Associates (“New Way”) Aircall’s supplier in Deals 13 & 32. Customer in 5 Acquisition deals for Deal 36
Opal 53 GmbH (“Opal) Aircall’s customer in Deal 25
Paul’s Freight Services Ltd (“Pauls”) Freight Forwarder in Deals 1,2,18, &33
Phone City Ltd (“Phone City”) Aircall’s supplier in Deals 5, 6, 27 and a Defaulting trader in Deal 34
Point of Logistics Ltd (“Point”) Freight Forwarder in Deals 4, 11, 14, 25, 26 & 28
Princeways Ltd (“Princeways”) Buffer in Deal 13
Q-Evolution General Trading LLC (“Q”) Aircalls Customer in Deals 5 & 27
Raduga Pte Ltd (“Raduga”) Aircall’s customer in Deals 10 & 16
Reems Enterprise Ltd (“Reems”) Buffer in Deal 3

APPENDIX 2

AUTHORITIES

A. JOINT AUTHORITIES INDEX

COURT OF JUSTICE OF THE EUROPEAN UNION CASE-LAW

- Axel Kittel v Belgium C-439/04; Belium v Recolta Recycling C-440/04 [2006] ("Kittel")
- Mahagében C-80/11 and Dávid (Joined Cases) C-80/11 and C-142/11 ("Mahagében")
- Gabor Toth C-324/11
- Bonik EooD C-285/11 ("Bonik")
- LVK – 56EOOD C-643/11
- Optigen Ltd and others v Customs and Excise Commissioners (Joined Cases C-354/03, C-355/03, C-484/03
- EMI Group Case C-581/08
- Commission v Frech Republic C-94/09, 06/05/10
- SALIX C-102/08, 04/06/09
- Weber's Wine World Handels-GmbH C-147/01

COURT OF APPEAL CASE LAW

- Mobilx Ltd and Others v The Commissioners for HMRC [2010] EWCA Civ 517 "(Mobilx")
- British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd (1994) 45 Con LR 1
- McPhilemy v Times Newspapers Ltd [1999] 3 A11 ER 775 ("McPhilemy")

HIGH COURT CASE-LAW

- S-B Children UK SC 17
- Blue Sphere Global Ltd v Commissioners for Her Majesty's Revenue and Customs [2009] EWHC 1150 (Ch) ("Blue Sphere")
- Three Rivers District Council v Governor and Company of the Bank of England [2001] UKHL 16 ("Three Rivers")
- Davy v Garrett (1878) 7 Ch D 473, 489
- Bullivant v Attorney General for Victoria [1901] AC 196
- Armitage V Nurse [1998] CH 241, 256
- Taylor v Midland Bank Trust Co Ltd (unreported) 21 July 1999
- GUS Merchandise Corp Ltd v Customs and Excise Commissioners [1992] STC 776
- Jonesco v Beard [1930] AC 298
- Livewire Telecom Limited v Revenue and Customs [2009] EWHC 15 (Ch) ("Livewire")
- Re B [2009] 1 AC 11
- Red 12 Trading Ltd v HMRC [2009] EWHC 2563 ("Red 12")
- Megtian Ltd v HM Revenue and Customs [2009] EWHC 1081 (Ch) ("Megtian")
- Calltel Telecom Ltd & Anor v HM Revenue and Customs [2009] EWHC 1081 (Ch)
- Lexi Holdings (in Administration) v Pannone [2010] EWHC 1416

FIRST-TIER (TAX) TRIBUNAL AND UPPER TRIBUNAL (TAX AND CHANCERY) CASE LAW

- Unistar Group Ltd, Unistar Trading Ltd v The Commissioners for Her Majesty's Revenue & Customs [2013] UKFTT 344 (TC) ("Unistar")
- JDI Trading Ltd v Revenue and Customs Commissioners [2012] UKFTT 642 (TC)
- Emblaze Mobility Solutions Ltd v The Commissioners for Her Majesty's Revenue and Customs (VAT) [2010] UKFTT 410 (TC)
- Ilford Cellular Ltd v Revenue & Customs [2013] UKFTT 435 (TC)
- Excel RTI Solutions v Revenue & Customs (Rev 1)[2010] UKFTT 519 (TC)
- Lifeline Europe Ltd [2012] UKFTT 451 (TC)
- Eurosel Ltd v Revenue & Customs [2010] UKFTT 451 (TC) ("Eurosel")
- Blue Sphere Global Ltd v Revenue & Customs [2008] UKVAT V20901 (17 December 2008)
- Rigcharm Ltd v Revenue & Customs [2013] UKFTT 270 (TC) (29 April 2013)
- Softhouse Consulting Limited v Revenue & Custom
- Olympia Technology Ltd v The Commissioners for Her Majesty's Revenue & Customs [2008] UKVAT 20570
- Powa (Jersey) Ltd v HMRC [2012] UKUT 50 (TCC) ("Powa")
- HMRC v S 1 Electronics Plc [2012] UKUT 87 (TCC) ("S & I")
- Edgeskill Limited v HMRC [2014] UKUT 38 (TCC) ("Edgeskill")
- Fonecomp Ltd v HMRC [2013] UKUT 599 (TCC)

B. MR GHAZI'S AUTHORITIES

- Unistar (see 29 above)
- H T Purser Limited v The Commissioners for Her Majesty's Revenue and Customs [2011] UKFTT 860 (TC)

C. AUTHORITIES IN HMRC'S EXHIBITS

- Xentric Limited v HMRC 2010 UKFTT 620 (TC)
- Aircall Export Limited v HMRC 2005 UK VAT V19185 "(the 2005 appeal")
- HMRC v Sunico 2013 EWHC 941 (CH) ("Sunico")

APPLICATIONS BUNDLE AUTHORITIES

- The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009
- Kittel (see 1 above)

- British Airways Pensions Trustees Ltd v Sir Robert Mcalpine & Sons Ltd (1994) 45 Con LR 1.
- McPhilemy v Times Newspapers Ltd (see 13 above)
- GUS Merchandise (see 21 above)
- Three Rivers (see 16 above)
- O'Brien v Chief Constable of South Wales Police [2005] 2 WLR 1038 ("O'Brien")
- Mobile Export 365 Ltd (2) Shelford IT Ltd v Commissioners for Revenue and Customs [2007] EWHC 1737 (Ch), STC 1794 ("Mobile")
- Brayfal Ltd v HMRC [2008] EWHC 3611 (Ch)
- Revenue and Customs v Noel Dempster [2008] EWHC 63 (Ch)
- Lexi Holdings (in Administration) v Pannone [2010] EWHC 1416 (Ch)
- Purple Telecom Ltd v The Commissioners [2008] UK VAT
- Europeans Ltd v Revenue and Customs Commissioners (1 September 2008; no. 20796)
- Blue Sphere Global Limited v HMRC [2008] UK VAT 20694
- Xentric Limited v The Commissioners for HM Revenue and Customs [2010] UK FTT 249
- Masstech Corporation Limited (In Administration) V HMRC [2011] UKFTT 649 ("Masstech")

APPENDIX 1

Appeal number: TC/2010/04860 & TC/2010/05430

FIRST-TIER TRIBUNAL
TAX CHAMBER

AIRCALL EXPORT LIMITED **Appellants**
&
AIRCALL INTERNATIONAL LIMITED

- and -

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

TRIBUNAL: JUDGE Rachel Short

Sitting in public at Bedford Square, London on 16 September 2013

Having heard Mr Bridge QC for the Appellants and Mr McGuiness for the Respondents

IT IS DIRECTED that

1. All the evidence served by the Respondents since 6 February 2013 to date be admitted into evidence;

2. The Respondents should file any further witness statements on which they wish to rely by no later that 1 November 2013. No further evidence may be served by the Respondents after that date without the leave of the Tribunal.

3. The Respondents should disclose the following documents as requested by the Appellants on or before 1 November 2013:

(1) The submissions and accompanying letters from Officers Brown and Brownsword (or other responsible HMRC Assurance Officers for the Appellants) to the Commissioners' Policy Unit recommending denial of in put tax on the grounds that the Appellants knew or should have known that it was participating in transactions connected with fraud, whether sent to the Commissioners VAT Fraud Team at 100 Parliament Street London SW1 or otherwise

(2) A copy of the responses from the Commissioners' Policy Unit (VAT Fraud Team or otherwise) to Officers Brown and Brownsword (or other responsible HMRC Assurance Officers for the Appellants)

(3) The Respondent may object to such disclosure on the grounds of public interest immunity, but must provide reasonable grounds for that objection.

4. Upon compliance with direction 2, the Appellants file and serve any further evidence on which it intends to rely before 1 December 2013.

5. By 14 December 2013 the Appellants advise the Respondents as to:

(i) Which witnesses the Appellants require for cross examination

(ii) Its time estimates for cross examination of the Respondents' witnesses.

6. By 14 December 2013 the parties must set out the agreed matters in dispute and in particular the Appellants must advise the Respondents as to whether they accept or deny in respect of each set of proceedings;

(i) That the evidence for each of the alleged defaulting traders reveals a tax loss;

(ii) That the evidence for each tax loss referred to shows that it is attributable to the fraud;

(iii)That the evidence for each of the Appellants' transactions shows that they were connected to such a fraudulent tax loss; and

(iv) That the evidence for each of the Appellants' transactions shows that they formed part of an orchestrated overall scheme to defraud the Revenue.

7. By 2 January 2014 the Respondents advise the Appellants;

(i) Which witnesses they require for cross examination; and

(ii) Their time estimates for cross examination of the Appellants' witnesses.

8. By 14 January 2014 the parties shall submit an agreed trial estimate supported by a timetable and provide their dates to avoid for the following 12 month period commencing from 14 January, for the final hearing and a pre trial review. In default of an agreed estimate, the parties are to submit their own estimates and timetables to the Tribunal.

9. Three months before the commencement of the substantive hearing the Appellants serve on the Respondents a draft index to the hearing bundle for agreement.

10. Within two weeks of the service of the draft index, the Respondents notify the Appellants of any further documents to be included;

11. The Appellants prepare a common hearing bundle serving one copy on the Respondents two months before the hearing and bringing three copies to the appeal hearing. The Respondent shall pay to the Appellants 100% of their reasonable copying costs of one copy of the bundle served on the Respondents and half the initial reasonable costs of copying the three copies of the trial bundle being delivered to the Tribunal.

12. The Appellants prepare an agreed core bundle with index and serve the same on the Tribunal and the Respondents one month before the hearing. The Respondents shall pay to the Appellants 100% of the reasonable photocopying cost of one copy of the core bundle served on the Respondent and half the reasonable costs of copying the three copies of the core bundle for the Tribunal.

13. The Respondents serve an opening skeleton argument on the Appellants and the Tribunal three weeks before the hearing

14. The Appellants serve an opening skeleton argument on the Respondents and the Tribunal two weeks before the hearing;

15. The parties agree a bundle of authorities one week before the hearing. The Appellants to prepare and bring two copies of the agreed bundle of authorities to the substantive hearing for the Tribunal and provide one copy to the Respondent. The Respondent to pay to the Appellants 100% of the reasonable copying costs of one copy of the authorities bundle served on the Respondents and to pay to the Appellants half the reasonable costs of copying the two copies for the Tribunal;

16. The parties shall between them nominate a shorthand writer to record a transcript of the substantive hearing, the cost thereof to be divided equally between the parties.

17. The Appellants' request for costs made at this hearing is denied but should the Respondents request further late submission of evidence after 1 November 2013 the Tribunal should consider both costs and the possibility of a debarment from submitting further evidence.

18. Liberty to apply.

Rachel Short PP Barbara Mosedale

TRIBUNAL JUDGE
RELEASE DATE: 20 SEP 2013

APPENDIX 4

EXCERPTS FROM NOTICE 726

2 About joint and several liability for VAT unpaid on the supply of specified goods

2.3 Why has this measure been introduced?

MTIC fraud is a systematic criminal attack on the VAT system, which has been detected in many EU states. In its simplest form the fraud, which cost the Exchequer between £1.7 to £2.75 billion in 2001-02 involves a fraudster obtaining a VAT registration number in the UK for the purposes of purchasing goods free from VAT in another EU Member State, selling them at a VAT inclusive purchase price in the UK and then going missing without paying the output tax due to Customs & Excise.

The fraud relies heavily on the ability of fraudulent businesses to undertake trade in goods with other businesses that may be either complicit in the fraud, turn a blind eye, or are not sufficiently circumspect about their trading connections.

8. Dealing with other businesses – How to ensure the integrity of your supply chain

8.1 Checks you can undertake to help ensure the integrity of your supply chain

The following are examples of checks you may wish to undertake to help establish the integrity of your supply chain.

1) Undertaking reasonable commercial checks to consider the legitimacy of customers or suppliers. For example:

- What is the supplier's history in the trade?
- Are the normal commercial arrangements in place for the financing of the goods?
- Are the goods adequately insured?
- What recourse is there if the goods are not as described?

2) Undertaking reasonable checks to ensure the commercial viability of the transaction. For example:

- Is there a market for this type of goods – such as superseded or outdated mobile phone models?

- Is it commercially viable for the price of the goods to increase within the short duration of the supply chain?
- Have normal commercial practices been adopted in negotiating prices?
- Is there a commercial reason for any third party payments?

3) Undertaking reasonable checks to ensure the goods will be as described by your supplier. For example:

- Do the goods exist?
- Have they been previously supplied to you?
- Are they in good condition and not damaged?

We recommend that sufficient checks be carried out in each of the above categories to ensure that you are not caught in a fraudulent supply chain.

8.2 Checks carried out by existing businesses

The following are examples of specific checks carried out by existing businesses. These may also help you to decide what checks you should carry out, but this list is not exhaustive and you should decide what checks you need to carry out before dealing with a supplier or customer.

- obtain copies of Certificates of Incorporation and VAT registration certificates;
- verify VAT registration details with Customs and Excise;
- obtain letters of introduction on headed paper;
- obtain some form of trade reference, either written or verbal;
- obtain credit checks or other background checks from an independent third party;
- insist on personal contact with a senior officer of the prospective supplier, making an initial visit to their premises whenever possible;
- obtain the prospective supplier's bank details, to check whether:

  payments would be made to a third party; and

  that in the case of import, the supplier and their bank shared the same country of residence.

- check details provided against other sources, eg website, letterheads, BT landline records.

Paperwork in addition to invoices may be received in relation to the supplies you purchase and sell. We believe that this documentation should be kept as evidence of a transaction's legitimacy. The following are examples of additional paperwork that some businesses retain:

- purchase orders;
- pro-forma invoices;

- delivery notes;
- CMRs (Convention Merchandises Routiers) or airway bills;
- Allocation notification;
- Inspection reports.

5

Again this is not an exhaustive list, but does show some of the more common subsidiary documentation.

Appendix 5

Veto Letter

"You are a trader who deals in the buying and selling of Mobile telephones from the European Community and from within the United Kingdom. As part of the care and management of Value Added Tax I would like to bring to your attention that we are currently unable to verify the bona fides of a business called **Phone System Ltd**, VAT registration number 802 3625 63.

If you have any transactions with this trader after the date of this letter you should be aware that HM Customs and Excise may disallow any input tax reclaimed if support by invoices from this company. If you have any queries relating to this company please contact the author of this letter."

Extract from Joint and Several Liability letter

"Trading in mobile telephones, computers, and associated components

As you may know the investigation of Missing Trader intra-Community (MTIC) fraud continues to be Customs' top VAT fraud priority, and the Department will continue to tackle the criminals behind this type of fraud. It is not a victimless crime; it is robbing the honest taxpayer of monies that could be used to fund essential public services. In addition to its criminal powers Customs has in place provisions enabling it to impose joint and several liability on VAT unpaid in the type of trades mentioned above.

I am writing to you because, as a result of my enquiries in respect of your 05/06 VAT repayment claim involving the purchase of **1600** mobile telephones **(Nokia N70)**. We now know the transactions in the UK supply chain commenced with the same defaulting trader, and resulted in the loss of revenue totalling **£55,580.00** with respect to these particular deals.

As explained in Notice 726, where you have genuinely done everything you can to check the integrity of the supply chain, can demonstrate you have done so, have taken heed of any indications that VAT may go unpaid and have no other reason to suspect VAT would go unpaid, the joint and several liability measure will not be applied to you.

However, if you knew, or had reasonable grounds to suspect, that VAT would go unpaid then the measure can be applied to you. From your records you will be able to ascertain who supplied you with the goods relating to the deals noted above **(New Order Trading Ltd)** and you may wish to consider what appropriate action is needed to ensure that the VAT does not go unpaid in respect of any future transactions."