[2014] UKUT 0038 (TCC)

Appeal number FTC/16/2012

VAT – MTIC fraud – (1) whether First-tier Tribunal erred in law in applying the Kittel principle as interpreted by the Court of Appeal in Mobilx – whether subsequent CJEU judgments cause that interpretation to be open to doubt – Mahagében and Dávid; Tóth; Bonik – (2) whether findings of fact or conclusions drawn by First-tier Tribunal from its findings of fact were perverse or irrational – appeal dismissed and application for reference to CJEU refused

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

EDGESKILL LIMITED **Appellant**

- and -

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

TRIBUNAL: THE HON. MR JUSTICE HILDYARD

Sitting in public at the Rolls Building, London EC4A 1NL on 20-22 March 2013
Further application on 26 April 2013 and further supplemental written submissions on 10, 11 and 19 June 2013

Andrew Trollope QC, Michael Patchett-Joyce and Leon Kazakos, instructed by P & Co LLP, for the Appellant

John McGuinness QC and Howard Watkinson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

The Hon. Mr Justice Hildyard :

Nature of the appeal

1. This is an appeal against a decision of the First Tier Tribunal ("FTT") dismissing the Appellant's appeal against the refusal by the Respondents ("the Commissioners") to allow the Appellant to recover input Value Added Tax ("VAT") in the sum of £15,294,335 relating to 93 transactions for the purchase and export by the Appellant of mobile telephones.

2. The Commissioners had denied recovery by the Appellant of input VAT on the basis that the Appellant knew or should have known that the transactions were all connected with fraudulent tax losses, some of which were generated in the course of what is known to the Commissioners (and more generally, though it is not a term of art) as "contra-trading fraud".

3. Contra-trading fraud is a sophisticated stratagem calculated to disguise or camouflage Missing Trader Inter-Community fraud ("MTIC fraud" or "carousel fraud"). I elaborate on the nature of this type of fraud later: suffice it for the present to take the following brief summary from a very recent decision supplied to me whilst completing this judgment, namely *Fonecomp Limited v The Commissioners for Her Majesty's Revenue and Customs* FTC/90/2012:

> "it is a term used to describe a trader which (a) buys goods from a defaulter [that is, a person who defaults on his obligation to pay VAT] 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 output 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 that the third trader is sought to be so distanced from the default that he could not know of his connection to it, or HMRC discover it."

4. MTIC fraud is by no means uncommon, especially in the context of trades in bulk mobile phones and computer chips, and causes huge losses of revenue to the United Kingdom (estimated at some 12.6 billion Euros in 2006).

5. In this case, the fraudulent evasion of VAT relied on by HMRC as justifying its refusal to repay input tax in relation to 93 transactions comprised (a) 52 transactions said to involve "direct" or "straight" fraud, traced back to a defaulting trader and (b) 41 transactions in apparently "clean" chains which were alleged to trace back to a tax loss via a dishonest "contra-trader".

6. The Appellant has not challenged the FTT's findings that (1) the defaulting trader in what it terms the "straight line deals" (the 52 transactions traced back directly to a defaulting trader) and (2) the ultimate defaulting trader in the contra-deals (the remaining 41 transactions which can be traced back to a tax loss via a dishonest contra-trader, a company called Uni-Brand (Europe) Limited ("Uni-Brand"), were fraudulent.

7. The real issues have always been (1) whether the Appellant knew or should have known that (a) the "straight" chains traced back to a fraudulent tax loss and (b) Uni-Brand was a dishonest contra-trader in respect of the contra-trades, and (2) whether a sufficient connection had thereby (or otherwise) been established between the Appellant and the fraudulent evasion of VAT, so as to disentitle the Appellant from recovering input tax.

The FTT's Decision

8. The FTT, having heard the evidence, including cross-examination of 19 witnesses over the course of a hearing that lasted from 8 November 2010 to 3 December 2010, found that the Appellant did indeed have actual knowledge of those frauds.

9. The FTT held that the Appellant's transactions were all connected with fraudulent tax losses, that the Appellant knew this, that the relevant transactions were connected in the required way with the fraudulent evasion of VAT, and that accordingly the Appellant had correctly been denied any right to deduct VAT in relation to its transactions in March, April and June 2006.

10. More particularly, the FTT held that the Appellant, through its relevant director, Mr Adil Rashid ("Mr Rashid"), had actual knowledge that

(1) the straight chains traced directly back to a fraudulent tax loss; and

(2) Uni-Brand was a dishonest "contra-trader" in respect of the contra-trades.

11. In point of approach, and as explained in paragraph 429 of its Decision, the FTT reserved its consideration of the Appellant's arguments until after its determination of the facts, since it considered that if it decided on the facts that the Appellant had no knowledge of the connection between its transactions and the fraudulent evasion of VAT, any further analysis of the law was unnecessary.

12. The FTT explained the circumstances as it found them, the relevant law and the reasons for its conclusions in a decision ("the FTT Decision") running to some 150 pages.

13. The FTT Decision follows a number of previous decisions, and it may owe its structure to previous analyses; it is a careful and comprehensive document.

14. In reaching its conclusions on the facts, the FTT found the evidence of Mr Rashid, the relevant director of the Appellant, to be almost wholly incredible, and the evidence against the Appellant to be overwhelming. As to the law, it followed the guidance of the Court of Appeal in *Mobilx Limited & Others v The Commissioners for Her Majesty's Revenue & Customs* [2010] EWCA Civ 517 ("*Mobilx*"), clarifying the test in the leading case in the European Court of Justice ("the ECJ", or now "the CJEU"), namely the joint matters of *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL* (C-439/04 and C-440/04, together "*Kittel*").

Permission to appeal

15. The FTT itself refused permission to appeal, for reasons it set out in considerable detail in a Decision Notice issued to the parties on 16 December 2011 ("the 2011 FTT Decision Notice").

16. However, the Appellant made a further application to the Upper Tribunal ("the UT"); and by a Decision Notice issued to the parties on 28 February 2012 ("the 2012 UT Decision Notice") Judge Roger Berner granted the Appellant permission to appeal on all the grounds set out in its application.

The contentions

17. The Appellant now advances 14 principal grounds of appeal, which are in effect headings for a myriad of further points, some of law and others of fact. In the latter context (appeals on matters of fact) it is clear, and not disputed, that the UT cannot interfere with the findings of the FTT unless the findings are perverse or the conclusions drawn from the facts as found are irrational.

18. There was an issue between the parties as to whether the permission thus given to the Appellant covered its 14th ground of appeal as put forward to this court, being in a different (and more extensive) form than that put forward to Judge Berner. I will address that in context later.

19. The Appellant's arguments on the facts were put forward by Mr Andrew Trollope QC, leading Mr Michael Patchett-Joyce and Mr Leon Kazakos. Mr Patchett-Joyce, who has made this area of tax law a speciality and has appeared in numerous cases on the issues that arise, presented the Appellant's legal arguments.

20. The essential legal argument put forward on behalf of the Appellant was that (1) the authority of cases decided in the Court of Justice of the European Union ("the CJEU"), formerly called the European Court of Justice ("the ECJ"), trumped any English authority; (2) properly analysed, the European cases only sanctioned the denial of input tax claimed in respect of transactions within the scope of VAT in the case of a trader who claims in respect of a purchase from a fraudster and with knowledge of the fraud, and (3) do not in any event sanction such denial where the fraudulent evasion of VAT is perpetrated by traders in another chain of supply in which the person claiming deduction is not involved.

21. Against this, the Respondents, the Commissioners for Her Majesty's Revenue and Customs ("the Commissioners" or "HMRC"), who appeared by Mr John McGuinness QC, leading Mr Howard Watkinson, contend that none of the many grounds of appeal avails the Appellant.

22. They submit that the law is concluded by English Court of Appeal authority and is clear, and contrary to the Appellant's case. They contend that the European cases, as analysed by the Court of Appeal, permit the denial of input tax deduction when the claimant has knowledge, or the means of it, of the fraudulent evasion of VAT. They submit that there is no basis disclosed for concluding that any of the relevant findings of fact was perverse; and that there is no other permissible basis for overturning the FTT's findings of fact. They invite the Court to dismiss the appeal accordingly.

Summary of conclusions

23. In the context and for the reasons I set out below, I have concluded that the Respondents are correct.

24. In my judgment, there is no basis disclosed, either on the facts or on the law (which I regard as clear), for interfering with the careful decision of the FTT, and this appeal must be dismissed.

25. Put summarily, I do not consider that there is any basis for upsetting the key findings of the FTT that

(1) the transactions were "part of a systematic and orchestrated fraudulent scheme which encompassed both the fraudulent defaults in 52 of the Appellant's transactions, the dishonest contra-trading in the remaining 41 transactions and the fraudulent defaults by those in Uni-Brand's broker chains";

(2) the Appellant was not a genuine independent trader: it had no rational commercial purpose other than to make huge profits from doing nothing other than submitting VAT returns;

(3) Mr Rashid had critical roles in, and knew that the transactions in question were connected with, the fraudulent evasion of VAT;

(4) the Appellant knew or should have known that its purchases were or would be connected with fraudulent evasion of VAT.

26. In such circumstances there is, to my mind, no doubt as to the legal position, both in terms of domestic authority (especially *Mobilx*) and in terms of ECJ and CJEU decisions (especially *Kittel*). In particular:

(1) contrary to the (legal) submissions of the Appellant, it is irrelevant whether the fraudulent evasion of VAT preceded or followed the purchase;

(2) the Appellant's further legal submission that a transaction may only be treated as sufficiently "connected with" a VAT fraud to permit denial of a claim to input tax if that VAT fraud occurs in the same chain of supply of goods and services, so that such denial is not permitted where the VAT fraud occurs in another chain of supply, is inconsistent with *Mobilx*.

27. The FTT were entitled (and, in my view, correct) to conclude that HMRC had properly refused recovery by the Appellant of input VAT in respect of all its 93 transactions accordingly.

28. I turn to explain some of the central concepts, and to elaborate the basis of my conclusions.

MTIC fraud: classic and contra-trading versions

29. Some of the concepts and definitions may have become common currency to the *cognoscenti*, but the jargon otherwise requires explanation, especially for the purposes of understanding the roles of the various participants in the principal forms of MTIC fraud.

30. Both the two main versions of MTIC fraud and the jargon developed to describe the participants are helpfully described in the judgment of Christopher Clarke J (as he then was) in *Red 12 Trading Ltd v The Commissioners for Her Majesty's Revenue and Customs* [2009] EWHC 2563 (Ch).

31. Although this is also quoted in the FTT Decision I think it is helpful to quote the relevant passage here:

> "2. … The classic way in which the fraud works is as follows. Trader A imports goods, commonly computer chips and mobile telephones, into the United Kingdom from the European Union ("EU"). Such an importation does not require the importer to pay any VAT on the goods. A then sells the goods to B, charging VAT on the transaction. B pays the VAT to A, for which A is bound to account to HMRC. There are then a series of sales from B to C to D to E (or more). These sales are accounted for in the ordinary way. Thus C will pay B an amount which includes VAT. B will account to HMRC for the VAT it has received from C, but will claim to deduct (as an input tax) the output tax that A has charged to B. The same will happen, mutatis mutandis, as between C and D. The company at the end of the chain – E – will then export the goods to a purchaser in the EU. Exports are zero-rated for tax purposes, so Trader E will receive no VAT. He will have paid input tax but because the goods have been exported he is entitled to claim it back from HMRC. The chains in question may be quite long. The deals giving rise to them may be effected within a single day. Often none of the traders themselves take delivery of the goods which are held by freight forwarders.
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> 3. The way that the fraud works is that A, the importer, goes missing. It does not account to HMRC for the tax paid to

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

4. The tribunal held that all of the 46 deals save one were part of an MTIC fraud. One deal – deal 32 – was tainted by fraud. In respect of 45 of the deals the subject of the fraud the tribunal dismissed Red 12's appeal. In respect of deal 32 the tribunal allowed the appeal because the case was pleaded on the basis of the fraud being an MTIC fraud, adding that, given its finding that deal 32 was tainted by fraud, albeit not MTIC fraud, whether the Commissioners chose to repay the input tax was a matter for them.

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

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

7. There are variants of the plain vanilla version of the fraud. In one version ("carousel fraud") the goods that have been exported by the broker are subsequently re-imported,

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

Claims in this case

32. In this case, HMRC alleged that the Appellant was involved with "the plain vanilla" or "straight" type of fraud in its transactions completed in the 03/06 period where it acted as a broker.

33. HMRC further alleged that in the other two periods (periods 04/06 and 06/06) the Appellant acted as a broker and a buffer respectively in fraudulent contra-trade operations.

34. HMRC contend that the Appellant was well aware of the nature of the arrangements, and that it knew or should have known that it was participating in VAT frauds.

35. The Appellant, on the other hand, asserted that it was a genuine trader acting as a rational business seeking to make a commercial profit from a commercial activity.

36. According to the Appellant (and as described in paragraph 5 of the FTT Decision), it simply entered into commercial supply contracts on which it paid input tax to its suppliers, for which those suppliers in turn have properly accounted to HMRC, and despatched those goods without them having been consumed to customers within and outside the European Union, which sales were zero-rated. Thus the Appellant submitted that it was entitled to reclaim the input tax that it paid on its purchases.

Approach of the FTT

37. The FTT, which of course is a specialist tribunal, and which has amassed considerable experience in dealing with the various manifestations of MTIC fraud, identified the following matters as requiring its determination in order to adjudicate whether the Commissioners were correct in refusing input tax in respect of the transactions in question:

(1) Was there a VAT loss?

(2) If so, was it occasioned by fraud?

(3) If so, were the Appellant's transactions connected with such a fraudulent VAT loss?

(4) If so, did the Appellant know, or should it have known, of such a connection?

38. The FTT recorded, correctly, that HMRC had the burden of proving on the balance of probabilities all the above four matters in relation to the Appellant's transactions.

39. The fourth matter was of particular note; for it was a main part of the Appellant's case that there was no persuasive evidence that it knew or had the means of knowing at the time that it entered into the transactions that they were connected to fraud.

40. In that context it was part of the Appellant's case that its knowledge was limited to the parties from which it bought, and to whom it sold; and accordingly, it could not put forward any positive evidence in respect of the alleged wider scheme, though it was entitled to put HMRC to proof of its case.

41. Given that the Appellant has focused almost exclusively on issues relating to that fourth matter (proof of knowledge of the frauds) I can deal relatively shortly with the other three matters, and then predominantly for the purpose of setting the context.

Issue (1): was there a VAT loss?

42. The Appellant did not contest HMRC's evidence of a VAT loss in respect of each of the 19 transactions entered into by the Appellant in the 03/06 period (from 13 March 2006 to 27 March 2006) which can be attributed to a defaulting trader.

43. The FTT was satisfied on the uncontested evidence that there was a VAT loss in each of the 19 "straight" or "plain vanilla" transactions where the Appellant acted as broker.

44. The Appellant did not substantively contest HMRC's finding that there were substantial tax losses of some £35,077,174 occasioned by four defaulting traders in the 56 Uni-Brand broker deals in the "dirty" chain of transactions in the 05/06 period.

45. The Appellant complained that the basis on which HMRC allocated 9 of these 56 broker deals, and some £6.4 million, to the Appellant's April 06 transactions was suspect; and HMRC accepted (as recorded in paragraph 468 of the FTT Decision) that HMRC's *"Officer Lam accepted that he had to jiggle with the 56 deals to arrive at the nine deals allocated to the Appellant but in the alternative he could have listed all 56 deals"*.

46. However, the Appellant's objection did not go to the issue whether there was a VAT loss in those deals: and I accept the FTT's assessment that, "jiggle" or not, a tax loss was demonstrated for the 05/06 period also.

47. As to the 08/06 period, the FTT found that tax losses of £4,265,460 were occasioned by two defaulting traders in seven broker transactions in which Uni-Brand was the purchaser in a dirty chain.

48. In short, there is no basis for upsetting, and I do not understand the Appellant to seek to upset, the FTT's conclusion (in paragraph 475 of its Decision) that VAT losses occurred in the Appellant's March 2006 deals and in Uni-Brand's broker transactions in the 05/06 and 08/06 periods.

Issue (2): was the VAT loss occasioned by fraud?

49. As to the second of the questions in paragraph [37] above, the FTT carefully considered the details of the trading in each of the three periods concerned, and concluded that

(1) the tax losses occasioned in relation to the Appellant's 19 deals in March 2006 were fraudulent;

(2) the tax losses occasioned in Uni-Brand's 05/06 broker deals in the dirty chains were fraudulent;

(3) the tax losses occasioned in Uni-Brand's 08/06 broker deals in dirty chains were likewise fraudulent.

50. The Appellant does not challenge the FTT's finding that the defaulting trader in the straight line deals and the ultimate defaulting trader in the contra-deals were fraudulent. It does, however, challenge the conclusion that Uni-Brand was knowingly involved as a dishonest contra-trader in respect of its dealings in the 05/06 and 08/06 VAT periods.

51. The FTT made careful findings of fact in relation to Uni-Brand's own operations in reaching that conclusion. More particularly, the FTT identified and set out in paragraphs 205 and 484 of the FTT Decision, no less than 20 *indicia* of fraudulent operations in support of its conclusion. I return in more detail later to the grounds advanced by the Appellant for upsetting that conclusion (in grounds 10 and 11 of its appeal). In summary, however, in my judgment none of those grounds succeeds: there is no proper basis for upsetting that conclusion.

Issue (3): were the Appellant's transactions in the three periods connected with fraudulent VAT losses?

52. It is recorded at paragraph 487 of the FTT Decision that the Appellant was not in a position to and did not challenge HMRC's evidence on the tracing of the Appellant's 03/06 transactions or the accounting mechanism deployed by Uni-Brand to offset its input tax claim against output tax which linked the clean chains with the dirty chains in Uni-Brand's 05/06 and 08/06 VAT periods. On the basis of that evidence, the FTT was satisfied and found that the traced invoice chains for the Appellant's March 2006 transactions demonstrated that each of the Appellant's March 2006 transactions was connected to a fraudulent VAT loss.

53. The FTT also made and explained its finding that Uni-Brand offset the impending input tax reclaims in its 05/06 and 08/06 broker transactions which were traced to fraudulent tax losses against the output tax liabilities on its onward sales of mobile phones to the Appellant in April and June 2006.

54. On the basis of these findings the FTT was satisfied and concluded that the Appellant's 03/06, 04/06 and 06/06 transactions were all connected to fraudulent tax losses. There is no substantial challenge, nor could there be, to those findings and conclusions.

Issue (4): was there (a) an overall scheme to defraud (b) to which the Appellant was knowingly party?

55. The two parts of the fourth, final and most important question are inter-related; but they were, quite correctly, dealt with in turn by the FTT in its Decision, since the question whether the Appellant participated in an overall scheme to defraud informs, but does not answer, the question whether the Appellant knew or should have known that it was participating in such a scheme.

56. In concluding at paragraph 513 of its Decision that *"the hallmarks of fraud were pervasive throughout the Appellant's three sets of transactions and Uni-Brand's 05/06 and 08/06 contra trades"* the FTT identified the following particular features:

(1) the inordinate length of the deal chains in the March 2006 transactions, which reduced to next to nothing the margins available for each individual trader in the chain and made no commercial sense (paragraph 493);

(2) flaws in the documentation of the deal chains, including absence of invoices, incomplete supplier declarations, and false signatures, suggestive of contrivance (paragraph 492);

(3) the regular appearance of specific traders in the chains with the traders organised in defined clusters for particular deals, the defined clusters having no inherent commercial logic and constantly regrouping in defiance of previous trading relationships (paragraph 494);

(4) a discernible pattern in the March 2006 deals of a new defaulting trader being introduced soon after the de-registration of the previous

defaulting one, demonstrating orchestration of the deal chains for fraudulent purposes (paragraph 495);

(5) payments to connected third parties which did not appear in the deal chains and had the effect of depriving the defaulting traders of the necessary funds to meet their VAT liabilities (paragraph 496);

(6) in the case of Uni-Brand's 05/06 and 08/06 dirty chains, the absence of valid VAT invoices, the lack of due diligence and the fact of third party payments (paragraphs 202-204 and 497);

(7) in the case of Uni-Brand's clean chains involving the Appellant, questionable commercial features including (a) in the 04/06 deals, the fixed low mark-up of either 0.5% or 1% for Uni-Brand and the high price paid by the Appellant's overseas customers when compared with the price paid by Uni-Brand to its overseas suppliers; and (b) in the 06/06 clean chain, the payment of substantial amounts to third parties (paragraph 498);

(8) the connections between participants in the dirty and clean 04/06 chains, highlighted by the role of the recipients of third party payments in the dirty chains in acting as suppliers (of mobile phones) to Uni-Brand's suppliers in the clean chains (paragraph 499);

(9) the common banking and currency arrangements for the traders in the disputed deals: all but one of the traders in the deal chains had accounts with FCIB and the currency denominated for all the transactions was pounds sterling regardless of the country origin of the parties (paragraph 502);

(10) the evidence of circular money flows in a majority of the deals and the prominent presence of connected companies in the money flows for the Appellant's transactions: for example, the facts identified 28 participants in the movement of funds within FCIB where there was no evidence of any invoices between the parties for those transactions (paragraphs 500 to 509);

(11) the evidence of associations and established relationships between participating companies in the various deal chains (paragraph 510);

(12) other striking similarities between the disputed deal chains in respect of participating companies, and the existence of established relationships

between those companies which played a significant role in the deal chains, emphasising the interconnections between the Appellant's three sets of transactions and Uni-Brand's 05/06 and 08/06 contra-trades (paragraph 512).

57. At the end of paragraph 513 of its Decision the FTT concluded as follows:

> *"The Tribunal concludes that the hallmarks of fraud were pervasive throughout the Appellant's three sets of transactions and Uni-Brand's 05/06 and 08/06 contra trades which dispelled the notion that the fraudulent trades were the result of the actions of a few rogue traders at the distant ends of the various chains. The demonstrated connections between the three sets of transactions and the Uni-Brand contra trades showed that they did not operate independently. The prominent roles played by a selective group of companies, most of which were connected, in the money flows and the transaction chains, highlighted the contrived nature of the arrangements. The cumulative effect of these findings established that the Appellant's three sets of transactions and Uni-Brand's contra trades constituted an orchestrated and systematic fraudulent scheme."*

58. The Appellant did not seek then and has not sought in the UT to contradict the evidence thus marshalled of coordinated fraud in and between the deal chains. It did, however, contend (as point two of the 1st ground of its Appeal, that is, alleged procedural impropriety) that there was unfairness in the fact that HMRC did not put the detailed evidence on money flows using FCIB accounts to Mr Rashid.

59. I can deal with this briefly. HMRC did put to Mr Rashid the circular money flow it had uncovered in March 2006 deal 1: his response was to deny all knowledge on the ground that he was only aware of the Appellant's immediate counterparties. I accept HMRC's contention that in the circumstances there was no point in putting, and no substantial unfairness in not putting, the detailed other money flows evidence to Mr Rashid: he could hardly have said other, consistently with his case that he knew nothing about them.

60. This is confirmed by his answer to a general question put to him about the circularity of funds:

> *"I don't know about other people. Just I can comment on my transaction."*

61. For substantially the same reasons I can also deal briefly with point three of the Appellant's 1st ground of appeal, which was that it was procedurally unfair and irregular for the FTT to rely on features of the transactions and the companies involved in them which showed connections between them and between the transaction chains, without having put each of those matters to Mr Rashid.

62. The premise of this point three is that it was incumbent on HMRC to put each of these alleged features and connections to Mr Rashid. But though perhaps Mr Rashid might have offered an opinion or observation, he could not offer evidence on matters on which, on his own case and say-so, he had no knowledge and could not comment. The argument advanced on behalf of the Appellant that HMRC was obliged to parade its case on these matters to Mr Rashid, as the Appellant's principal witness, even though he had explained he knew nothing about these matters, is, to my mind, misconceived. That is the more so because HMRC's case rested on uncontested documentary evidence.

63. However, as noted above, and as the FTT expressly accepted, in paragraph 514 of its Decision, the fact that the Appellant's transactions were found to be part of a wider fraudulent scheme does not mean that the Appellant knew of their connection with the fraudulent scheme. The FTT expressly there recognised that

> *"the Appellant's transactions must be considered on their own merits, which left open the possibility that the Appellant was an innocent dupe."*

Issue as to the Appellant's knowledge

64. I turn, therefore, to part (b) of the fourth question, as to the Appellant's knowledge. The FTT correctly recorded that the burden was upon HMRC to prove (on the balance of probabilities) that the Appellant was not an innocent dupe, and that it knew or should have known at the time of entering into the disputed transactions that they were connected with the fraudulent evasion of VAT.

65. The FTT's approach to the determination of this central issue was fashioned by reference to the way that HMRC and the Appellant put their respective cases. Paragraph 621 of the FTT Decision describes the essential dispute:

> "*HMRC presented its case on the basis [that] the evidence was compelling that the Appellant knew of the connection between its disputed transactions and the fraudulent evasion of VAT through an MTIC scheme. The Appellant defended the case on*

the basis that it was a genuine trader acting as a rational business seeking to make a commercial profit from an economic activity. The Appellant [contended that its] activities were regulated by specific contractual terms and conditions, and properly insured and documented. The Appellant [contended that it] took active steps to ensure that its deals were legitimate by carrying out extensive due diligence of its customers and suppliers and a thorough inspection of goods."

66. The FTT's approach was to focus on the way that the Appellant's business was conducted in the relevant period, and to test the Appellant's case that it was carrying on legitimate trade in a regular, diligent and documented way. Amongst the matters on which it particularly focused (and to which I shall return later, see especially paragraphs 158 and 218 to 227) was the nature and extent of any control exerted over its affairs by a company called KSC Electrical Industries ("KSC"), a body corporate within a group called the KSC Group of Companies in Pakistan. The only exception to its focus on facts directly relevant to the Appellant's own transactions and way of doing business, and thus within the Appellant's own knowledge, was that the FTT also referred to the attendant circumstances of the wider deal chains and money flows to provide the context and a fuller picture of the Appellant's June 2006 deals.

67. In paragraph 620 of the FTT Decision, the FTT summarised its findings on the Appellant's own knowledge in respect of the disputed transactions in 12 numbered sub-paragraphs as follows:

"*(1) The terms of the Appellant's agreement with KSC meant that the Appellant had no choice over its customers and the price charged to them from the moment when it commenced trading in mobile phones in 2002 until August 2006. The existence of this agreement seriously undermined the Appellant's assertions that it was an independent trader subject to the normal market forces of supply and demand. Throughout the period of the disputed transactions KSC exercised significant control over the Appellant's trading activities.*

(2) The Appellant was utterly reliant on KSC for providing it with the necessary capital and cash flow to fund its mobile phone business. KSC provided the funding for the Appellant's March 2006 deals with the loan of £1.5 million. The Appellant's relationship with KSC was totally devoid of the characteristics associated with arms length commercial arrangements between two separate businesses. KSC controlled the Appellant's customers, the prices charged, and its finances. The terms of the documents regulating their

relationship had no commercial justification. The Appellant fitted the description of KSC's stooge.

(3) The Appellant's sole business rationale was to make a profit from the VAT repayment. The commission arrangements with KSC meant that it was unable to make a profit from its wholesale dealings in mobile phones. The Appellant's business activities were inextricably linked with the cycle of VAT return submission and VAT repayments. The Appellant had no business existence outside the cycle and remained dormant for the majority of the time during the period of the disputed deals.

(4) The Appellant had no rational commercial justification for its existence as a profit making business. The Appellant made huge gross profits from its operations (including the March and April transactions) that did not add value to the products it was selling. The Appellant in the disputed transactions was not active in a niche market or seizing opportunities from failures in the distribution market for mobile phones. The Appellant's mark ups in the disputed transactions did not conform with its own benchmarks, and its competitors were prepared to sell their phones at a lower price to the Appellant than what they could achieve on the open market. The Appellant's switch in April and June 2006 to an exclusive supplier arrangement with Uni-Brand defied the Appellant's own rationale for doing business. The reality was that the Appellant's only meaningful product from its activities with the disputed transactions was a completed VAT return at the end of each month supported by VAT invoices.

(5) The Appellant's published terms and conditions for the disputed deals fulfilled no commercial function. The Appellant had adopted them to give the impression of proper ongoing commerce knowing full well that it had no intention of applying them to its mobile phone deals.

(6) The Appellant's reliance on ship on hold was a belated attempt to give its dealings an aura of commercial legitimacy. In the Tribunal's view this was another example of the Appellant finding another justification for its trades once its original rationale had been exposed as false.

(7) Mr Rashid's portrayal of the conduct of disputed transactions demonstrated their contrived nature. His portrayal of the Appellant's transactions meant that that the parties knew of each others' existence, no party had ownership of goods, the parties allocated and transported goods they did not own and suppliers would not be paid until the Appellant had received

payment from its customers. This depiction belied Mr Rashid's assertions that the Appellant was operating as an independent trader, arms length from its suppliers and customers in pursuit of the best deal. Instead Mr Rashid's portrayal unwittingly disclosed the existence of contrived arrangements having no hallmarks of commercial arms length trading and involving a chain of connected traders which went beyond the Appellant's immediate suppliers.

(8) The Appellant did not fulfil its stated purposes for conducting due diligence on its customers and suppliers. The Tribunal's findings showed that the due diligence had no influence on the Appellant's trading. Mr Rashid did not critically evaluate the information provided by the due diligence and ploughed ahead with the transactions regardless of the negative indicators. In short the due diligence formed no part of the Appellant's decision to trade with the customers and suppliers in the disputed transactions. The Tribunal concludes that the Appellant's due diligence was just a charade to give the impression that the Appellant was engaged in commercial trading and complying with the joint and several requirements of HMRC Notice 726.

(9) The Tribunal's findings on the Appellant's inspections for the disputed deals undermined Mr Rashid's claim that Aberdale was engaged by the Appellant to verify and check all stock bought and sold. The defects in the Appellant's document trail of requests and reports for the disputed deals indicated that they played no commercial role in Appellant's business. The cumulative effect of the findings, however, carried more serious implications for Mr Rashid's credibility, and the bona fides of the disputed deals. The findings on Mr Rashid's knowledge regarding the April transactions, Mr Rashid's attempt to mislead HMRC with 500 bogus IMEI scans, the non-production of the records of the IMEI scans and the Appellant's capability of producing inspection reports in Aberdale's name all pointed to the conclusion that Aberdale did not scan the IMEI numbers of the mobile phones in the disputed deals, and that the Appellant not Aberdale was responsible for the production of the inspection reports.

(10) The Appellant's insurance arrangements for the disputed transactions were no more than a façade designed to give the transactions an aura of authenticity. The reality behind the façade was that the Appellant did not care whether the goods were adequately insured, and only interested in having a piece of paper which might satisfy the requirements of HMRC Notice 726.

> *(11) The evidence relied upon by HMRC in respect of the deal documentation except for the contractual arrangements was inconclusive. The evidence neither advanced nor hindered HMRC's case.*
>
> *(12) The Appellant's deals with Uni-Brand and Gold and Horizon in June 2006 were contrived and calculated to produce a purported trading loss of £4.2 million in order to generate a VAT repayment of £700,000. The trading loss was covered by a cash injection from Midcom, which meant that at the end of the deals the Appellant was left with a £100,000 credit balance in its bank account and with the expectation of a substantial VAT repayment claim.*"

68. To this catalogue of *indicia* supportive of the case as presented by HMRC and undermining of the case as presented by the Appellant the FTT added in paragraph 622 of the FTT Decision its perception of the course of Mr Rashid's cross-examination. That paragraph reads as follows:

> "*As HMRC's case rolled out the Appellant's defence unravelled. Mr Rashid's first line of defence to the inconsistencies in the Appellant's transactions as revealed by HMRC was that they were clerical mistakes or dealt with on the telephone, of which no records were kept. When those explanations were found wanting, Mr Rashid was forced to admit that the Appellant did not conduct its transaction in the manner portrayed by the copious documentation and his witness statements. The final picture painted by Mr Rashid of the Appellant's disputed transactions was that the deals were conducted by telephone, the Appellant and its suppliers did not own the goods, the transactions carried no financial risk, and the Appellant's documentation, procedures and due diligence were irrelevant because of the ship on hold arrangements. Despite Mr Rashid's volte face he still maintained that the Appellant's transactions were legitimate and typical of a wholesale business.*"

69. The FTT concluded by reference to and on the basis of its findings as adumbrated above that (to quote from paragraph 623 of the FTT Decision):

> "*the Appellant was not a genuine independent trader acting as a rational business. The Appellant's business and funding for the disputed transactions were effectively controlled by a third party KSC. The Appellant had no rational commercial purpose making huge profits from the March and April deals for doing nothing other than submitting VAT returns. The Appellant in*

respect of the disputed transactions flouted its contractual terms and conditions, ignored its due diligence, fabricated inspections of the mobile phones, and did not care whether the mobile phones were insured. The Appellant's deals in June 2006 were contrived and calculated to produce a purported trading loss of £4.2 million in order to generate a VAT repayment of £700,000. The sum of these findings and Mr Rashid's volte face on the Appellant's case are that the Appellant knew when it entered into each of its March, April and June transactions [that] they were connected with the fraudulent evasion of VAT."

70. The FTT then considered what it called "the wider circumstances surrounding the Appellant's transactions". Its findings can be summarised by reference to the FTT Decision as follows:

"*624. …The Appellant's positions in the fraudulent scheme for the March, April and June transactions were critical for the successful execution of the VAT frauds. The Appellant operated as a broker in the March and April deals and as a buffer with a potential large VAT repayment in June…*

625. ….The Appellant's transactions were all completed within the respective chains on a back to back basis with the suppliers holding the exact quantity of stock that was required by the customers…The deal chains showed the difference in the prices paid for the goods at the head of the chain and the Appellant's sale price of the goods. This price differential was not justified on commercial grounds as the respective deals took place on the same day within a very short period of time. Also the price differential questioned why the Appellant's overseas customer was sourcing the mobile phones from the Appellant when it could have got a much cheaper deal by dealing direct with the overseas supplier for the respective deal chains.

626. …The Tribunal is satisfied that the Appellant's switch from a direct deal chain to a contra trade in April 2006 was a direct response to HMRC's investigation of the Appellant's VAT repayment claim for March with the disguised aim of facilitating a fraudulent VAT repayment claim for its April deals…

627. When the Appellant occupied the key role of broker within the fraudulent scheme it secured significantly

higher profits than the other parties in the March transaction or Uni-Brand in the April deals…The large profits achieved by the Appellant as compared with the other traders [a ten-fold increase] was because as a broker it took the highest risk in the fraudulent scheme as it would have to submit a repayment claim to HMRC which may have been refused. The high profit was a reward for taking that risk.

628. The Appellant's profits in the March deals showed a distinct correlation with the VAT defaulted upon (34-36%)…The Tribunal agrees with HMRC that the Appellant's profits should not, if it was an ordinary commercial enterprise, bear any consistent mathematical relationship to the amount of VAT defaulted upon by the fraudster, particularly as the fraudster was apparently three or four companies removed from the Appellant in the chain.

629. The evidence showed that the Appellant in the transactions was repeatedly involved in the circular fund structures. The circularities of funds allowed the Appellant to be ultimately reimbursed for its purchase, which was utterly lacking in commerciality…The prevalence of circular money flows in Uni-Brand's April and June clean chains involving the Appellant undermined their description as clean and emphasised their fraudulent nature through their connection with the dirty chains.

630. All of the Appellant's dealings in the four month period from March to August 2006 except for three invoices have been traced to the fraudulent evasion of VAT. The excepted three invoices related to buffer sales to Shelford Trading which also appeared in deals 5 and 10-12 of the Appellant's 03/06 period. HMRC argued that a near 100% incidence of fraud in respect of its transactions over a four month trading went beyond the realms of coincidence and the true inference to be drawn was that the Appellant knew they were connected to a fraudulent MTIC scheme. The Tribunal agrees…"

The FTT's ultimate decision

71. The FTT summarised its ultimate decision in paragraph 654 of the FTT Decision as follows:

"(1) VAT losses were incurred in the Appellant's March 2006 deals and in the Uni-Brand's dirty chains of the 05/06 and 08/06 periods.

(2) The VAT losses in the Appellant's March 2006 deals and in the Uni-Brand's dirty chains of the 05/06 and 08/06 periods were fraudulent.

(3) Uni-Brand knowingly operated as a dishonest contra trader in respect of its dealings in the 05/06 and 08/06 VAT periods.

(4) The traced invoice chains for the Appellant's March 2006 transactions as set out in Appendix 1 to HMRC's skeleton demonstrated that each of the Appellant's March 2006 transactions was connected to fraudulent tax losses.

(5) The Appellant in April and June 2006 purchased the mobile phones from Uni-Brand which the Tribunal has found to be a dishonest contra-trader concealing its own role in the fraud through its dealings with the Appellant. Further the Tribunal holds that Uni-Brand offset its impending input tax reclaim in the dirty chains tracing to fraudulent tax losses against the output tax liabilities on its onward sales to the Appellant. The Tribunal is satisfied on the above findings that the Appellant's April and June 2006 transactions were connected to fraudulent tax losses.

(6) The Appellant's transactions were part of a systematic and orchestrated fraudulent scheme which encompassed both the fraudulent defaults in 52 of the Appellant's transactions, the dishonest contra-trading by Uni-Brand in the remaining Appellant's 41 transactions and the fraudulent defaults by those in Uni-Brand's broker chains.

(7) The Appellant knew at the time it entered the April and June 2006 transactions that Uni-Brand was a dishonest contra-trader.

(8) The Appellant knew at the time it entered into each of its March, April and June 2006 transactions that they were connected with the fraudulent evasion of VAT.

(9) The Appellant is not entitled to its right to deduct VAT in relation to the March, April and June 2006 transactions."

Grounds of appeal: overall

72. I turn to discuss in turn the grounds put forward for upsetting these clearly expressed and carefully reasoned findings and conclusions, which persuaded the FTT to dismiss the Appellant's appeal against HMRC's decisions to refuse input tax in the total sum of £15,294,335 claimed in the VAT accounting periods 03/06 (£5,535,460), 04/06 (£6,460,125) and 06/06 (£3,298,750).

Applicable legal principles

73. Although put last in the Appellant's list and Skeleton Argument, I propose to deal first with the legal principles, and the Appellant's specific legal arguments. Section 11(1) of the Tribunals, Courts and Enforcement Act 2007 provides for a right of appeal to the Upper Tribunal "on any point of law arising from a decision made by the first tier tribunal other than an excluded decision". It is well established that the principles established under section 11(1) of the Tribunals and Inquiries Act 1992 and its predecessors were equally applicable under section 11(1) of the 2007 Act.

74. The Appellant's legal arguments are advanced, or in the case of the latter sought to be advanced (see below), as what the Appellant described as Grounds 13 and 14 of the Appeal. HMRC object that the arguments advanced under the description "Ground 14", as denominated by the Appellant, are not arguments mentioned or permitted to be the subject of appeal: I address this under the relevant heading.

Overview of the law

75. Before addressing the Appellant's arguments, it is necessary to place them in their legislative context, and to refer to certain leading authorities that have added colour to that context.

76. This was what was done by the FTT in its "*Overview of the Law*" in paragraphs 12 to 15 of the FTT Decision. To avoid the need for cross-referencing, but without further addition or gloss, I propose to transcribe those paragraphs into this judgment.

77. Articles 167 and 168 of the Council Directive 2006/112/EC provide:

> "167. A right of deduction shall arise at the time the deductible tax becomes charged.

168. Insofar as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay: The Vat due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person."

78. Sections 24 to 26 of the VAT Act 1994 enact the right to deduct tax paid on goods and services used for the purposes of business into UK legislation. Thus a trader is entitled to the payment of input tax it claims.

79. The ECJ in *Kittel* established an exception to the right to deduct when the trader knew its transactions were connected to fraud. The Court stated:

"51. In the light of the foregoing, 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 (see, to that effect, Case C-384/04 *Federation of Technological Industries and Others* [2006] ECR I-0000, paragraph 33).

52. It follows that, where a recipient of a supply of goods is a taxable person who did not and could not know that the transaction concerned was connected with a fraud committed by the seller, Article 17 of the Sixth Directive must be interpreted as meaning that it precludes a rule of national law under which the fact that the contract of sale is void, by reason of a civil law provision which renders that contract incurably void as contrary to public policy for unlawful basis of the contract attributable to the seller, causes that taxable person to lose the right to deduct the VAT he has paid. It is irrelevant in this respect whether the fact that the contract is void is due to fraudulent evasion of VAT or to other fraud.

53. By contrast, the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity' are not met where tax is evaded by the taxable person himself (see Case C-255/02 *Halifax and Others* [2006] ECR I-0000, paragraph 59).

54. As the Court has already observed, preventing tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive (see Joined Cases C-487/01 and C-7/02

Gemeente Leusden and Holin Groep [2004] ECR I-5337, paragraph 76). Community law cannot be relied on for abusive or fraudulent ends (see, inter alia, Case C-367/96 *Kefalas and Others* [1998] ECR I-2843, paragraph 20; Case C-373/97 *Diamantis* [2000] ECR I-1705, paragraph 33; and Case C-32/03 *Fini H* [2005] ECR I-1599, paragraph 32).

55. Where the tax authorities find that the right to deduct has been exercised fraudulently, they are permitted to claim repayment of the deducted sums retroactively (see, inter alia, Case 268/83 *Rompelman* [1985] ECR 655, paragraph 24; Case C-110/94 *INZO* [1996] ECR I-857, paragraph 24; and *Gabalfrisa*, paragraph 46). It is a matter for the national court to refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent ends (see *Fini H*, paragraph 34).

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

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

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

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

60. It follows from the foregoing that the answer to the questions must be that where a recipient of a supply of goods is a taxable person who did not and could not know that the transaction concerned was connected with a fraud committed by the seller, Article 17 of the Sixth Directive must be interpreted as meaning that it precludes a rule of national law under which the fact that the contract of sale is void – by reason

> of a civil law provision which renders that contract incurably void as contrary to public policy for unlawful basis of the contract attributable to the seller – causes that taxable person to lose the right to deduct the VAT he has paid. It is irrelevant in this respect whether the fact that the contract is void is due to fraudulent evasion of VAT or to other fraud.
>
> 61. By contrast, where it is ascertained, having regard to objective factors, that the supply is to a taxable person who knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, it is for the national court to refuse that taxable person entitlement to the right to deduct."

80. The Court of Appeal in *Mobilx Limited & Others v The Commissioners for Her Majesty's Revenue & Customs* [2010] EWCA Civ 517 clarified the test in *Kittel*:

> "59. The test in *Kittel* is simple and should not be over-refined. It embraces not only those who know of the connection but those who 'should have known'. Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in *Kittel*.
>
> 60. The true principle to be derived from *Kittel* does not extend to circumstances in which a taxable person should have known that by his purchase it was more likely than not that his transaction was connected with fraudulent evasion. But a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion."

Ground 13

81. The Appellant contends in Ground 13 of its appeal that the FTT erred in its interpretation and/or application of the *Kittel* test because (so it is submitted) the FTT gave no or no proper consideration to the question whether the Appellant had in fact *"by his purchase"* participated in transactions connected

with the fraud (as it is said the *Kittel* test requires) by thereby aiding the perpetrators of the fraud or becoming their accomplice.

82. The Appellant seeks to support its argument by reference to the fact that in the FTT's summary of the four issues to be determined (in, for example paragraph 6 of the FTT Decision) the necessity to show such participation is not separately identified.

83. More substantively, perhaps, the Appellant elaborated its argument under this ground to the effect that on its true interpretation *Kittel* is premised upon direct participation in fraud, in the sense (adopting paragraph 61 of the judgment in *Kittel*) that (a) the supply is to a taxable person (b) who knew or should have known that, (c) by his purchase, (d) he was participating in (e) a transaction connected with fraudulent evasion of VAT (f) by the seller (this last being a gloss introduced by the Appellant's Counsel).

84. I do not accept either that the FTT gave no proper consideration to the issue of participation, or that in doing so it misinterpreted or misapplied the *Kittel* test. The two points are, to my mind, most clearly dealt with in reverse order.

85. It is quite clear from *Kittel*, as explained by the Court of Appeal in *Mobilx*, and by Sir Andrew Morritt C in *Blue Sphere Global Ltd v Revenue and Customs Commissioners* [2009] STC 2239, that the objective criteria which determine the scope of VAT and the right to deduct are not met, not only (a) where it is demonstrated that the taxable person is himself seeking to evade tax but also (b) where it is demonstrated that the taxable person knew or should have known that the transaction which he is undertaking, even if it would otherwise meet the objective criteria, is connected with fraudulent evasion of VAT. In either case, the taxable person is to be regarded as a participant, and thus disqualified from the right to deduct.

86. Thus, once a connection between the transaction and fraudulent evasion of VAT somewhere along the line or chain is demonstrated, proof of knowledge (or that the taxable person should have known) of that connection makes that person a participant.

87. The four questions posed by the FTT identify what is to be established to show participation.

88. This also disposes, in effect, of the other argument advanced by the Appellant under Ground 13 of its Appeal. There is no sensible argument, in my judgment, that the FTT in this case did not consider the relevant factors in

determining participation in transactions either themselves constituting or connected with fraudulent evasion of VAT. On the contrary, the FTT manifestly did consider, and with conspicuous care, the matters which *Kittel*, as explained in *Blue Sphere* and *Mobilx*, identifies as requiring to be considered and demonstrated if the right to deduct is to be denied.

89. That leaves aside the question as to the knowledge to be proved to disallow a right to deduct, and as to whether *Mobilx* and *Blue Sphere* incorrectly interpreted *Kittel* in this regard: that is the subject matter of Ground 14.

Ground 14

90. Ground 14 raises questions as to what knowledge on the part of the Appellant has to be demonstrated to support the Commissioners' decision to refuse to disallow the right to deduct.

91. It is the Appellant's contention that in a contra-trading case, where the essence of the stratagem is that transactions in the clean chain are used to mask transactions in the dirty chain (and see *Brayfal v HMRC* [2011] UKUT 99 (TC)), knowledge of either (a) fraud in the dirty chain or (b) dishonest concealment must be shown, in this case, on the part of Uni-Brand.

92. The Appellant submits that in the present case, the Commissioners had accepted that the Appellant did not know, and could not have known, of Uni-Brand's acts of concealment. And as to (a), the "dirty chain" was merely "*an accounting construct demonstrated by Officer Lam's unilateral allocation of monies to various transactions which gave rise to the alleged contra-trading referable to the Appellant*" (and see the "jiggle" referred to in paragraph [41] above).

Preliminary dispute as to scope of Ground 14 of the Appellant's appeal

93. It is necessary for me to address a preliminary dispute between the parties as to the permitted scope of this ground of appeal. The dispute arises because the Commissioners contend that, under the banner of Ground 14 as above described, the Appellant has sought to introduce a variety of arguments which amount to a "*significant and wholly unheralded expansion of that ground…without seeking permission from the Upper Tribunal or notifying the Respondents*".

94. The importance attached to Ground 14 by the Appellant may be illustrated by (a) the fact that no less than 40 pages of their 86-page Skeleton Argument was

devoted to that ground and (b) the great majority of the time spent at the hearing was devoted to some aspect of this ground (as well as Ground 4 to which I shall later return).

95. There is to my mind little or no doubt that the Appellant has elaborated, if not extended, Ground 14 to cover, under the banner of the *"Test of knowledge of contra trade fraud"* a gamut of points which were not identified specifically or at all, and which involve reconsideration of case law already held to be binding at this level.

96. I have been tempted to shorten this Decision by refusing permission to appeal on any point not plainly covered by the express wording of Ground 14 as put to Judge Berner when he gave permission to appeal. According to the Commissioners that would exclude from consideration the following arguments:

(1) that the decision in *Mobilx* was made in error, and/or is not binding on this Tribunal as being inconsistent with EU law;

(2) that if the supplies in question were fraudulent and thus outwith the scope of VAT, it follows that there was no loss properly described and which the Commissioners can properly characterise as a "VAT loss", because there would have been no VAT chargeable;

(3) that the only relevant measure in UK domestic law which establishes an exception to the right of deduction being section 77 VATA, which has no application, and it being a matter for the national court applying domestic law to determine whether a right of deduction is to be refused, there is no legal basis on which the right of deduction could be refused;

(4) that the principles established in *Kittel* cannot be extended to cover contra-trading;

(5) that there must be privity of contract between the Appellant and a fraudster for the principle in *Kittel* to apply: only a connection with fraud which is direct and immediate will be sufficient;

(6) that the Respondents could not make good their case without alleging conspiracy, and did and could not do so;

(7) that the FTT took into account irrelevant objective factors to which it should not have had regard;

(8) that it was discriminatory and disproportionate, and in breach of the principles of "*equal treatment*" and "*fiscal neutrality*", to deny the Appellant the right to deduct in this case;

(9) that the FTT ignored the presumption that the Appellant's trading was "regular".

97. In the end I have decided to address these points, whilst deprecating the failure to adumbrate them earlier. As I shall explain, that is because the points are all capable of being fairly shortly and conveniently dealt with by reference to existing authority, and it is on balance in my view better to dispose of them substantively.

98. The starting point, and in a sense also the end point, is the decision of the Court of Appeal in *Mobilx*, giving broad application to the principles in *Kittel.*

99. The Appellant seeks to challenge the approach of the Court of Appeal in that case. It wishes to contend that, notwithstanding clear precedent from a higher court than this in domestic terms, this Court should and must follow the higher authority of Articles 167 and 168 of Directive 2006/112 ("the VAT Directive") and case law as to its interpretation and application in the CJEU, which it submits mandate a different and more restrictive approach (which during the hearing came to be referred to by the shorthand "slim *Kittel"*).

100. In support of its arguments, the Appellant invites the UT

(1) to re-examine *Kittel* and conclude that (contrary to the unanimous view of the Court of Appeal in *Mobilx*) the ECJ did not intend to extend the circumstances in which a right to deduct could be refused: the only circumstances that would justify such refusal would be proof of direct, immediate and active connection with fraud;

(2) to treat the subsequent decisions of the CJEU in Joined Cases, namely, *Mahagében kft v Nemzeti and Peter Dávid* [2012] EUECJ C-80/11 ("*Mahagében"*) and *Tóth v Nemzeti* [unreported, September 2012] ("*Tóth"*) as confirming this "slim" or restrictive interpretation of *Kittel*;

(3) to hold that the benefit of the right to deduct can only be refused where it can be established (on the basis of objective factors) that the claimant had the requisite knowledge as regards its direct and immediate counterparty.

101. Counsel for the Appellant, and in particular Mr Patchett-Joyce, who has considerable experience in the field and took the primary role in laying out the Appellant's submissions on the law (whereas his leader Mr Andrew Trollope QC largely confined himself to the facts), treated me also to a linguistic analysis of the original French texts in support of his case.

102. He also emphasised the point that the notion of related (though separate) "dirty chains" and "clean chains" and the whole construct of what has come to be called, in this jurisdiction, *"contra-trading"*, is a concept which is (a) unknown in EU law and (b) dependent upon an assumption of a connection between the clean and dirty chains.

103. I shall take these points in turn as follows:

(1) what *Mobilx* decided as to the scope of *Kittel;*

(2) whether *Mobilx* (in 2010) is inconsistent with *Mahagében* or *Tóth* (both in 2012), and if so what is to be done at this level (given domestic theory of precedent);

(3) whether and how the principles as established apply to contra-trading;

(4) what knowledge must be shown in the context of a construct said to comprise "contra-trading" to disallow deduction where the taxable person claiming repayment of input tax is not himself a dishonest co-conspirator.

Mobilx and *Kittel*

104. In *Mobilx*, which is the composite reference to what in fact were three appeals, two by traders and one by HMRC, the Court of Appeal examined *Kittel* and the earlier ECJ decision in *Optigen Limited v Customs and Excise Commissioners* [2006] ECR 1-483.

105. The three appeals provided a range of factual circumstances against which to test the competing arguments. The Court of Appeal considered the arguments with especial and painstaking care having regard to (a) the prevalence of MTIC fraud (b) the fact that at that time there were in excess of 800 live appeals relating to such fraud involving more than £2 billion of VAT and (c) the fact that there had already been 20 decisions at tribunal level and six in the UT or High Court. The Court of Appeal was required to give systemic guidance; and it did so.

106. All the appeals turned on what the ECJ meant when it ruled in *Kittel* that the right to deduct may be refused if:

> "it is ascertained having regard to objective factors, that the taxable person *knew or should have known* that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT."

107. One of the appeals (the *Blue Sphere* appeal) concerned "contra-trading."

108. In respect of all the appeals, the Court of Appeal identified the two essential questions as being:

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

109. The Court of Appeal concluded in summary as follows:

(1) Whereas in *Optigen* the ECJ had considered the issue as to whether a taxable person who did not and could not know that a transaction which was connected to fraud and/or lacked any economic substance could be denied the benefit of the right to deduct (and answered that in the negative), in *Kittel* the ECJ considered the position of a taxable person who did know (or should have known) that the transaction concerned was connected with fraud;

(2) Prior to *Kittel*, the ECJ had decided that it would be a matter for the national court to refuse to permit the claim to the right to deduct, if and

where demonstrated that such right was being relied on for fraudulent or abusive ends;

(3) In *Kittel* the ECJ had

> "developed its established principles in relation to fraudulent evasion. It extended the principle...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…"

(4) As to the development from *Optigen:*

> "*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 transactions were connected with fraud, were to be treated as participants…"

(5) Furthermore, in *Kittel* the ECJ

> "must be taken to mean that even where the transaction in question would otherwise meet the objective criteria which the Court identified, it will not do so in a case where a person is to be regarded, by reason of knowledge, as a participant;"

(6) The test of knowledge prescribed in *Kittel* differed from UK domestic law (where complicity in fraud denotes a more culpable state of mind than carelessness): for the purposes of VAT a taxpayer who

> "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…"

(7) More generally:

> "The test in *Kittel* 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*"

However:

"the true principle to be derived from *Kittel* does not extend to circumstances in which a taxable person should have known by his purchase that it was more likely than not that his transaction was connected with fraudulent evasion."

(8) No principle of legal certainty requires the restriction of the connection that must be established to a fraudulent evasion which immediately precedes a trader's purchase:

"If the circumstances of that purchase are such that the 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"

(9) Further:

"It is not arguable that the principles of fiscal neutrality, legal certainty, free movement of goods or proportionality were infringed by the Court itself, when they were at obvious pains to preserve those principles (see paragraphs 39 to 50 [of *Kittel*]). By enlarging the category of participation by reference to a trader's state of knowledge before he chooses to enter into a transaction, the Court's decision remained compliant with those principles."

110. In my judgment, this analysis, which I am satisfied was adopted and applied by the FTT in this case, is binding on the UT and disposes of all the points made by the Appellant in Ground 14, subject to two questions. These are

(1) whether these principles require modification in the context of a case based on a "construct" of contra trading; and

(2) whether the analysis is invalidated by subsequent decisions of the ECJ or CJEU.

111. As to (1) in paragraph [110] above, Mr Patchett-Joyce submitted that there is no case in the ECJ or CJEU which establishes that a taxable person can be refused the benefit of the right to deduct on the basis of the contra-trade "construct".

112. Mr Patchett-Joyce drew my attention to the helpful description of contra-trading provided by Dr Avery Jones (sitting as Chairman of the FTT) in *Livewire Telecom Limited v HMRC* in 2007 (which went on appeal to the UT) at paragraph 5 and to his warning (in paragraph 6) that:

> *"The nature of contra-trading is easy to state…but the problem in real life is that there is no logical connection between the clean and dirty chains. First, the [relevant persons'] VAT accounting periods may not coincide…Secondly, the goods dealt in may be different in the two chains. Thirdly, for a particular [links in each chain]….Fourthly, the [person who acts as importer in one chain and exporter in the other, referred to as "C")] may not have deliberately entered into imports in the clean chain in order to cancel the inputs in the dirty chain; C may merely be both an importer and an exporter whose outputs in relation to the former happen roughly to cancel its inputs in relation to the latter. Fifthly, there may be many [parties] in between the importer and exporters.*"

113. On appeal to the UT, Lewison J (as he then was) broadly accepted these points, and also that the whole concept of contra-trading is to that extent a construct of the Commissioners. He emphasised that it is not enough for the Commissioners to identify two chains, suggest an accounting connection and label them as constituting "contra-trading".

114. However, (although he dismissed the Commissioners' appeal in *Livewire Telecom Ltd*) Lewison J allowed their appeal in the conjoined matter of *Olympia Technology Limited*. Although of course decided before, and without the guidance of the Court of Appeal in *Mobilx*, Lewison J's judgment is of continuing interest for its analysis of contra-trading and the two potential frauds it involves, which Lewison J identified as being:

(1) the dishonest failure to account for VAT by the defaulter or missing trader in the dirty chain; and

(2) the dishonest cover-up of the fraud by the contra-trader.

115. Lewison J continued (see paragraphs 103, 105 and 106 of his judgment) as follows:

> "Thus it must be established that the taxable person knew or should have known of a connection between his own transaction and at least one of those frauds. I do not consider it necessary that he knew or should have known of a connection between his own transaction and both of these frauds. If he knows or should have known that the contra-trader is engaging in fraudulent conduct and deals with him, he takes the risk of participating in a fraud the precise details of which he does not and cannot know…
>
> In other words, if the taxable person knew of the fraudulent purpose of the contra-trader, whether he had knowledge of the dirty chain does not matter.
>
> However, if the contra-trader is not himself dishonest, then there will only have been one fraud, namely the dishonest failure to account for VAT by the defaulter in the dirty chain. In that situation, the taxable person will not, in my judgment, be deprived of his right to reclaim input tax unless he knew or should have known of that fraud. But if the taxable person knew or ought to have known of that fraud, then he will be deprived of his right to reclaim input tax, even if the contra-trader is wholly innocent…"

116. Thus, it is not the badge or description of the transactions, but knowledge or constructive knowledge of the fraudulent evasion of VAT and/or of a scheme or device to disguise it which disentitles the taxable person of the right to deduct input tax. Contra-trading is simply a name given to a stratagem that involves both fraudulent evasion by the defaulting or missing trader (dirty chain) and its disguise or cover-up by the contra-trader (clean chain): if the taxable person seeks deduction with knowledge (actual or constructive) of either, he can be treated as a participant in the fraudulent evasion of VAT and denied it.

117. In short, and as Lewison J confirmed, the rationale of *Kittel* applies to contra-trading as it does to the simpler or "plain vanilla" single chain species of MTIC fraud. That conclusion is reinforced and indeed mandated by the decision of the Court of Appeal in *Mobilx*, whose judgment also disposes in effect of Mr Patchett-Joyce's further submissions in relation to breach of EC principles of non-discrimination, proportionality, equal treatment and fiscal neutrality.

118. The remaining legal issue (see paragraph [110] above), therefore, is whether subsequent ECJ/CJEU authority, and in particular, *Mahagében*, which was decided by the CJEU after the Court of Appeal decision in *Mobilx,* is the "game-changer" which Mr Patchett-Joyce submitted it to be. This submission was advanced broadly on the ground that (so he contended) *Mahagében* endorsed a restrictive reading of *Kittel* (confining disentitlement of a right to deduct to the circumstance of a contractual relationship between the taxable person/claimant and the fraudster) and was inconsistent with the broad construction adopted by the Court of Appeal in *Mobilx*.

119. Mr Patchett-Joyce especially relied in this regard on paragraphs 45 and 52 of the judgment in *Mahagében* as supporting his argument that the only basis on which the right to deduct may be denied is if it can be shown that the claimant/taxable person knows or should have known of fraud in the particular transaction in respect of which the taxable person is seeking to exercise his right to deduct.

120. I have to say that this is not as I read the decision in *Mahagében*, which seems to me to acknowledge at the very least that knowledge (actual or constructive) of earlier fraud in the chain of supply would disentitle the claimant.

121. In particular, I found difficult to follow and accept Mr Patchett-Joyce's resourceful attempt to explain away references in the judgment to "fraud by the supplier *or another trader* acting earlier in the chain of supply" [my emphasis] on the basis of the happenstance that in *Mahagében* the consignor or physical supplier of the goods was different from the person who supplied the invoice containing the tax charge (the taxable supplier), so that the references to a trader at an earlier stage were, on the facts, references to the invoice supplier as opposed to the supplier of the physical goods.

122. In any event, however, what seems to me plain is that

(1) nothing in the judgment in *Mahagében* was intended to restrict *Kittel;*

(2) the question before the court was, in reality, a narrow one: it was (see paragraph 36 of the CJEU judgment) whether the Directive 2006/112 should be interpreted as permitting a national practice adopted by the Hungarian tax authorities of refusing a taxable person a right to deduct on the ground that the issuer of the invoice or one of his suppliers acted improperly, without any need to establish that the taxable person was aware of the improper conduct or colluded in it;

(3) the answer given (which was "no") was entirely consistent with the analysis in *Optigen* and *Kittel* and reiterated the requirement of actual or constructive knowledge of fraudulent evasion on the part of the claimant without confining such knowledge to the transaction to which the claimant was party.

123. The conclusion that *Mahagében* does not support either the notion of a restrictive interpretation of *Kittel* or the contention that the analysis in *Mobilx* is inconsistent with later European authority is supported by an *ex tempore* but approved judgment of Moses LJ in *Powa (Jersey) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2013] EWCA Civ 225. Moses LJ (who had delivered the judgment in *Mobilx* with which Chadwick and Carnwath LJJ agreed) there refused Mr Patchett-Joyce's application for permission to appeal, saying:

> "…it seems to me quite clear that, whilst it is true that from time to time the court referred to another trader at an earlier stage of the transaction, it was accepting the principle that, so far as participation in fraud was concerned, if a person had knowledge or the means of knowledge that fraud was being carried out at an earlier stage in the chain of supply, that would denote that he was a participant in the fraud and thereby lose his right to deduct. That is plain from *Optigen*; it is plain from *Kittel*; and the court in *Mahagében* was saying nothing different."

124. In short, nothing in *Mahagében*, or perhaps I should add for comprehensiveness, *Tóth, 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] (each of which was pressed on me on behalf of the Appellant in supplemental submissions in writing dated 10 June 2013 as confirming its contentions), 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.

Conclusions as to Ground 14 and the legal principles applicable

125. As also indicated above, I conclude that none of the arguments advanced on behalf of the Appellant under the banner of Ground 14 avails it, each being inconsistent with *Mobilx* and the *Kittel* principles.

126. For comprehensiveness, and taking the sub-headings suggested by Counsel for the Commissioners:

(1) I do not accept the contention that *Mobilx* was wrongly decided, and shown to be so by subsequent European cases. Such a conclusion would not in any event be open to me; if I thought the contention had merit (which I do not) my correct course would be to follow *Mobilx* but give permission to appeal: and see *S & I Electronics plc v The Commissioners for Her Majesty's Revenue & Customs* [2012] UKUT 87 (TCC) at paragraphs 20 to 30. *Powa* reinforces my conclusion.

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

(3) The argument that the *Kittel* principles do not apply to contra-trading is untenable.

(4) So too is the argument that there must be privity of contract between the claimant and a fraudster for such principles to apply.

(5) The Appellant's contention that the FTT erred in law in disallowing deduction in the absence of a plea and proof of conspiracy is untenable also. I accept the Commissioners' submission that the test is the same in the context of contra-trading cases as in others: did the claimant/Appellant know or should it have known of the connection between its transaction and the fraudulent evasion of VAT or its disguise?

I accept further that there is no requirement upon the Commissioners to prove either that the Appellant knew that the chains in which it was involved were part of a contra-trading stratagem, or the identities of the companies involved.

It is the knowledge of fraudulent evasion which is of the essence; not its mechanics or labels. See further *Megtian Limited (in Administration) v The Commissioners for HMRC* [2010] EWHC 18 (Ch) at [37]-[38], where Briggs J explained:

"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 took place.

Similarly, I consider that there are likely to be many cases in which facts about the transaction known to the broker are sufficient to enable it to be said that the broker ought to have known that his transaction was connected with a tax fraud, without it having to be, or even being possible for it to be demonstrated precisely which aspects of a sophisticated multi-faceted fraud he would have discovered, had he made reasonable inquiries. In my judgment sophisticated frauds in the real world are not, invariably susceptible as a matter of law, to being carved up into self-contained boxes even though, on the facts of particular cases including Livewire that might be an appropriate basis for analysis."

(6) I reject the Appellant's contention that the FTT took into account irrelevant factors to which it should not have regard and erred and was wrong in law in relying on the overall scheme and features of the deal documentation and the Appellant's general business practices. Moses LJ in *Mobilx* (at paragraphs 83 to 84) approved Christopher Clarke LJ's words in *Red 12 v HMRC* [2009] EWHC 2563 and made clear that the FTT is entitled to take into account the totality of the Appellant's transactions and all their attendant circumstances.

(7) I have explained above the reasons why I cannot accept that the FTT erred in law on the ground that it was "*discriminatory*" and "*disproportionate*" for the Appellant to be denied the right to deduct and that the principles of "*equal treatment*" and "*fiscal neutrality*" had been breached in the light of the treatment of other parties in the supply chain: *Mobilx* dealt with these matters and rejected the argument: see paragraph 66.

(8) The Appellant submitted that the FTT erred in law because consequent upon *Mahagében* "*…in the absence of any action on the part of HMRC, there must be a presumption of regularity*" in relation to the Appellant's activities unless it can be established that at or before the

time of entry into the relevant transaction the Appellant was in possession of any material justifying the suspicion that VAT irregularities or fraud had been committed within the sphere of activity of the issuer of the invoice.

The Appellant seeks to elevate paragraphs 59 and 60 of the decision in that case to assert that a threshold requirement must be met before a taxable person is under any obligation to make enquiries about a potential supplier.

I do not read those passages in that way. The CJEU was not attempting to stipulate what would give rise to a requirement of due diligence; it was affirming that the Hungarian tax authorities' attempt to introduce strict liability without proof of knowledge was inconsistent with the scheme of VAT.

The Court in *Mahagében* was not giving guidance on what constitutes reasonable due diligence. This was left to be determined on a case-by-case basis according to the facts of the particular case. See paragraphs 58 and 59 of the CJEU's judgment in *Mahagében.*

I accept the Commissioners' submission that the CJEU was not attempting to define the relevance of "due diligence" to *Kittel* cases but was simply stating that the carrying out of due diligence cannot be a pre-requisite to the exercise of the right to deduct.

(9) Generally, in my judgment the Appellants have not shown that the FTT erred in law on any of the grounds asserted under the banner of Ground 14.

Other grounds of appeal

127. I have dealt with Grounds 13 and 14 thus far: I must now turn to the other grounds of appeal. These relate to (a) alleged procedural irregularities (Grounds 1 to 3), and (b) criticisms of the way the FTT approached the evidence, advanced as errors of law (Grounds 6 to 12).

128. In addition, Ground 4 (and to a large extent Ground 5) advance the contention that the FTT was wrong to admit and rely upon as expert evidence the opinions of Mr Fletcher (Ground 4), and erred in making adverse factual findings against the Appellants based upon that "evidence" (Ground 5).

129. By way of preface to this part of this Decision, I should say that I do not consider that any of the grounds, which again each generated a plethora of sub-grounds, reveals any error such as to warrant allowing this appeal, although I have been troubled by some aspects of Mr Fletcher's evidence. I should also say that I have been much assisted by the careful and detailed response of the FTT to the Appellant's contentions when initially refusing permission to appeal.

Complaints of Procedural Irregularities: Ground 1

130. The Appellant contends that the FTT erred "by making findings of fraud by and/or involving the Appellant (and, in particular, Mr Rashid) in respect of allegations which were simply not put to Mr Rashid in cross-examination". The Appellant has sought to support this contention with a long and detailed (32-page) schedule (first attached to its application to the FTT for permission to appeal) of examples of what it describes as "findings of fact which are based upon matters not put to the Appellant in cross-examination". The Appellant had previously, though in less detail, made much the same submission in the course of the hearing before the FTT, which was rejected, as appears from paragraphs 439 to 444 of the FTT Decision.

131. The Appellant correctly, but to my mind inappositely, cites what without reservation I accept is the general and fundamental principle that serious allegations of wrongdoing should be pleaded fairly and squarely and put to any witness accused of it.

132. However, I do not see that this principle was infringed in this case. The suggestion that it was involves, as it seems to me, the Appellant re-characterising the Commissioners' substantive case and then submitting that that case was not put: this is plainly unsustainable.

133. Thus, as sub-ground one of Ground 1, the Appellant complains that the Commissioners should have asked Mr Rashid more questions in cross-examination about Uni-Brand in circumstances where it was finally alleged by them that Mr Rashid and the Appellant were actually complicit in Uni-Brand's fraud. But what the Commissioners pleaded, were required to put and prove, and did prove (see paragraph 436 of the FTT Decision), was knowledge on the part of Mr Rashid and the Appellant that it was participating in a transaction connected with fraudulent evasion of VAT.

134. There is no doubt that the Commissioners' case as to Mr Rashid's (and through him, the Appellant's) knowledge that his/its transactions were connected with fraud was put fairly and squarely to him (though he flatly

denied it). There is no doubt either that it was put to Mr Rashid that he knew full well that he was directed to buy only from Uni-Brand "*so that Unibrand could contra off its deals with [the Appellant] against its other VAT liabilities*".

135. I would accept that it would have been preferable for Mr Rashid to have been confronted specifically with the later elaboration of the Commissioners' case to extend to the contention that the Appellant was set up to facilitate fraud, and that Mr Rashid and the Appellant knowingly and actively collaborated with Uni-Brand in the fraudulent evasion of VAT. But (a) that was not a necessary part of the Commissioners' case; (b) my reading of the transcripts is that Mr Rashid knew in reality that this was being suggested but preferred not to descend to particularity; and (c) I accept the FTT's view (in paragraph 437 of the FTT Decision) that this "elevation" of the evidence "*did not alter the nature of the case against the Appellant…*"

136. The Appellant's second complaint is that banking evidence supporting the fact that there was an overall scheme to defraud was not put to Mr. Rashid.

137. But Mr. Rashid's evidence was that he could not comment on other people's transactions. Indeed the Appellant's entire case was that the Appellant knew only of its own transactions. When Mr. Rashid was asked about the circularity of funds his answer was:

> "*I don't know about other people. Just I can comment on my transaction.*" [G.T4.p.141.lns.6-12]

138. The Commissioners did not have to prove that Mr. Rashid knew of the circularity of funds. That evidence was documentary and spoke for itself. It would have been a waste of time and wholly inappropriate to put documents to Mr Rashid for comment, when he had made clear he could give no evidence.

139. The Appellant's third complaint is that links between other companies were not put to him. Again, these were uncontested documentary evidential facts – not the "case" that was to be put to Mr. Rashid. I do not see any substantial flaw: I accept the Commissioners' contention that they did not have to prove that Mr. Rashid knew of the links and they did not have to be put to him.

140. The Appellant's fourth complaint is that the selective cross-examination of Mr Rashid on the issue of due diligence left the FTT with a picture which was not representative of the true extent of what the Appellant had done by way of due diligence "across the entire spectrum of the Appellant's business activities during the period in question".

141. It appears that most of the due diligence material, including what was referred to as the Veracis Report, was put to Mr Plowman, who also gave evidence for the Appellant and whom the Appellant chose to call as their principal witness on the issue. So the real complaint is not that the material was not explored in cross-examination, but that "*the detail should, in fairness, have similarly been put to [Mr Rashid] so that he could explain why the concessions made by Mr Plowman in cross-examination about oversights or omissions in the due diligence process were not actioned*".

142. In my judgment the FTT was correct in its view, expressed in paragraph 441 of its Decision, that there was no requirement to put to Mr Rashid matters about the due diligence material upon which Mr Plowman had given a witness statement and was questioned. I agree that the Appellant appears to have ignored the principle in *Re Yarn Spinners' Agreement [1959]* 1 All ER 299 at 309 *per* Devlin J that a party's case may be put to any of the witnesses who deal with the matter in chief and it can then be relied upon by that party in argument.

143. As it was, Mr. Rashid was cross-examined both on one example of due diligence (in relation to a particular customer) and on his wider due diligence practices (at some length). My reading of the transcripts supports the depiction of that evidence in Mr McGuinness QC's Skeleton Argument as having been disastrous: he accepted that his checks on the customer were inadequate, he claimed not to have read the Veracis report on the company despite being invoiced for it, and he effectively conceded that on the basis of the report the man behind the particular customer was a fraudster.

144. I have carefully considered the Appellant's contention to the effect (as I understood its gravamen) that the unfairness went deeper because it

> "*crystallised in the [FTT's] decision [in paragraph 620(8) of its Decision] that the Appellant's due diligence was 'a charade to give the impression that the Appellant was engaged in commercial trading and complying with the joint and several requirements of Notice 726' – a point made in the Commissioners' closing submissions but not put to the Appellant's director.*"

145. I think it might have been preferable for this conclusion that his lack of due diligence demonstrated that Mr Rashid was engaged in a charade or contrivance to have been put in or substantially in that form to Mr Rashid; but I do not think the omission to do so discloses substantive procedural irregularity so as to begin to undermine the FTT's approach to and conclusions on the facts.

146. Furthermore, the quotation needs to be read in its broader context, and especially in the light of the FTT's findings of more general contrivance (at paragraph 620(6) of its Decision) based on its observation of Mr Rashid's evidence and his own description of the way he handled the disputed transactions:

> "*Mr Rashid's portrayal of the conduct of disputed transactions demonstrated their contrived nature. His portrayal of the Appellant's transactions demonstrated their contrived nature. His portrayal of the Appellant's transactions meant that the parties knew of each others' existence, no party had ownership of goods, the parties allocated and transported goods they did not own and suppliers would not be paid until the Appellant had received payment from its customers. This depiction belied Mr Rashid's assertions that the Appellant was operating as an independent trader, arms length from its suppliers and customers in pursuit of the best deal. Instead Mr Rashid's portrayal unwittingly disclosed the existence of contrived arrangements having no hallmarks of commercial arms length trading and involving a chain of connected traders which went beyond the Appellant's immediate suppliers.*"

147. More generally, I have been struck by the somewhat unrealistic nature of the Appellant's complaints (set out also in its schedule) about Mr Rashid's cross-examination and the alleged failure on the part of the Commissioners to put their case to him in cross-examination.

148. Mr Rashid filed numerous witness statements in response to points put by the Commissioners in their evidence; he was carefully cross-examined over the course of three days; even allowing for apparent language and communication difficulties, and for Mr Rashid's plea that he may have misunderstood some things, being a "*not very educated man*", he can have been in no doubt that the Commissioners' case was that he was an untruthful witness who knew that the Appellant's transactions were connected with the fraudulent evasion of VAT and its disguise. He knew full well that inconsistency with standard practices and contrivance was alleged against him and the Appellant.

149. The course of his cross-examination makes this quite clear. As the FTT put it (at paragraph 622 of its Decision):

> "*As HMRC's case rolled out the Appellant's defence unravelled. Mr Rashid's first line of defence to the inconsistencies in the Appellant's transactions as revealed by HMRC was that they were clerical mistakes or dealt with on the telephone, of which no records were kept. When those explanations were found wanting, Mr Rashid was forced to*

> *admit that the Appellant did not conduct its business in the manner portrayed by the copious documentation and his witness statements. The final picture painted by Mr Rashid of the Appellant's disputed transactions was that the deals were conducted by telephone, the Appellant and its suppliers did not own the goods, the transactions carried no financial risk, and the Appellant's documentation, procedures and due diligence were irrelevant because of the ship on hold arrangements. Despite Mr Rashid's volte face he still maintained that the Appellant's transactions were legitimate and typical of a wholesale business.*"

150. Lastly under this Ground 1 the Appellant suggests that the FTT "erred in concluding that reasons of 'proportionality' permitted it to dispense with the Commissioners' obligation to put their factual case to the Appellant's witnesses during cross-examination: see paragraph 444 of the Decision…" Paragraph 444 says, and the FTT did, no such thing. Mr Rashid was cross-examined for three full days, fully and fairly.

151. In summary, therefore, on Ground 1, I have considered carefully the schedule provided by the Appellant, as well as the particular points it has highlighted: I have not been persuaded that there were any procedural irregularities in the conduct of the hearing before the FTT such as to call in question its approach, its assessment of the facts and the witnesses, or its ultimate conclusions.

Complaint of Procedural Irregularities: Ground 2

152. Given the connection with Ground 1, I can deal swiftly with Ground 2 of the appeal, which is the Appellant's contention that its right to a fair trial was breached by the FTT's approach to its fact-finding role.

153. In my judgment, no breach has been established.

Complaint of Procedural Irregularities: Ground 3 (failure properly to plead fraud)

154. The Appellant's third ground of appeal is expressed to be that the FTT erred as matter of law in

> "*permitting the Commissioners to allege for the first time in its closing argument that the Appellant, from its inception, had been created with the intention of facilitating fraud.*"

155. The allegation does not appear to have been pleaded: and it was not put to Mr Rashid. The FTT recorded in paragraph 516 of its Decision that the Commissioners did indeed "invite the Tribunal" to consider the issue, basing the contention on a series of facts and cumulative circumstances adumbrated in that same paragraph and suggested to impel the conclusion that the Appellant was indeed an entity established for the purpose of VAT fraud.

156. Many of the facts and circumstances relied on related to events in 2002, well before the relevant transactions. For example, the Commissioners placed emphasis on the circumstances surrounding trades by the Appellants with a supplier (Kennyton) in 2002. The FTT assessed those trades, and found (see paragraph 519) that they had *"the hallmarks of fraudulent transactions"*, thus implicating the Appellant. However, the FTT went on to clarify that it placed

> "*…no significance on the Kennyton trades which were completed in 2002. The probative value of the trades was outweighed by the prejudicial value. The fact that the Appellant may have been engaged in fraudulent trading in 2002 did not mean that it knew of the fraudulent nature of the disputed deals conducted in 2006.*"

157. The FTT also refused to accept some of the allegations adumbrated, such as the allegation that Mr Rashid had lied to an investigating officer in 2002.

158. The only one of the facts and matters or circumstances prayed in aid in support of the invitation made by the Commissioners that the FTT placed real reliance on was the allegation that the activities of the Appellant were, from the moment when it commenced trading in mobile phones in 2002 until August 2006 (and thus throughout the relevant period), in effect dictated by KSC.

159. With that exception (which is nonetheless important and to which I shall return later in the context of another ground of appeal, Ground 12), the FTT found the evidence regarding the Appellant's formation, and the circumstances under which it was registered for VAT as a sock and small garment company which was dormant for some months before it commenced trading in mobile phones, to be *"confusing"*.

160. In such circumstances, and with that exception, the FTT in effect declined to commit itself. It stated (in paragraph 529 of its Decision) that it

> "*reserves its position on whether the Appellant was an entity set up to facilitate MTIC fraud until after consideration of all the evidence on the Appellant's knowledge.*"

161. In the event, it never did make any factual finding on that specific issue. It also stated in paragraphs 639 to 640 of its Decision that it

> "*did not consider it necessary to make finding on those matters relating to the Appellant's dealings from 2003 to January 2006 relied upon by HMRC, unless they related to the directly related facts such as the KSC agreement*"

and that

> *"The matters not dealt with by the Tribunal were of no relevance to its fact finding exercise on the question of knowledge."*

162. I have had some reservations about the FTT's approach to this aspect of the matter. Its recital of HMRC's late-sprung invitation to it (in their closing submissions) to conclude that (a) the Appellant had been set up to facilitate MTIC fraud and (b) that gave rise to a strong inference that Mr Rashid knew that its disputed transactions were connected with the fraudulent evasion of VAT (see paragraphs 435 and 516 to 518 of the FTT Decision), its related discussion of the KSC Agreement, its indication that it would "park" the issue and deal with it later, and its failure specifically to do so, gave me some concern as to whether the invitation had influenced its approach.

163. In particular, I consider that the FTT ought not to have permitted the Commissioners to advance the case, which was not pleaded or put, that the Appellant had been set up to facilitate fraud; nor should it have made findings as to the fraudulent nature of the Kennyton trades. That is so, even if it thereafter put no material weight on them. In doing so, it encouraged the perception that factors might weigh with it which were not properly before it and which had not fairly been put and tested.

164. Nevertheless, the question ultimately is whether it has so skewed the FTT's approach as to justify allowing the appeal or directing a re-trial. In my judgment, there is no serious argument that it did, especially having regard to the FTT's emphasis that it was not attaching weight to the matters to which I have referred above.

Complaint of Procedural Irregularities: Ground 4

165. Ground 4 of the Appellant's Grounds of Appeal comprises an assault on the reliance placed by the FTT on the evidence of Mr John Fletcher, whom the Commissioners called as an expert on the features and usual practices within

what is termed the "grey market" in which the Appellant professed to be operating. The purpose of the Commissioners doing so was, of course, to contrast usual and legitimate practices within that "grey market" with those in fact adopted by the Appellant to test the latter's viability as genuine trades for profit rather than as part of a MTIC fraud.

166. The "grey market" involves the sale of mobile phones, legally but outside normal distribution channels, by companies which may have no relationship with the original producer of the goods. The grey market is well established for mobile phones, but is, understandably, discouraged by producers or Original Equipment Manufacturers ("OEMs"). A description of the origin and growth of the market is given in paragraphs 20 to 27 of the FTT Decision.

167. Ground 4 of the appeal is that the FTT erred in accepting Mr Fletcher's opinions as expert evidence and should have instead rejected it altogether as being that of a non-expert.

168. The Commissioners contend, as a preliminary point, that this objection could and should have been raised before the FTT, and the Appellant should have applied then and there to exclude the evidence; it did not, and it is now too late to do so.

169. The arguments advanced by the Appellant before the FTT in relation to Mr. Fletcher are recorded at paragraph 40 of the FTT Decision:

> "*The Appellant argued that Mr Fletcher's evidence was irrelevant as a matter of law except his admission that there was a grey market in the international wholesale of mobile phones. In addition the Appellant pointed out that Mr Fletcher's expertise was in strategy and related to [Mobile Network Operators or "MNOs"] and their supply to the retail market. Finally Mr Fletcher's evidence relied on material which post-dated the disputed transactions that were the subject of this Appeal.*"

170. The Appellant did not seek a ruling; it proceeded to cross-examine Mr Fletcher; and it was not put to Mr Fletcher that he had not the requisite expertise or was in some way precluded to act as an expert. I accept that the Appellant should have required a ruling on its objection; and then either appealed, reserved a right to appeal subsequently, or abandoned (or be taken to have abandoned) that objection. But the Commissioners themselves could also have pressed for a ruling.

171. The Commissioners contend that the risk of prejudice to them is such that the Appellant should not be permitted to advance this Ground 4. They submit that had the Appellant made an application to exclude Mr. Fletcher's evidence the Commissioners could have approached it by adducing further evidence from Mr. Fletcher about his expertise if necessary. Further, had Mr. Fletcher's evidence been excluded the Commissioners could have sought other evidence about the operation of the grey market in mobile telephones. The Commissioners cannot now do either of the above and are irremediably prejudiced should the Appellant be allowed to raise this point that was not taken before the FTT.

172. There are to my mind, two main difficulties with the Commissioners' arguments in favour of refusing to allow the Appellant to advance this ground of appeal:

(1) First, the Appellant is not really seeking to raise a new point: it has always maintained that the entire evidence is irrelevant and should carry no weight. Its objection was rejected; and would have been so likewise if it had sought to exclude rather than depict it as irrelevant. The Commissioners can hardly complain that if the Appellant had succeeded it would have adduced different evidence: the Commissioners did not invite a ruling either, and there was always the possibility that the evidence would be ruled irrelevant on appeal.

(2) Secondly, the fact is that the Appellant has already been given permission to appeal on this point, by Judge Berner.

173. It is necessary, therefore, for me to consider whether or not there are substantive and sufficient grounds for interfering with the FTT's decision, having heard the arguments, to admit and attach weight to Mr Fletcher's evidence.

174. Three questions need to be addressed:

(1) Was the FTT wrong to conclude that the subject matter of Mr Fletcher's report was in the nature of expert evidence?

(2) Was the FTT wrong to conclude that Mr Fletcher had the requisite expertise to give such evidence?

(3) Has it been demonstrated that the FTT gave perverse weight to that evidence?

175. As to question (1) in paragraph [174] above, I see no basis for saying that the FTT was wrong to conclude that it would be assisted by evidence of "grey market" practice and the characteristics or features of "ordinary" grey market trading in mobile phones whereby to assess whether the trading in this case was out of the ordinary (which might suggest that it had some different purpose than profit through ordinary trading). On the contrary, I consider that such evidence was obviously capable of being relevant and of assistance, as indeed many other tribunals faced with possible MTIC frauds in the grey market for mobile phones have found.

176. As to question (2) in paragraph [174] above, the Appellant contends with some vigour that Mr Fletcher had neither expertise nor the necessary quality of independence and objectivity, and on both grounds was not equipped or appropriate to be called and relied upon as an expert witness.

177. The Appellant especially relied on

a) Mr Fletcher's lack of personal experience in trading on the grey market and the signs in his report and the observations of previous Tribunals in other cases that Mr Fletcher's evidence was derivative or second hand, based on information derived from unnamed sources and the work or views of others;

b) Mr Fletcher's experience in and affinity with "white market" and in acting for OEMs;

c) Mr Fletcher's firm's (KPMG's) membership of the "Anti-Gray Market Alliance" (noted by Judge Brooks in *JDI Trading Limited* [2012] UKFTT 642 (TCC)), which undermined his impartiality.

178. I must admit to have had, and expressed at the hearing, some reservations as to the wisdom and appropriateness of selecting Mr Fletcher as an expert, given these considerations (which were not substantially disputed). I have carefully considered whether these reservations are such as to indicate that the FTT was simply wrong to rely on him at all. I have concluded that they do not, and that it was not improper for the FTT to proceed as it did.

179. Although Mr Fletcher's experience of the grey market might be said to be tangential rather than direct, the Appellant goes too far in denying it altogether. As set out in his witness statement and in his *curriculum vitae*, Mr. Fletcher was a Director at KPMG with over 15 years experience in the

telecoms industry having held positions in audit, accounting, corporate finance, international business development and strategy. He had been employed by the parent companies of Mobile Network Operators and Service Providers and had worked on a variety of projects involving mobile telephone markets. I accept that the FTT was entitled to proceed on the basis that through his experience he had acquired significant expertise in mobile telephone markets.

180. Experience and expertise may have a number of sources. What might be termed as direct "field" experience may usually be the most valuable, and the most reliable. But especially where (as here) the expertise called for is in identifying characteristics of a given market, previous experience in analysing that market is not to be disparaged or thought invalid. Of course there is the danger that an expert may come to be regarded as such simply because he has said the same thing on different occasions or clings to his views with professional tenacity. However, I do not think it wrong, by way of assessing the issue, to bear in mind the dozen or more occasions on which Mr Fletcher had previously given evidence of the grey market to Tribunals, though it is also right to recognise that his expertise has been questioned by some (described not incorrectly by the Commissioners as "a small minority").

181. I have also borne in mind the comments of Sir Andrew Park in considering similar reservations expressed about Mr Fletcher's predecessor at KPMG in *Mobile Export/Shelford IT Ltd v HMRC* [2009] EWHC 797 (Ch) in which Sir Andrew Park stated at §§17-18:

> "17(2). It is said that Mr Taylor is not an expert. I do not accept that his evidence should be excluded on this ground. I make three specific points in support of my conclusion.
>
> (a) For most purposes, I think that Mr Taylor can be regarded as an expert. He has considerable past experience, which he describes in his witness statement, of the mobile telephone business generally, even though he has not himself worked in the particular sector of it in which the appellants have operated. Further, an important point in my opinion is that Mr Taylor appears to be KPMG's internal expert upon the mobile telephones sector. In that role it must be expected that he would have acquired a great deal of specialist knowledge of the business. And the content of his evidence displays to my mind that he plainly does have extensive knowledge and understanding of the field to which the evidence is directed.

(b) In any case the Value Added Tax Tribunal rules provide as follows in paragraph 28:

> '28. Evidence at a hearing
>
> (1) … a tribunal may direct or allow evidence of any facts to be given in any manner it may think fit and shall not refuse evidence tendered to it on the grounds only that such evidence would be inadmissible in a court of law.'

This rule is not an open sesame for any party to an appeal to call anyone to give evidence on anything. It does however relax, and in my judgment is intended to relax, some of the more rigid evidential rules which can arise in High Court proceedings. I do not accept the submission that the rule comes close to being a one-way option in favour of appellants. If HMRC wish to adduce in evidence a competent and informative analysis of a sector of business and of an appellant's activities within it, rule 28(1), in my judgment, enables them to do that without having to meet technical arguments about whether the witness does or does not strictly rank as an expert.

(c) … Although the Tribunal's reasons are somewhat obscure on this, my own opinion is that the categorisation of the evidence as expert or not does not matter. As I have said, I have read Mr Taylor's evidence. It appears to me potentially helpful to the Tribunal, and it seems to me entirely proper for the Tribunal to have accepted it.

(3) It is submitted that Mr Taylor's evidence is not relevant. I cannot agree with this. In my judgment the evidence is relevant. The Tribunal may or may not in the end accept it, but I cannot conceive of it as being regarded as irrelevant."

182. I should add that in reaching my conclusion I have also considered further written submissions filed by the Appellant and answered by the Commissioners in June 2013 (well after the conclusion of the hearing). In these submissions, which I did not invite or anticipate, the Appellant pressed further its case that Mr Fletcher lacked independence; and cast doubt on the carefulness of his report by reference to the proximity of its compilation to the date of his instruction, and other details (in respect of which the Appellant also sought further specific disclosure). I do not consider that my conclusion is invalidated or materially shaken by this further material; and for the avoidance of doubt, I confirm that I considered it far too late, and disproportionate, to direct further disclosure.

183. That leaves, under this Ground 4, question (3) in paragraph [174] above, as to whether the FTT attached disproportionate weight to Mr Fletcher's evidence such as to invalidate its approach.

184. In my judgment, it did not. I would note in passing that at least to some extent, the Appellant's argument that it did undermines its contention that Mr Fletcher's "evidence" was not really such, but really only argument. Mr Fletcher's evidence provided a description of certain features identified from previous trading in the grey market which provided the FTT with a framework by reference to analyse and test certain aspects of the trades in this case. This led the FTT to support the Commissioners' analysis of *"the Appellant's misfit with the four grey trading opportunities identified by Mr Fletcher"* (see paragraph 541 of the FTT Decision). However, I do not consider that in adopting that analysis the FTT attached disproportionate weight to Mr Fletcher's evidence; and it is apparent from the long and careful analysis in the rest of the FTT Decision that the FTT reached its conclusion on the crux of the case, being whether the Appellant knew or should have known that its transactions were connected with the fraudulent evasion of VAT, by reference to a number of other and to my mind more important factors: Mr Fletcher's evidence was not ultimately central.

185. In summary, in my judgment, Ground 4 does not justify allowing the appeal.

Complaint of Procedural Irregularities: Ground 5

186. Ground 5 of the appeal largely overlaps with or repeats Ground 4. I can deal with it relatively shortly in consequence.

187. As it seems to me, four principal sub-points are advanced. The first is that the FTT erred in making factual findings against the Appellant based upon Mr Fletcher's evidence as to the *indicia* of legitimate and illegitimate trading he identified, since he had not the requisite expertise: I have dealt with this: and I reject the suggestion.

188. The second is that the FTT was unduly influenced by, and had fallen into error because of, Mr Fletcher's evidence that traders in the grey market would in selecting a supplier aim to be as close as possible to an Authorised Distributor, because in the market an Authorised Distributor would be likely to obtain the best price from an Original Equipment manufacturer (see paragraphs 37 and 38 of the FTT Decision). This had caused the FTT, wrongly in the Appellant's view, to regard the long deal chains, and the lack of due diligence to establish the identity of counterparties in this case, with suspicion. I reject this also. In my judgment, the FTT cannot be said to have been wrong in that approach,

which, I may add, seems to me to be based on logical suggestions informed by but not dependent on Mr Fletcher's experience.

189. The third, related, point is that its finding that the transactions made no commercial sense was not reasonably open to the FTT on the basis of the admissible material (that is, excluding Mr Fletcher's evidence, in accordance with the Appellant's argument). That too I reject. I have found that the FTT was not wrong to admit Mr Fletcher's evidence; but even without treating the framework as admissible I do not accept that the FTT had no sufficient basis for its conclusion in this regard: indeed its analysis of the factual evidence seems to me to have fully justified its conclusion.

190. Fourthly, the Appellant appears to contend that in some way the FTT's approach was wrong because it was based on findings or assumptions inconsistent with factual findings in other cases. If that is the contention it is misconceived: each case is to be determined on its own facts by the Tribunal entrusted with the decision. It may be, however, that what is really being contended by the Appellant is that the FTT in this case did not take into account contrary arguments and findings exposed in other decisions. But that would not be perverse or an error such as to invalidate its conclusions in circumstances where it cannot be said (as here it cannot) that its approach to the facts or law in the case in hand was wrong.

191. Accordingly, in my judgment, Ground 5 provides no basis for success in this appeal.

Complaint of Procedural Irregularities: Ground 6

192. In Ground 6 the Appellant complains that the FTT erred in assuming that it could identify certain "hallmarks" of fraud, and, if it found them in this case, find fraud accordingly; or as the Appellant's Skeleton Argument explained (since it considered the FTT did not understand the point when permission to appeal was sought):

> "*Put another way, the reference to 'hallmarks' was clearly employed as an analytical shorthand by the Tribunal to refer to factors which it considered to be indicative of fraud. However, those factors were never explained, argued or tested in evidence.*"

193. I do not accept the complaint. I accept the Commissioners' submission that the FTT cannot be criticized for using, and was clearly entitled to use, common sense in ascertaining whether transactions were part of ordinary commerce or

were part of a fraud. The fact that the FTT used the term "hallmarks" of fraud as a shorthand for what, on any objective view, were clear *indicia* of fraudulent activity is neither here nor there and cannot amount to an error of law or (for that matter) procedural irregularity.

194. Ground 6 fails accordingly.

Ground 7: alleged improper evaluation of transactions

195. Although still advanced under the banner of procedural irregularity, it seems to me that this (as possibly a number of the preceding grounds) could only be sustained if demonstrated to reveal perversity and/or error of law. It is well established, and oft-repeated, that considerable deference is to be given to a tribunal such as the FTT, which has been entrusted by Parliament, in reliance on their specialist experience, to be the primary decision-maker (see, for example, *per* Jacob LJ in *Procter & Gamble UK v Revenue and Customs Commissioners* [2009] EWCA Civ 407, [2009] STC 1990, drawing on what Baroness Hale said (albeit in a different context) in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [[2008] 1 AC 678 at [30]).

196. The Appellant's first complaint at Ground 7 is that the FTT erred by considering whether the Appellant added value in the transactions. This is not an easy complaint to follow. As the Commissioners submit, it is only common sense to enquire what a trader has done to gain a profit: in ordinary commerce as a matter of common sense one does not make money for nothing. The Appellant made enormous profits for doing little more than arranging for goods to cross the English Channel. As a matter of common sense the FTT was entitled to consider why the Appellant was so richly rewarded for doing so little and why it was able to sell the goods for so much more than it purchased them for, when it had not altered them or added any value to them in any way. (The Commissioners suggest that Appellant has wilfully misread the relevant passage of the decision as an implied assertion that VAT is only chargeable where the overall value of e.g. goods is increased in an onward taxable supply. That may be: but it would not assist the Appellant.)

197. The Appellant's second complaint at Ground 7 is that the FTT erred by considering whether the Appellant should have been able to explain how stock entered the grey market. Mr. Rashid claimed to have been operating in the grey market. As a matter of common sense the FTT was entitled to take into account whether Mr. Rashid had any knowledge as to how the market worked in assessing whether he was a bona fide participant in that market. This too is incapable of being an error of law.

Ground 8: illegitimate findings of fact: no evidence to support

198. Over the course of eight pages and in 15 numbered points the Appellant seeks to identify errors of fact in the FTT Decision that it contends

> "*demonstrate, when taken together, that the Tribunal either paid insufficient attention to the evidence given by Mr Rashid and/or inaccurately summarised the same evidence in order to find reasons to reject it. In the light of the inaccuracies and errors it cannot be said that the Tribunal fairly and properly evaluated the evidence given by the Appellant's director.*"

199. The Appellant had earlier, in seeking to persuade the FTT to give it permission to appeal, compiled and filed a schedule (Schedule 2) of alleged errors to the same effect.

200. In the Commissioners' Skeleton Argument these are all described as "*a ragbag assortment of minor factual errors"* which, even if established to be errors, cannot realistically be said to have been such as to vitiate the FTT's substantive conclusions. I also bear in mind the Court's wariness of attempts to elevate findings of fact into questions of law, and the formidable difficulty of demonstrating an error such as to vitiate a decision. In *Georgiou v Customs and Excise Commissioners* [1996] STC 463 Evans LJ, with whom Saville and Morritt LJJ (as they then were) agreed, said at 476:

> "There is a well-recognised need for caution in permitting challenges to findings of fact on the ground that they raise this kind of question of law. … It is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure to the High Court to be abused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled.
>
> It follows, in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding

> which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of the evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong."

201. Bearing that in mind, I do not think it necessary or proportionate to trawl through each alleged error, although I have considered every one. Subject to two points, I do not dissent from the Commissioners' overall description.

202. The two points relate to the only errors of any importance at all: (a) the finding that Mr Rashid had acknowledged that it would be cheaper for the Appellant to sell direct to customers who had not been introduced by KSC, whereas his evidence was that the course was simply not available to the Appellant, since then KSC would cancel the agreement and the Appellant would have to pay commission for the whole year; and (b) the inaccurate summary of Mr Rashid's evidence as being that he had asserted that the Appellant sold only later and in-demand models of mobile phones (which was shown not to be so), whereas he did not really address that. But although both errors might be said (at most) to indicate some tendency to assume departure from ordinary market standard, that is very far from saying that the errors demonstrate perversity or error such as to infect the judgement as a whole. For clarity: in my judgment, neither does either.

203. I would add only that the FTT Decision demonstrates to my mind careful attention to, and a fair and proper evaluation of, the evidence, including that of Mr Rashid. I consider this Ground 8 to be without foundation, and indeed misconceived.

Ground 9: illegitimate findings of fact: perversity

204. In support of Ground 9, the Appellant has assembled some 16 alleged examples, elaborated over the course of some 11 pages, of findings of fact against the Appellant which are said to amount to an error of law.

205. The error of law is submitted to be the making of findings of fact that on the evidence available to the FTT it was not reasonably open to the FTT to make (i.e. that were perverse). The Appellant relies in that regard on *Edwards v Bairstow* [1956] AC 14, which actually considered the converse point, whether on the facts as found any person acting judicially and properly

instructed could have come to the determination under appeal (see *per* Lord Radcliffe at page 36).

206. In my view, the Appellant appears to have misunderstood or misapplied that case. The Appellant appears to me to have proceeded on the basis that the numerical aggregation of alleged errors of fact will amount to an error of law; but that is not, in my view, the correct approach.

207. What must be demonstrated, on my reading of the case, is that once the erroneous findings of fact are identified, shown to be such that they were not reasonably open to the tribunal to make, and corrected, the only reasonable conclusion from the true facts contradicts the determination made; or put another way, the error in the finding(s) of fact must be unequivocal (in the sense that no reasonable tribunal acting judicially could have made the finding(s)) and the erroneous findings must have vitiated the ultimate determination (or, in other words, so infected the ultimate determination as to render it perverse or, at the least, unsafe).

208. If that is correct, it is necessary to assess, first, whether the errors of fact alleged were plainly findings that the FTT, acting judicially and properly instructed, could not have made; and secondly, if unequivocally erroneous findings are demonstrated, whether it has then also been demonstrated that they infected the ultimate determination so as to render it perverse or unsafe. A negative answer at either stage negates any error of law.

209. In my judgment, the Appellant fails on this (9th) ground of appeal at both stages and in respect of each of its various criticisms or grounds set out in sub-grounds a. to p. over the course of some 10 pages of its Skeleton Argument on appeal.

210. In sub-ground a., the Appellant criticises the FTT for relying on Mr Fletcher as having had significant experience in the wholesale mobile telephone market when in fact (so the Appellant maintains) he did not, his experience being limited to the retail sector and being "theoretical rather than practical". I have already addressed aspects of this criticism in the context of Ground 4. I need only add in particular relation to sub-ground a. of Ground 9 that the Appellant's criticism is based on a misreading or mistake as to the approach of the FTT, and a departure from, or at least inconsistency with, its own approach at the hearing before the FTT.

211. The FTT in fact did not treat Mr Fletcher as having direct trading experience. At paragraph 41 of its Decision it made clear the basis on which it was attributing weight to Mr Fletcher's opinion:

> *"The Tribunal concluded that Mr. Fletcher had significant **strategic** experience in the trading of mobile phones which together with his extensive research and the support of his research team made him a competent expert witness."* (The emphasis is of words not included in the Appellant's quotation from the same paragraph of the FTT Decision.)

212. As noted by HMRC, the Appellant had itself depicted Mr Fletcher's expertise as being in strategy. It was plainly open to the FTT to proceed accordingly and to conclude that Mr Fletcher had relevant expertise. I accept HMRC's submission that it cannot be said that the FTT's conclusion in this regard was perverse.

213. As to sub-ground b., the Appellant asserts that the FTT was "simply not entitled" to use Mr. Fletcher's evidence as a sounding-board or yardstick by which to measure the credibility of the Appellant's evidence as to the grey market and as to the way it ran its business. However, although the Appellant has challenged Mr Fletcher's objectivity, it did not challenge Mr. Fletcher's understanding of the grey market opportunities available to traders. Indeed, as the FTT recorded at paragraph 43 of its Decision, in some respects the evidence of Mr. Rashid and Mr. Fletcher were at one on the grey market. Of course, there may be disagreement as to the degree of reliance and emphasis to be placed on his evidence as a sounding-board; but I do not consider that this sub-ground comes close to disclosing perversity.

214. Similarly, as to sub-ground c. and the Appellant's contention that the FTT gave "improper and undue weight – to the extent that…no reasonable tribunal could have done – to the evidence of Mr Fletcher in finding that there was no commercial rationale for long deal chains". In fact, the FTT primarily based its finding that the length of the deal chains made no commercial sense on the simple and unassailable point that the mark-up achieved by the majority of the traders within the chains was minimal (ranging from 0.02 per cent to three per cent). It also relied on a comparison between the length of the March 06 deal chains and the length of the Appellant's dealings with Uni-Brand in 04/06 and 06/06 which consisted of only two or three UK traders respectively (see paragraph 493 of the FTT Decision). It relied on Mr Fletcher's evidence as confirming its own common-sense analysis and to counter the Appellant's argument that in some way HMRC had misunderstood the nature of the Appellant's business. Again, nothing approaching perversity is demonstrated.

215. In relation to sub-ground d., I can find nothing approaching perversity in the FTT's recitation of the fact that, though Mr Rashid stated that the Appellant sometimes paid its supplier first, he did not provide any concrete examples of when this happened. The Appellant's contention that Mr Rashid was not challenged to provide examples misses the simple points that (a) the relevant

paragraph (paragraph 53) was a recitation of background, not a finding of fact, and (b) the pattern of the arrangements appeared to render Mr Rashid's evidence unlikely. In any event, this is far from being a point that could materially alter the result.

216. In sub-ground e. the Appellant contends (in effect) that the FTT unfairly pounced on Mr Rashid's evidence in cross-examination that "they do not allow us to make more than that" as constituting an admission that Mr Rashid (and thereby the Appellant) was a knowing stooge, controlled by another. The Appellant more particularly contends that (a) the use of the word "they" by Mr Rashid is explained by his insecure grasp of English and a misunderstanding and (b) Mr Rashid later explained that by "they" he meant the market rather than any unseen controller, and the FTT was wrong to attribute more weight to Mr Rashid's "slip" than to his explanation (see paragraphs 61 and 544 of the FTT Decision). However, and once again, it cannot be said to have been perverse in the required sense for the FTT so to have concluded, especially given the view it formed as to Mr Rashid's reliability more generally; and in any event the FTT's conclusion that the Appellant was indeed controlled was based on a number of other facts and findings, and even if the FTT's approach could be described as erroneous, it cannot seriously be argued that such an error went to the root of the decision.

217. In sub-ground f. it is contended that the FTT was wrong in suggesting (at paragraph 62 of its Decision) that Mr Rashid only sold at a flat mark-up of 7 per cent. But Mr Rashid's own evidence was to that effect, as the extract from the transcript below illustrates:

> JUDGE TILDESLEY: As I understand it, you in terms of – if you just go back to deal 1, what you are saying is that Elite Mobile offered you the Nokia 9300 at 350 a unit.
> A. That's right.
> Q. What you then do after you have sort of checked it, you have got your circle of customers, as I understand it.
> A. That's right, yes.
> Q. And you add your mark-up --
> A. Yes.
> Q. -- which is a fixed amount. Is it 7 -- 6%?
> A. 7%.
> Q. You add your mark-up to that and you offer it to your range of customers?
> A. That's right.
> Q. If one of your range of customer buys it, says, "I will buy it", then you contact Elite and say, "We are buying it from you". That's how I understood your evidence. Okay?
> A. That's right.
> MR JENKINS: That answered my question. Okay.
> MR PATCHETT-JOYCE: I just didn't want to lead a witness on something.
> JUDGE TILDESLEY: The Tribunal has correctly understood it. Is that correct?

> A. Yes, because 7%. Then customer coming up and we going down. If we happy both parties to buy and sell on certain price, then we'll sell it. Otherwise we back down.

218. Complaint is made in sub-ground g. that it was perverse for the FTT to find (as it did in paragraph 71 of its Decision) that Mr. Rashid changed his evidence regarding the effect of the agreement with KSC in terms of its control over the Appellant. It is said that the FTT should have concluded that, although Mr Rashid accepted that it had the alleged effect, his concession related to the KSC agreement in its original form, whereas Mr Rashid later explained that its terms were subsequently varied.

219. The FTT summarised the point in this way (at paragraph 71 of its Decision):

> *"Mr. Rashid initially denied in cross examination that the agreement entitled KSC to choose the Appellant's customers. Mr Rashid stated that when he was having difficulty in finding customers KSC gave him an introduction to whom to sell by providing references. Mr Rashid, however, later changed his evidence, confirming that under the terms of the agreement KSC advised him to whom to sell mobile telephones and that he was bound to follow that advice."*

220. HMRC's response is that the FTT's factual finding was, again, an entirely accurate recitation of Mr. Rashid's evidence as per the transcript, where Mr. Rashid began by flatly denying that KSC chose the Appellant's customers and concluded with him conceding that he had to sell to whomever KSC told him to sell.

221. To my mind, HMRC's response misses the point. The point is that Mr Rashid's subsequent evidence of a change in the terms of the KSC Agreement as a condition of its extension released the Appellant from the most direct instrument of control over it available to KSC, which was (as the Appellant's appointed sole selling agent) its monopoly of choice as to the Appellant's customers.

222. It was KSC's control of the Appellant's choice of customer that led to the following conclusions in paragraph 529 of the FTT Decision that

> *"The terms of the [KSC] agreement mean that the Appellant had no choice over its customers and the price charged to them from the moment when it commenced trading in mobile phones in 2002 until August 2006. The existence of this agreement seriously undermined the Appellant's assertions that it was an independent trader subject to the normal forces of supply and*

demand. Throughout the period in question KSC exercised significant control over the Appellant's trading activities. The Tribunal reserves its position on whether the Appellant was an entity set up to facilitate MTIC fraud until after consideration of all the evidence on the Appellant's knowledge."

223. The Appellant seeks to upset the finding on the grounds that (a) Mr Rashid's evidence as to the variation of the KSC Agreement by mutual consent should have been accepted, HMRC not having adduced evidence to counter it, (b) the correspondence indicated "*that such control as there may have been was by no means as stringent as the Tribunal seems to imply*", and (c) in cross-examination of Mr Rashid, Counsel for HMRC seemed "*to concede the possibility that KSC did not control every aspect of the Appellant's business*". The Appellant contends that in all these circumstances the finding made by the FTT in this regard was not reasonably open to the FTT based on the evidence adduced, and was perverse accordingly.

224. Points (b) and (c) above do not seem to me to come close to justifying any suggestion of perversity: and in any event, I do not accept the factual assessment upon which each is based.

225. As to point (a) in paragraph [223] above, I have carefully read the transcript of Mr Rashid's evidence. I accept the Appellant's contention that Mr Rashid did fairly consistently assert that the KSC Agreement had been varied when extended to the effect described above: and I do not think that the FTT was correct to suggest otherwise.

226. However, the fact remains that the written agreement to extend the KSC Agreement, which Mr Rashid failed to disclose until required to produce it when being cross-examined, contained no whisper of a suggestion of any alteration to the other terms; and the FTT's rejection of the suggestion cannot be depicted as perverse, especially in the more general context of the fact that the FTT's findings ultimately depended on an assessment of Mr Rashid's credibility as a witness.

227. I would add that Mr Rashid accepted that, even after the alteration he asserted was collaterally agreed upon the extension of the KSC Agreement, the term in that agreement entitling KSC to a commission of 0.325% of its annual turnover, and thus on all deals whether or not introduced by KSC, retained for KSC and demonstrated its considerable influence over the Appellant's affairs, even on Mr Rashid's case.

228. In summary, further analysis has confirmed HMRC's contention as regards sub-ground g. of Ground 9 that the Appellant has not demonstrated anything sufficient to support its contention of perversity.

229. In short, I see no proper basis on which to interfere with the FTT's findings in this regard.

230. In sub-ground h. the Appellant contends that the FTT erred in accepting the evidence of Officer Pooke in relation to the transactions conducted in 01/06, since she had no personal knowledge of them. However, in its Appeal Decision, the FTT confirmed it had not in that context placed reliance on that evidence. I accept that: and in any event, even if it did, and did so in error, that would not, in my judgment, be so material as to vitiate its decision.

231. The Appellant's sub-ground i. is based primarily on the contention that the FTT was in error in accepting as fact HMRC's assertion that Uni-Brand knowingly operated as a contra-trader in the Appellant's transactions in 04/06 and 06/06 without properly testing that assertion, though it was not challenged by the Appellant. The Appellant also contends in this regard that the FTT proceeded to find fraud on the basis of an understanding of how the legitimate market operated as explained by Mr Fletcher, whom the Appellant submits is discredited. Thirdly, the Appellant contends that the FTT failed to question whether the facts established could be consistent with innocence, and (relying on the *dictum* of Millett LJ in *Armitage v Nurse* [1998] Ch 241 at 254) that since there might be an innocent explanation consistent with innocent trading, a finding of fraud was not open to it.

232. In my judgment, none of these contentions on which sub-ground i. is based is sustainable.

233. As to the Appellant's principal contention, the FTT did not simply accept HMRC's assertion as to the fraudulent nature of Uni-Brand's activities. At paragraph 484 of its Decision the FTT set out detailed findings of fact in relation to Uni-Brand's dealings in the dirty chains in the 05/06 and 08/06 VAT periods. No basis is suggested, and in my judgment there is no basis for concluding, that any of these findings was perverse. The FTT went on (in paragraph 498 to 513 of its Decision) to consider more specifically whether Uni-Brand's dealings in the clean chains involving the Appellant were consistent with innocent commercial activity.

234. In my judgment, there is no basis demonstrated for setting aside its conclusion, principally by reference to (a) its findings of Uni-Brand's plainly fraudulent activity in the dirty chains, (b) the connections between the dirty and clean

chains and their participants (paragraphs 499 and 508 to 509 of the FTT Decision), (c) its findings on the money flows (paragraph 500), and (d) its conclusion (which I consider was plainly open to it) that the common banking and currency arrangements for all the traders, together with the circularity of money flows and the evidence of pre-ordained payments, went beyond coincidence and were further suggestive of co-ordination and control towards a fraudulent end (paragraphs 503 to 504 of the FTT Decision).

235. In summary, the FTT did not simply accept an untested assertion; it gave substantial reasons for its finding that Uni-Brand was a dishonest contra-trader; and no basis has, in my judgment, been demonstrated for impugning that finding, still less concluding that it was perverse.

236. The other two contentions advanced by the Appellant in support of sub-ground i. fall away accordingly. No doubt the FTT's approach was informed by Mr Fletcher's evidence; but (a) for reasons previously given, I do not think that provides a basis for impugning the conclusions, and in any event (b) the FTT's approach is both reasoned and logical.

237. In light of its findings, it was, in my judgment, plainly open to the FTT to conclude that the hallmarks of fraud were pervasive (see paragraph 513 of its Decision). Its conclusion that, taken in the round, the pattern of trading was inconsistent with innocent commercial activity, and its finding of fraud, leaves no room for the application of Millett LJ's *dictum* in *Armitage v Nurse (supra).*

238. Sub-ground i. fails accordingly.

239. Sub-ground j., to the effect that the FTT erred in accepting HMRC's assertions as to the flows of money for the deals in question, and should have found the evidence insufficient to sustain a plea of fraud, is, in my judgment, similarly without merit. The FTT appreciated that the analysis performed by Officer Orr was imperfect in that *"she could not say with complete certainty that the money she had allocated to each transaction did in fact relate to that transaction"* (paragraph 216 of the FTT Decision). The FTT was, in my judgment, plainly entitled to conclude that, nevertheless, her methodology *"produced a reliable depiction of the parties involved in the money flows associated with the Appellant's deals"* (paragraph 225) and that her *"reasoning for selecting specific deals in each of the disputed periods for analysis was sound and enabled conclusions to be drawn which had implications for all the disputed transactions"* (paragraph 227). Further, in my judgment, the FTT's findings of fact on the money flows as set out in paragraphs 229 and 230 of the FTT Decision had sufficient evidential footings, and cannot sensibly be characterised as perverse.

240. The Appellant's suggestion that the evidence was not "*sufficiently cogent or compelling…to sustain a plea of fraud"* is redolent of a complaint based not on perversity, but on difference of subjective assessment. Thus sub-ground j. also fails.

241. Sub-ground k., and the Appellant's contentions that the FTT erred in insinuating that Mr Rashid had tampered with two CDs, is without foundation; no perversity is apparent and, in my judgment, the test of materiality (that the finding was central to the ultimate disposition of the matter) is not met either.

242. Sub-ground l. rehearses once more the Appellant's contention that the FTT erred in finding that the Appellant was substantially controlled by KSC. I have already, in effect, rejected that contention; I accept HMRC's contention that no perversity is apparent.

243. In sub-ground m. the Appellant contends that the finding of the FTT (in paragraph 623 of its Decision) that in respect of the disputed transactions the Appellant flouted its contractual terms and conditions and ignored any due diligence was not open to it on the evidence. I disagree: I accept HMRC's contention that Mr Rashid's replies under cross-examination provided ample support, and that in any event there can be no suggestion that the FTT's finding was perverse.

244. In sub-ground n. the Appellant contends that it was not open to the FTT to find (as it did find) that there was an overall scheme to defraud HMRC, given that neither HMRC nor the FTT was able positively to identify who was the "ringmaster", so that the suggestion of some unseen orchestration of the scheme was "*nebulous"*. In my judgment, this is misconceived. The evidence of a fraudulent scheme was plainly sufficient to justify the FTT's conclusion, without there being any need for the FTT to be able to say exactly who operated that scheme or how they did so.

245. Sub-grounds o. and p. appear to be based on the premise that since none of the officers of HMRC felt able to state, or to point to under cross-examination, any evidence establishing whether or not the Appellant had knowledge of the fraudulent scheme, the FTT's finding of such knowledge was perverse. This too is unsustainable.

246. As the FTT explained in paragraph 637 of its Decision, by reference to the decision of Briggs J (as he then was) in *Megtian Limited (in Administration) v The Commissioners for HMRC* [2010] EWHC 18 (Ch), it was not necessary for HMRC to establish knowledge on the part of the Appellant of the details of the fraud, such as whether its chain was clean or dirty or whether contra-

trading was involved: all that was necessary to establish was either actual or "blind eye" knowledge that the transactions in which the Appellant was participating were connected with some form of fraud on HMRC or its cover-up.

247. In this regard, the FTT had no doubt (see paragraph 637 of its Decision) that *"the Appellant certainly knew at the time that it entered into the transactions with Uni-Brand in April and June 2006 that they were connected with the fraudulent evasion of VAT"*. In support of this firm conclusion, the FTT set out (in paragraph 638 of its Decision) eight specific findings of fact which it considered raised the irresistible inference of knowledge on the part of the Appellant that Uni-Brand was a dishonest contra-trader. There is, in my judgment, no basis for dismissing these findings, and the conclusion reached by the FTT, as perverse.

248. I agree also with HMRC that the Appellant's suggestion that no single witness was prepared to state that the Appellant was dishonest is of no consequence in the circumstances. The inference of knowledge arose from the facts as a whole, and from the FTT's assessment of the explanations offered by Mr Rashid in evidence. It was for the FTT, and not the witnesses, to determine by reference to the evidence as a whole whether the Appellant had the requisite knowledge. I am quite satisfied that neither its approach nor its conclusion was perverse. I am satisfied also that there was no material failure to put matters on which these findings and conclusions were reached to Mr Rashid.

249. Both sub-grounds o. and p. fail.

250. It follows that, in my judgment, Ground 9 fails in its entirety.

Ground 10: conclusion that Uni-Brand knowingly engaged was in error

251. The essence of the Appellant's 10th ground of appeal is that the FTT based its findings in relation to Uni-Brand (which it set out with care in paragraph 484 of its Decision) on *a priori* assumptions formed on the basis of hindsight and the evidence of Mr Fletcher and other evidence collated too long afterwards to be sufficiently reliable to warrant such findings.

252. As submitted on behalf of HMRC, these are essentially the same criticisms as are relied on in Ground 9(i). I reject them accordingly, for the same reasons.

Ground 11: no sufficient evidence of an overall scheme to defraud

253. Similarly, I agree with HMRC that the Appellant's contention in Ground 11, to the overall effect that the FTT had no reasonable evidential basis for its conclusion that there was an overall scheme to defraud, is in substance a restatement of its Ground 9(n), which I have rejected. The conclusion that the FTT, as the finder of fact, reached on the basis of its (21) findings (see especially paragraph 484 of its Decision) and its assessment of the witnesses, to the effect that there was an overall scheme to defraud HMRC, the fraudulent nature of which, amongst others, the Appellant had sufficient knowledge of, is to my mind unassailable on appeal.

254. For completeness, I would add that any suggestion that this element of HMRC's case was not pleaded is not tenable. As noted by HMRC in its submissions, the Statement of Case clearly pleads an overall scheme; and every decision letter annexed to the Statement of Case stated:

> *"The Commissioners are satisfied that the transactions…form part of an overall scheme to defraud the public revenue."*

Ground 12: the FTT erred in finding that the Appellant had actual knowledge of fraud

255. Once again, the contention advanced as Ground 12 that the FTT "erred in finding that the Appellant had actual knowledge of the fraudulent scheme" is in substance a re-hash of points already advanced under Ground 9.

256. As previously noted, and again as emphasised on behalf of HMRC, there was no requirement for HMRC to prove that the Appellant knew the details of the overall scheme, and that is not what was found by the FTT.

257. At the risk of repetition, it should be emphasised that what the FTT concluded was that (1) the Appellant knew at the time that it entered the April and June 2006 transactions that Uni-Brand was a dishonest contra-trader, and (2) the Appellant also knew at the time that it entered into each of its March, April and June 2006 transactions that they were connected with the fraudulent evasion of VAT. As previously recorded, there is, in my judgment, no basis for setting aside these conclusions and the findings of fact (set out at paragraph 638 of the FTT Decision) on which they were based.

258. Ground 12 fails. That is the last of the grounds of alleged factual error relied on by the Appellant.

Overall conclusions

259. At the end of this long statement of my reasons for my Decision I can summarise my conclusions very shortly:

(1) the Appellant has not come close to discharging the heavy burden of displacing findings of fact made after consideration of the evidence by the tribunal charged with that responsibility: the FTT was entitled on the evidence to reach the conclusions it reached;

(2) the law is settled; the Appellant had to demonstrate some basis for distinguishing *Mobilx;* or some basis for a reference as to its compatibility with *Kittel;* or some inconsistency between *Mobilx* and *Mahagében* or *Tóth*; and it has failed to do so;

(3) the appeal must be dismissed; there is no proper basis for a reference to the CJEU, and the Appellant's request for one is refused.

260. As a postscript, I note that my conclusion that the law is clear, settled and against the Appellant is confirmed by the recent decision in *Fonecomp Limited v The Commissioners for HM Revenue and Customs* FTC/90/2012 ("*Fonecomp*"). That appeal from the FTT was heard and adjudicated by Sales J and HHJ Roger Berner in the UT at the end of last year (2013); and I was sent a draft transcript after I had substantially completed my work on this Decision.

261. Essentially the same points in relation to contra-trading and the case of *Mahagében* were advanced (also by Mr Patchett-Joyce) in *Fonecomp* as under Ground 14 in this case. Sales J and HHJ Berner there stated at paragraphs 27 to 29 of their Decision (released on 5 December 2013) as follows:

> "27. …despite the conclusion of the Court of Appeal in *Mobilx*, on this appeal Mr Patchett-Joyce submitted that we should review the European authorities and conclude that the Court of Appeal had (at least arguably) misconstrued them so that a reference to the Court of Justice should be ordered for it to clarify the law. As a further and alternative submission, he submitted that the judgment in *Mahagében and Dávid* involved a significant modification of the approach of the Court of Justice in *Kittel*, such that it is now clear that a narrow test of connection between a transaction in respect of which input VAT is claimed and VAT fraud applies, on the basis of which either it is *acte clair* that Fonecomp must be allowed to reclaim

its input VAT or there is such doubt about whether it is entitled to do so that a reference to the Court of Justice should be ordered.

28. We regard both these submissions as misconceived. The Court of Appeal in *Mobilx* read and interpreted the judgment in *Kittel* with meticulous care. We do not consider that it is open to this Tribunal to second guess the Court of Appeal's interpretation of that judgment, laid down in authoritative fashion in *Mobilx*. But even if it were open to do so, we should record our full agreement with the Court of Appeal's interpretation. There is, in our view, no lack of clarity in the position. Accordingly, there is no proper basis on which it would be right to contemplate making a reference to Luxembourg to test whether the Court of Appeal in *Mobilx* was correct in its interpretation.

29. Moreover, we do not consider that the judgment in *Mahagében and Dávid* creates any doubt or uncertainty about the interpretation of the judgment in *Kittel* where there was none before…"

262. I have quoted from the Decision of the UT in *Fonecomp* at some length, first, because although I have reached my own conclusions independently and before having the benefit of that judgment, it encapsulates my own views on the applicable legal principles; and, secondly, to emphasise the point that the matters of law advanced by the Appellants in that case and this are misconceived: the law must be taken to be settled by *Mobilx*, the reasoning in which has not been disturbed by the subsequent ECJ/CJEU decisions to which I was referred.

MR JUSTICE HILDYARD
TRIBUNAL JUDGE
RELEASE DATE: 27 January 2014