

## GOOD NEWS FOR TRADERS IN COMMON SENSE TRIBUNAL DECISION

### CTM - MTIC CRIMINAL AND CIVIL DEFENCE SPECIALISTS



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Liban worked for HM Revenue & Customs for 20 years, predominately in MTIC investigations, before being recruited by **KPMG**. He formed CTM in 2005 and now manages all Tribunal and High Court appeals.

#### Overleaf:

The Members Decision.

#### **Brayfal Win in Unusual Tribunal Decision**

Brayfal, having been successful in their “means of knowledge” appeal to the Tribunal in 2008, had the decision appealed by HMRC to the High Court. The High Court referred the case back to the Tribunal to consider recent High Court Judgements and to give further reasons.

Although no live witnesses were called again, the Tribunal heard further submissions over two days.

In extraordinary fashion, it became clear why the Tribunal Chairman had not stated full reasons. The Tribunal, during both hearings for Brayfal, was made up of a Chairman and two members. The explanation why the Chairman in the first hearing failed to give reasons was because he didn’t agree with the decision he was writing. As he had invited two members to sit with him, this allowed them to out vote him if they disagreed with him and this is exactly what they did.

The members are normally accountants, or businessmen, who have a great deal of experience in tax matters, and business in general, and their assistance is vital in providing a balanced and informed view. The Tribunal would only have two members if the case was particularly complex, as this was, although many such appeals still only have one member. In the Blue Sphere Global Court of Appeal hearing, a Judge stated how important such members were in reaching a decision.

The second Brayfal decision clearly shows that the members, not only disagreed with the Chairman, but events must have become a little heated. Never before have we seen such a decision released where the Chairman appears to be severely criticised by the members and the members are openly criticised by the Chairman.

The problem that the Chairman had, was that the Tribunal in general have taken a view that they will find against most traders, purely on the way they trade and not based on any actual evidence of knowledge (see our advice on expert witnesses below). They have put in place this measure until the Court of Appeal hands down its judgement in Blue Sphere Global et al, now expected week commencing 19 April 2010. After such time, we expect many more traders to be successful in Tribunal, if the appeals are prepared well.

## Overleaf:

CTM Costs for Trials.

The Chairman in Brayfal decided to put his own comments in the decision and the two members insisted on doing the same. The Chairman, as he did to a certain degree in the first appeal in 2008, made negative remarks that were totally unfounded and not substantiated with any evidence whatsoever, as the members pointed out. The Chairman repeatedly applied the wrong legal test and generally gave a confusing account of events, as he saw them. He criticised everything the trader did and gave no weight to any argument put forward.

The Chairman did not find that Brayfal was a co-conspirator; he did not find that it was fraudulent at all. He came to the conclusion that Brayfal knew of the fraud, due to the director turning a blind eye to indicators of fraud and a lack of due diligence. This makes little sense; particularly as there was no fraud in Brayfal's supply chain and the contra trader was not found to be a fraudster.

Although being bound by High Court Judgements, the Chairman decided to adopt the test applied in the Blue Sphere Global Tribunal Decision. He admitted that this was why there were fundamental differences between him and the members. We believe the Chairman is very wrong on this point, as a result of the Blue Sphere Global High Court Judgement.

### The Members Decision

The two members began by stating that they were using their 60 years of experience to form their view. They stated the following:

- There was no evidence before the Tribunal that showed Brayfal *could* have found out about the fraud. It was not sufficient to say that Brayfal should have identified the fraud through additional enquiries, if Brayfal could not have identified the fraud no matter what it did.
- They found it extremely uncomfortable to find the contra trader (who was the supplier to Brayfal) a fraudster, as the director was not there to answer questions. We believe the Court of Appeal had similar concerns in such contra trading cases and we keenly await their Judgement on this point.
- They agreed that the evidence suggested that IMEI numbers are not unique and this is very relevant when HMRC allege that a trader (not in Brayfal's case) purchased mobile phones that had previously been recorded in the UK as stolen. CTM has many such cases and we are arguing this issue in current trials.
- They believed that traders who deal in mobile phones need no more than a mobile phone and a fax machine to buy and sell. The fact that traders deal in large amounts of mobile phones does not mean that they need any more than that. This was a direct criticism of the Chairman who stated that, because the Austrian customer's office was not well equipped, it should have raised alarm bells. This comment from the Chairman is strange as there is no suggestion that the customer had

## Next Edition:

### Reaction to Court of Appeal Judgement.

anything other than full commercial landline communication facilities.

- The FCIB bank was properly constituted and authorised by the Dutch authorities and they saw nothing suspicious about the bank at all.
- They found that “in the real world”, a trader will not be able to check beyond its immediate supplier and checks with a freight forwarder would not provide any further information.
- The Chairman had earlier stated that, because a supplier could find exactly the stock that Brayfal’s customer wanted on every occasion, this was an indicator of fraud. The members disagreed and stated that any wholesale distributor would either hold stock, or be able to purchase it at short notice. The members also noted that Brayfal purchased on a speculative basis, at times, with no intended customer.
- They disagreed with the Chairman when he said that a genuine supplier would never release stock to an exporter without substantial deposits. The members thought this perfectly normal.
- They concluded by stating that Brayfal was an experienced mobile phone trader that conducted adequate due diligence and adopted sound trading procedures. The members clearly lived in the real world, as they repeatedly pointed out, and stated that Brayfal did nothing that raised suspicion, nor did Brayfal see anything that was suspicious. They had traded like a perfectly normal and legitimate wholesaler.
- On a final note, the members chose to believe the evidence of the director and not the HMRC Officer, whose evidence they believed was deliberately misleading on critical points. They also favoured the director’s evidence as he was extremely knowledgeable about the industry he worked in.

This is a very good, common sense decision from the Tribunal.

#### **CTM Costs for Trials**

As a number of traders contacted us for details of our fees for a trial, it seems sensible to state what our fixed rate is in support of counsel. Counsel fees are separate and depend on individual budgets.

CTM charges a fixed rate of £1,000 + VAT per day; so a 10-day trial will simply cost £10,000.

If you require any further information, please feel free to contact us.