

**20901**

*VAT – Input tax – MTIC fraud – whether tax loss – yes – attributable to fraudulent evasion of VAT – yes – contra-trading – whether Appellant’s purchases connected – yes – whether Appellant should have known of the fraud – yes – inadequacy of enquiries – nature of evidence to show whether Appellant should have known – appeal dismissed*

**LONDON TRIBUNAL CENTRE**

**BLUE SPHERE GLOBAL LIMITED**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY’S  
REVENUE AND CUSTOMS**

**Respondents**

**Tribunal: JOHN CLARK (Chairman)  
JOHN N BROWN CBE, FCA, CTA**

**Sitting in public in London on 30 June, 1-4 and 11 July 2008**

**Colin Challenger of Counsel, instructed by Thomas Cooper, Solicitors, for the Appellant**

**Jonathan Hall of Counsel, instructed by Howes Percival, Solicitors, for the Respondents**

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## DECISION

1. Blue Sphere Global Limited (“BSG”) appeals against a decision of the Respondents (“HMRC”) to refuse repayment of input tax, on the grounds that BSG ought to have known that export sales made by it in April 2006 were connected to “MTIC” (ie missing trader intra-Community) fraud.

### **The issues requiring our determination and our decision in summary**

2. As the facts of this case are complex and detailed, we first set out a summary of the issues and our decision on them, before indicating in detail the basis on which we have arrived at this decision. The parties identified four issues on which our decision is required:

- (1) Was there a VAT loss?
- (2) If so, did this loss result from a fraudulent evasion?
- (3) If there was a fraudulent evasion, were the BSG transactions the subject of this appeal connected with that evasion?
- (4) If such a connection was established, should BSG have known that its purchases were connected with a fraudulent evasion of VAT?

3. In summary, our decision on those issues is as follows:

- (1) We find that there were tax losses.
- (2) We find that these tax losses resulted from fraudulent evasion.
- (3) We consider that BSG’s April 2006 transactions were connected with such fraudulent evasion.
- (4) We consider that BSG should have known of that connection.

### **The facts**

4. The evidence took the form of twelve bundles of documents, the principal elements of which were contained in a core bundle. On behalf of BSG, Michael Peters, its sole director and a shareholder in BSG, provided two witness statements, and Harry Hughes, who had been a director of Advanced Transport Limited (a company put into administration at the end of 2007) and Martin Thompson, who had been an employee of Advanced Transport Limited, each provided a witness statement. On behalf of HMRC, Simon Devine and Lisa Orr, both being Higher Officers of HMRC, each provided two witness statements, and a further witness statement was provided by Rod Stone, an officer in HMRC’s Risk and Intelligence Service concerned principally with MTIC compliance and enforcement activities. Oral evidence was given by Michael Peters, Harry Hughes, Martin Thompson, Simon Devine and Lisa Orr.

5. From the evidence we make the following findings. We consider later those aspects of the evidence where the testimony of different witnesses was in conflict.

### *Background*

6. By the time of his first witness statement made in mid-October 2007, Mr Peters had been in the information technology industry for over 13 years. He had successfully worked his way up through the reseller and distribution market. From  
5 1997 he had worked for Kingston Technology Europe Ltd, which had a US \$1.9 billion turnover in the manufacture and sale of computer chips. Within Kingston Technology, Mr Peters had rapidly become directly responsible for turnover of approximately \$35 million in the UK and about \$250 million in Europe.

7. After working for Kingston Technology for several years, Mr Peters had decided  
10 to leave and set up his own company. Initially he set up a company called DDR Distribution Ltd. He also set up a new company called Retronet Ltd, which sold switches and servers. He later sold this company and set up BSG. In his evidence, he indicated that his intention had been that DDR Distribution Ltd should sell items relating to the component side of the information technology market, and that BSG  
15 would concentrate on the telecommunications side; in the event, because of the growth in the mobile sales business, both companies had subsequently become involved in the sales of mobile telephones, although DDR Distribution Ltd had continued also to sell components.

### *DDR's history*

8. DDR was incorporated on 19 September 2002. Its application for VAT  
20 registration was signed by Mr Peters and dated 4 October 2002. It set out its "Current and/or intended business activities" as "Distributor of computer equipment". The value of its expected taxable supplies in the next twelve months was stated to be £500,000. Under Question 25, relating to EC trade in the next twelve months, DDR  
25 specified buy and sell figures of £400,000 each to member States (ie four fifths of its expected turnover).

9. Following this application, Mr Peters was interviewed by an HMRC officer, Mr  
Munro-Birt of HMRC's Staines LVO, on what was termed an "MTIC pre-registration  
30 visit" to Mr Peters' home in Camberley to review the application. That visit took place on 25 October 2002. Mr Munro-Birt had interviewed Mr Peters in depth, including a discussion relating to the way in which the business would be operated. The officer noted that the set-up appeared to be close to MTIC, but that Mr Peters had given "a credible description of his proposed trading as a genuine hardware dealer". Mr Peters had indicated that he was aware of MTIC fraud and traders involved in it;  
35 he had stated that he did not like MTIC traders as they tainted the rest of the industry, and he had indicated very clearly that he would not be involved in "MTIC-type" trade. The officer had told Mr Peters that if he did become involved in such trade, he would be deemed to have lied during the pre-registration interview. The officer concluded that he believed Mr Peters, but in his note observed that HMRC "would  
40 have to keep an eye on this one". On the basis of Mr Peters' comments, DDR's VAT registration had subsequently been allowed to proceed. HMRC's decision to permit registration was notified to DDR in a letter dated 1 November 2002.

10. On 27 July 2005 HMRC sent DDR a "Redhill Verification Letter" warning it of MTIC fraud and indicating that it should verify with HMRC's Redhill office the VAT

status of potential customers and suppliers and take other measures to verify their VAT status. A copy of Notice 726 (“Joint and Several Liability in the Supply of Specified Goods”) was enclosed. On the same date, HMRC’s Redhill office responded to an earlier request from Mr Peters to check a company named Xicom Systems Ltd. In a telephone conversation with HMRC’s officer Steve O’Hara on 7 September 2005 Mr Peters had confirmed that he had received and read Notice 726. Mr O’Hara advised Mr Peters during this conversation that the details of recommended due diligence checks outlined in Notice 726 were not to be regarded as a checklist. On 5 October 2005, HMRC wrote to Mr Peters advising him that DDR was operating in a high risk trade sector where substantial amounts of VAT had gone missing; the officer requested further information towards the verification of DDR’s 09/05 return.

11. Mr Peters made various attempts to have DDR put onto monthly returns, his reason being that this was the only way in which DDR could survive, but HMRC refused these applications on the grounds that DDR could not provide satisfactory evidence of a VAT repayment history. On 3 November 2005 HMRC issued Mr Peters with a letter reminding him that the trade sector in which DDR operated was a high risk trade sector with substantial losses to the UK revenue. The letter also advised that some of the phones traded in VAT period 09/05 had been previously traded in the UK before DDR had traded them and that the goods had passed through businesses which did not pay the VAT on the transactions, resulting in a substantial loss to the UK revenue. The letter stated that the legitimacy of the 09/05 claim was now in doubt. It reiterated that DDR had an obligation to make every effort to ensure the integrity of the supply chain, and indicated that all information provided by an existing or potential supplier should be viewed with caution.

12. On 23 March 2006 HMRC issued DDR with a warning letter, as a defaulting trader had been identified in one of the transactions reflected in DDR’s 12/05 return. The letter indicated that this had resulted in a loss to the UK revenue, but did not specify the amount of that loss.

30 *Deals undertaken by DDR*

13. No detailed evidence of the transactions undertaken by DDR was provided in connection with this appeal, other than matters referred to by HMRC as having been discovered in connection with the review of transactions undertaken by BSG. We are aware that DDR is pursuing a separate appeal against HMRC’s refusal to allow deduction of input tax claimed by DDR, and that an application by HMRC for that appeal to be heard together with BSG’s appeal was refused.

*History of BSG*

14. BSG was incorporated on 6 September 2004. At the date of incorporation the directors were Gary Winston Gibbs and Michael Peters; the company secretary was Mr Gibbs. (There was no specific evidence as to the identity of the shareholder or shareholders, although Mr Peters did not dissent from a suggestion in cross-examination that he was either the sole shareholder or owned BSG jointly with his wife.) Its intended main business activity was shown as “Network Reseller”. Following a request for further information, this was subsequently explained as “resell

networking products like Cisco/Juniper/Extreme to end users”. The projected annual turnover was £100,000. The supporting evidence of intention to trade was in the form of a letter from Essex Inspections Limited. This generated a request within HMRC for a pre-registration visit to be conducted, as that company had been identified by HMRC as being potentially involved in the MTIC trade sector.

15. The pre-registration visit involved an interview similar to the one which Mr Peters had had with Mr Munro-Birt concerning DDR, but with a different officer. (Another interview was carried out in relation to his other company, Retronet Limited, which was subsequently sold to a third party.) He could not remember the names of the officers concerned, but could recall the substance of what had been said. In each case Mr Peters had provided the officer with full details of the nature and operation of the proposed business. In turn, the officers in each case had given Mr Peters information as to what was required by HMRC. After the visit, BSG was registered for VAT with effect from 18 November 2004.

16. On 29 March 2005 Mr Gibbs resigned as a director of BSG, leaving Mr Peters as sole director. (There was no evidence to indicate whether he was also then left as the sole shareholder.) Mr Gibbs remained as company secretary until his resignation on 28 June 2005. Mr Peters’ wife Michelle Peters became company secretary with effect from 5 October 2005.

17. On 11 April 2005 Mr Peters was contacted by HMRC’s “New Business Team”. HMRC’s note of this conversation recorded Mr Peters’ description of BSG’s main business activity as being telecommunications, rather than that previously given. Mr Peters indicated that he made no sales outside the UK, but later in the conversation he mentioned a one-off sale in Denmark. He requested and was issued with HMRC’s public notices relating to Cash Accounting, Annual Accounting and the Flat Rate Scheme for Small Businesses.

18. On 9 June 2005 Mr Peters contacted HMRC’s National Advice Service to state that his co-director Mr Gibbs had left the business and that Mr Peters thought that Mr Gibbs had been acting fraudulently; he did not specify in what way.

19. On 12 July 2005, HMRC issued BSG with a Redhill Verification Letter. A copy of Notice 726 was enclosed. On 26 July 2005 HMRC carried out an “MTIC Post Registration Visit”. During that visit Mr Peters said that BSG’s main business activity was the sale of switchers, routers, computer components and Cisco products which were supplied to companies to enable construction of servers. He said that he had made one sale to Denmark and that Mr Gibbs, his then co-director, had completed the EC sales list. Mr Peters said that he had been approached in connection with mobile phones but that he was not interested in trading in these at that time. He said that Mr Gibbs had been the primary director in terms of the earlier business activities of BSG but that he and Mr Gibbs had fallen out and that Mr Peters was resuming the business.

20. On 4 August 2005 Mr Peters applied on BSG’s behalf for returns to be submitted on a monthly rather than a quarterly basis. On 10 August 2005 HMRC requested evidence to support that application. On 17 August 2005 HMRC made a further visit

to Mr Peters. He had told the officer that BSG had been verifying customers but as yet he had done no deals; he was just getting everything into place in order to do so. He said that he had verified four companies through HMRC's Redhill office. He also indicated that he had conducted due diligence on these companies by speaking to  
5 representatives of the companies. Mr Peters said that if there was a market in the EC and globally then he would make sales there. The officer reminded Mr Peters of the importance of undertaking due diligence checks. Mr Peters indicated to the officer that he was receiving trading advice from customers whom he had verified in terms of due diligence procedures through HMRC's Redhill office, namely Xicom Systems  
10 Limited, Xicom Europe Limited, Scand Limited and Ultimate Security Agency.

21. On 25 August 2005 Mr Peters sent HMRC a letter in support of BSG's application for monthly returns. This stated that BSG had "strong/direct relationships with major manufacturers, we have opportunities to supply products to resellers and end users in the EU and non-EU states. . . I can not calculate the percentage of EU sales as this is a  
15 target area at the moment".

22. The application for monthly VAT returns was refused by HMRC on the grounds that there was insufficient evidence to support the contention that BSG would regularly be in a VAT repayment position. Written notification was given to Mr Peters on 26 August 2005.

20 23. On 28 October 2005 BSG received from Xicom Systems Ltd a repayment of the sum of £136,000 invested by BSG seven days previously, together with the sum of £1,585.91, which was BSG's profit on the deal. Xicom's letter stated: "This amount is the full and final settlement of our seven day trial period agreement." By a document headed "Investment Agreement" carrying the date 8 November 2005 but shown as  
25 signed on behalf of Xicom Systems Ltd on 30 October 2005, BSG entered into an agreement with Xicom Systems Ltd for the latter company and its "instructed companies" to act as BSG's exclusive suppliers and brokers for all transactions to be carried out over the seven day period, and to source suitable customers, negotiate and set up trades on behalf of BSG. This was for a seven day trial period. Xicom stated: "I  
30 look forward to receiving your initial investment and working with you". The amount of the investment was not specified. There was no explanation why the agreement had been entered into after the repayment had been made to BSG. The agreement was signed for Xicom Systems Ltd by Maxine Jones, a director of that company; Mr Peters confirmed in evidence that this was her maiden name, and her married name  
35 was Peries, she being a sister-in-law of Darren Peries. He indicated that Darren Peries was a friend whom he had known since the age of fifteen. Mr Peries was aged 38 or 39, about a year older than Mr Peters.

24. BSG submitted nil returns for periods 06/05 and 09/05. Following a change of "VAT stagger", the next return generated was for the period 1 October 2005 to 31  
40 January 2006. In that period 01/06 BSG became active in wholesaling CPUs and mobile phones, rather than the items previously mentioned by Mr Peters to HMRC. BSG submitted a repayment claim for £749,680.75. The basis for this was three sales invoices covering 3,150 CPUs and 9,300 mobile phones, the other parties being two companies in Israel. BSG's turnover for the period was approximately £4.5 million.

The two suppliers were Vehement Solutions Limited and Unique Distribution Limited. These companies had not previously been mentioned to HMRC.

25. On 13 February 2006 HMRC asked Mr Peters for further documentation relating to these transactions. As there was no reply to this, a further request was made on 17 February 2006. On 13 February HMRC had also issued a letter advising BSG that until enquiries into the 01/06 transactions had been satisfactorily concluded, repayment would be withheld. On 17 February 2006 Mr Peters informed HMRC that the third transaction had been cancelled, as the goods had not been supplied quickly enough for the customer, so the return was amended to reduce the repayment claim to £347,180.75. HMRC sent BSG formal notification of amendment of the return to reduce the input tax deductible. On 23 February 2006 HMRC wrote to Mr Peters concerning the 01/06 repayment, advising him that the repayment was being made on a without prejudice basis as enquiries remained ongoing.

*BSG's first April 2006 deal: the customer*

26. In an undated letter not showing the details of the addressee and bearing a fax date 16 March 2006, an individual named Jason Davis with the designation "(Director)" shown below his signature wrote to introduce the Austrian company of which he was described as a director, "Universal Handels – GmbH". He stated:

"Universal is based in Vienna, Austria, with over fifteen years experience in the telecommunications sector.

We are a wholesale trader specialising in the telecommunications market.

We are constantly looking to improve our procurement and distribution in all aspects of telecommunications trading. . ."

This letter attached a statement of various company details, together with a three page statement in German of various matters relating to the statutory status of the company, including information as to its VAT status, and continued:

"We look forward to hearing from you with respect to commencement of a long and healthy trading relationship."

27. On 17 March 2006 Mr Peters, on behalf of BSG, sent a fax to HMRC's Redhill office requesting verification of the details of Universal Handels GmbH. In an annotation dated 7 April 2006, Mr Peters recorded that he had obtained a "verbal validation" under a specific reference, followed by the words "contacted Michelle", and setting out the underlined letters "OK" at the end.

28. Mr Peters was unable to travel to Universal's office in Vienna to carry out a due diligence visit, so he commissioned a third party, Anne Marie Peries (another sister-in-law of Darren Peries) who was a director of a company called Petrel Management Limited, to do this on BSG's behalf. Her visit report was set out on a plain A4 sheet of paper, with no letter heading or signature, and carried no date, although two of BSG's due diligence forms, one showing the "Authorised signatures" and the other headed "Directors Statement", carried the date 5 April 2006. The report described the location of the main office as being at the back of a warehouse which was protected by 24 hour security. Reference was made to the six accompanying photographs said to

demonstrate that a business was being run from the premises. Mrs Peries described the office as being in full time use and extremely busy. She referred to her conversation with Jason Davis, from which she considered it evident that he had been in the mobile phone industry for some years. It was Mr Davis who controlled the transactions of the company, while the administration was controlled by Paul Shepherd.

29. Anne Marie Peries reported that Universal held comprehensive due diligence checks on all its suppliers and customers, and that IMEI (International Mobile Equipment Identity number) reports and random checking were requested as standard for each shipment before receipt of goods would be issued. The name and address of two trade references and Universal's accountant had been supplied in the "Trading Application Form" attached to the report.

30. The copy of the five-page Trading Application Form provided in evidence carried the fax date 6 April 2006. This showed that Universal had commenced trading on 18 December 2003. Mr Davis' signature on the "Directors Statement" was dated 5 April 2006. This statement referred to obligations under the Value Added Tax Act 1994. On the "Directors Details" page, Mr Davis indicated that he was aware of "HMCE draft statement on practice of Joint and Several Liability". The remaining page of the form showed two trade references, a company named SDV Luxembourg, and a company named C Com in Netanya, Israel.

*BSG's first April 2006 deal: the supplier*

31. The supplier for this deal, as well as for BSG's second April 2006 deal [considered below] was a company called Infinity Holdings Ltd. (In this decision we refer to Infinity Holdings Ltd as "Infinity"; there was a "sister" company named Infinity Distribution Limited, which we refer to where appropriate in this decision by its full name.) Mr Peters explained in evidence that he was introduced to Infinity by Xicom Systems Ltd after he had had two or three meetings with Xicom; he did not give a precise date for the introduction. There was an introduction letter; this was not dated, and the only copy put in evidence was that in the core bundle, which was faxed by Infinity in June 2006.

32. Details of Infinity's address, bankers, and copy documentation showing VAT registration and incorporation were faxed on 24 April 2006. Although there is no specific evidence of this, we find that on the balance of probability, in particular because of Mr Peters' approach the following day to HMRC's Redhill office, this fax must have been sent from Infinity to BSG. BSG's due diligence questionnaire forms, consisting of a Trading Application Form, a bank details form, a trade reference form, a Directors' Details form and a Directors' Statement, were faxed in completed form on 27 April 2006 to Infinity's number. (The identity of the sender is not apparent from the copies provided in evidence.) The date 27 April 2006 appeared against the three listed "Authorised Signatures" (which showed only the first names of the three individuals), and also on the Directors' Statement. The latter form contained the following annotation: "Please note the application form must be completed in full to commence any trading". Various items on these forms were not fully completed; we consider these later. The trade references given by Infinity were a company called

Future Communications in Stanmore, Middlesex, and CCA Distribution Ltd in Stockport, Cheshire.

33. Mr Peters completed a “Due Diligence Visit Report”, showing the date of his visit to Infinity as “April 06”, without specifying which day of April. At the end of this report, Mr Peters set out his final conclusion: “We are satisfied with every aspect of the company and have decided to open trading with Infinity Holdings.”

34. On 25 April 2006 Mr Peters, on behalf of BSG, sent a fax to HMRC’s Redhill office requesting verification of Infinity’s details. He set out that company’s VAT number, and stated that “Company details are to follow.” In an annotation dated 27 April 2006, Mr Peters recorded a “verbal validation”, setting out the words “OK Valid No” and a reference number. HMRC did not provide a written response to Mr Peters’ fax until 7 June 2006. The letter stated:

“I can confirm that the VAT registrations listed below are valid at this time. This confirmation is not to be regarded as an authorisation by this Department for you to enter into commercial transactions with this/these traders and any input tax claims you make may be subject to subsequent verification.

Universal Handels Gmbh	ATU57972956
Infinity Holdings Ltd	861 6368 17”

35. In a document carrying the date 25 April 2006 Mr Peters completed a “Check list for Exporters VAT Information”. The boxes to indicate “Customer NT103” and “Exporters NT103” were not ticked. The box for “Verification from Red hill [ie Redhill] of Supplier was ticked, although by that stage there had not yet been a response from HMRC. The box for “Inspection Report” was also ticked, although the report was not actually received until later (see below).

36. By a “Purchase Order” dated 21 April 2006 Universal Handels GmbH placed an order with BSG for 10,550 Nokia 8800 phones, at a unit price of £445.00. The total amount payable as a result of the order was £4,694,750; there were no charges for shipping or tax. (We comment below on certain features of this “Purchase Order”.) BSG’s invoice to Universal was dated the same day, and for the corresponding total amount. BSG’s “Goods Receipt Note” was dated 28 April 2006, and was subsequently signed by Jason Davis of Universal on 2 May 2006, with the handwritten endorsement: “Goods received @ Boston Freight 28/4/6” and stamped with Universal’s corporate and VAT details. For BSG, Mr Peters completed two check lists entitled “Check list for Exporters Due Diligence on Shipment” and “Check list for Exporters VAT Information” (the latter dated 25 April 2006).

37. BSG’s Purchase Order addressed to Infinity was dated 25 April 2006. It was for 10,550 Nokia 8800 phones, at a net price of £4,431,000, plus VAT of £775,425, giving an order total of £5,206,425. There was no charge for carriage of the goods. Instead of a single invoice to BSG, Infinity addressed a total of six invoices to BSG in respect of various quantities of Nokia 8800 phones totalling 10,550, and with a total price of £4,431,000 plus VAT. All these invoices carried the date 21 April 2006.

38. Mr Peters' evidence was that on 27 April 2006 he took photographs of the goods at the premises of Courier Plus. (Six photographs taken on this occasion were included in the evidence; we comment on these later.)

39. In a fax dated 28 April 2006 (but showing the transmission date "25 Jan 2000 09.18") a transport company, Courier Plus, gave a "pre-alert" to BSG relating to the shipment of 10,550 Nokia 8800 phones on a "Ship and Hold" basis. This estimated the arrival time of the consignment as "21.00 – estimated". The document named BSG's customer as "Universal Handels Gmbh". It specified that there were 52 pallets, to be transported in seven "Sprinter" vehicles and one 7.5 tonne lorry. For each vehicle there were two drivers' names specified. The total weight of the consignment was 10,825 kgs. The subsequent invoice from Courier Plus, dated 30 April 2006, referred to the receipt and storage of 53 pallets, but to the same quantity of phones and the same total weight. It indicated that the goods were for Universal Handels Gmbh Wien [ie Vienna] and that the destination of the goods was Boston Freight, Veurne, Belgium. The receipt and storage charges were calculated by reference to 53 pallets and not 52. The "CMR" (Convention des Merchandises Routiers) documents (the CMR being the document stating the shipping information, a copy of which goes with the load and is stamped on arrival at the destination) showed a total of 52 pallets.

40. On 28 April 2006 a firm called "A1 Inspections" issued an inspection report relating to Nokia 8800 phones; its reference number was shown as 59564. It gave the location of the goods inspected as "Pauls Freight". It showed the quantity of phones inspected and scanned as having been 1,055, being 10 per cent. It listed the pallets, language codes and quantities of the phones. It showed the total quantity as 10,520. Six language codes were mentioned; three gave the same combination of Manual language, warranty details language and software languages, with the other three having differing combinations. The chargers were shown as "2 pin/3 pin". The total number of phones was shown as 10,520 rather than 10,550. A list of IMEI numbers was attached. On the same date A1 Inspections issued two different invoices to BSG. One, carrying the same number (59564) as on the report, was for inspecting and scanning 1,055 phones; the total charged was £316.50 plus VAT of £55.39. The other invoice, numbered 59474, included the same items but contained an additional item, namely 5 photographs at a unit price of £1 each. The total net amount of this invoice was £321.50, plus VAT of £56.27.

41. On 10 May 2006 an invoice was issued to BSG by HIA International. This was for the premium on a policy of insurance. The cover period was expressed to be from 28 April 2006 to "change of title to goods". The effective date of the cover was 28 April 2006, the policy type "Marine/Goods in transit", and the goods were specified as 10,550 Nokia 8800 mobile phones with an insured value of £4,431,000. The carrier, and the point of departure, were both listed as Courier Plus Ltd, the destination Boston Freight, Belgium, and the "Customer of insured" as Universal Handels. The premium was £7,311.15. The policy document, which carried the date 26 June 2006, stated that it commenced for risks on and after 28 April 2006 and continuing for four days' storage after arrival. The sum insured was £4,431,000, ie the net of VAT price payable to Infinity rather than the £4,694,750 payable by Universal. Under a "Ship to

Hold” clause, the indemnity was not to be extended to any profit that would have resulted from the sale. Further, there was a £25,000 “deductible” for each loss.

42. On 9 May 2006 BSG’s bank account was credited with an inward sterling payment from Universal of £1,099,986.16. On 11 May there was a further credit from Universal of £981,929.13. On 15 May there was another credit from Universal, this time in the sum of £499,986.19. On 16 May there was a further credit from Universal, of £919,986.19. The final credit from Universal was on 18 May, this time in the sum of £1,192,793.22. The total credits were £4,694,680.89, as compared with the invoiced sale price of £4,694,750. On 10 May a CHAPS payment of £14,783.90 was made to Courier Plus. The following CHAPS transfers to Infinity were made out of BSG’s bank account: on 10 May, £1,100,000; on 11 May, £981,943; on 15 May, £500,000; on 16 May, £920,000; and on 18 May, £1,704,482. The total amount transferred to Infinity was £5,206,425, of which £4,431,000 represented the invoice price before VAT and £775,425 represented the VAT. Thus, ignoring the VAT and the minor difference between the price payable by Universal and the actual amounts remitted (presumably reduced by bank charges), BSG’s profit on the difference between unit prices on its purchase and those on its sale was £263,750 (£25 x 10,550). The VAT element of the price payable to Infinity was not paid until BSG made its final payment on 18 May. BSG’s expectation was that the VAT (which amounted to £775,425) would be recovered by way of its input tax repayment claim. (There was no recovery from Universal of the amount charged by Courier Plus, which was therefore a further charge on BSG’s profit.) There was no evidence, either in the documentation relating to BSG’s sale to Universal or in that relating to its purchase from Infinity, of any arrangement for payment in a number of separate sums together constituting the amount due.

*BSG’s second April 2006 deal*

43. In an undated fax not showing the details of the addressee, but bearing the fax date 2 March 2006, a German company called Allimpex Handels GmbH with an address in Berlin wrote to introduce itself:

30 “Letter of introduction

May I take this opportunity to introduce our Company Allimpex Handelsges. mbH, [*sic*] we have been established since March 2003 we specialise in the electrical/Telecommunications sector aiming our Products to a wide spectrum of corporate clients around the World. We currently in the market researching for new Products. [*Sic*]

We hope to endeavour a high, reliable and trustworthy business relationship. [*Sic*]

Kind Regards

Director. Mr B. Amer”

44. On 13 March 2006 Mr Peters sent a fax to HMRC’s Redhill office requesting the verification of the details of “Allimpex”; this fax did not specify what, if any, further details were provided to HMRC. On 28 March 2006 HMRC responded with an annotation on a copy of Mr Peters’ fax:

“I can confirm that the VAT registrations listed below/above are valid at this time. This confirmation is not to be regarded as an authorisation by this Department for you to enter into commercial transactions with this trader and any input tax claims you make may be subject to subsequent verification.

5 All Impex Handelsgesellschaft mbH [*sic*]  
DE 230097736”

45. Mr Peters’ “Due Diligence Visit Report” relating to Allimpex recorded the date of his site visit as 3 March 2006, and the name of the director as “Burhan Amar”. Among the various other matters mentioned were the following. The company’s  
10 premises were serviced offices in Berlin; Mr Peters considered them to be satisfactory for the type of business carried out. He recorded that Allimpex had been at the current premises since 2001. Its freight company did all its inspections. Allimpex carried out IMEI scans of stock, and kept a database. It carried out due diligence on its suppliers, and VAT verification on all companies. Mr Peters concluded that Allimpex was a  
15 well maintained organisation, with adequate staff and operational facilities to carry out the running of its day to day business. BSG was awaiting verification from HMRC at Redhill. Photos had been taken of the staff and premises. By way of identification, Mr Peters had obtained a copy of a page from the director’s passport showing his name as “Amer Burhan” and signed “A. Burhan”. Mr Peters stated that  
20 “We are satisfied with every aspect of the company and have decided to open trading with Allimpex.” [Certain other forms relating to Allimpex were subsequently completed; we consider these below.]

46. On 28 April 2006 Allimpex placed a purchase order with BSG for 800 Nokia Black phones at a unit price of £774.00, 2,500 Nokia 9300i phones at a unit price of  
25 £392.00, and 1,000 Samsung P850 phones at a unit price of £371.00. The total amount of the order was £1,970,200. On the same date Mr B. Amer on behalf of Allimpex notified details of its freight company in Europe; the new address was Boston Freight, “7 Koksijoe [*sic*] Straat, 8630 – Veurne”, in Belgium. He requested BSG to transport the stock covered in the purchase order. Also on the same date BSG  
30 issued invoice number 1121 to Allimpex for £1,970,200; there was no charge shown for carriage.

*The supplier for BSG’s second April 2006 deal*

47. As we have indicated, the supplier for BSG’s second April 2006 deal was Infinity. On the same day as that of the purchase order from Allimpex, BSG issued four  
35 purchase orders to Infinity. The first was for 800 Nokia Black phones at a unit price of £730.00. The total net amount in this purchase order was £584,000. VAT on that amount was £102,200. The goods were to be shipped to Courier Plus Ltd in Uxbridge. The second purchase order was for 1,250 Nokia 9300I phones at a unit price of £370.00. The total net amount in this purchase order was £462,500. VAT on that  
40 amount was £80,937.50. The third purchase order was also for 1,250 Nokia 9300I phones at a unit price of £370.00. The total net amount in this purchase order was, again, £462,500, and VAT on that amount was £80,937.50. The fourth purchase order was for 1,000 Samsung P850 phones at a unit price of £350.00. The total net amount in this purchase order was £350,000. VAT on that amount was £61,250. These  
45 remaining three purchase orders did not specify shipping instructions.

48. Infinity issued four invoices to BSG covering the supply of mobile phones. These were dated 27 April 2006. They were, respectively, Invoice number 2920 for “800.00 Nokia Black mobile handset simfree”, invoice number 2921 for “1250.00 Nokia 9300I mobile handset simfree C/EUR”, invoice number 2924 for “1250.00 Nokia 9300I mobile handset simfree C/EUR”, and invoice number 2926 for “1000.00 Samsung P850 mobile handset simfree C/E”.

*Delivery arrangements for the second deal*

49. In a “Ship and Hold Note” addressed to Courier Plus Ltd and carrying the date 8 [sic] April 2006, Mr Peters instructed Courier Plus to ship and hold the mobile phones ordered by Allimpex. They were to be shipped to “Boston Freight, 7 Koksijdestraat, Veurne 8630 Belgium”. The instruction was “Please Ship and Hold the following to our client Allimpex Handels GmbH, until you receive verbal and written confirmation [sic]”. This note carried Mr Peters’ name, with “DDR Distribution” typed after it.

50. In a document carrying the date 28 April 2006 Mr Peters completed a “Check list for Exporters VAT Information”. The entry against “Insurance” in this document was “HIA”. In addition there were (undated) forms headed “Check list for Exporters Deals” and “Check list for Exporters Due Diligence on Shipment”. In the latter, the box “Receive Inspection reports” was not ticked.

51. On 9 May 2006 Courier Plus Ltd issued a “Pre-Alert” for the attention of “Blue Sphere Global (DDR Dist)”. This related to Invoice number 1121. It listed “Your Customer” as “Universal Handels GmbH” (not “Allimpex Handels GmbH”). It specified the total number of pallets as 15 and listed the total numbers of the three types of phone. A 7.5 tonne vehicle to be driven by Rod Capsey and Lee Batley was to carry 8 pallets containing a total of 2,000 Nokia 9300i phones and 3 pallets containing Nokia 8800 phones, the number not being specified. A second vehicle, a “Sprinter” to be driven by Martin Thompson and Justin Withers, was to carry 2 pallets containing a total of 500 Nokia 9300i phones and 2 pallets containing 1,000 Samsung P850 phones. The date of arrival was Wednesday 10 May, and the estimated time of arrival 08.00. Also on 9 May, Mr Peters took photographs at Courier Plus; we consider these later in this decision.

52. Copies of the CMR documents were provided by fax to BSG. These were dated 9 May 2006. (They carried the fax date of 5 February 2000, which we find to be erroneous, probably resulting from turning off the fax machine and not re-setting the date when turning it on again.) One, covering the smaller consignment of 4 pallets, showed the total weight as 1,039 kg. The consignee was Boston Freight; the carrier was Advanced Transport Ltd. Under “Place designated for delivery of Goods (place, country)”, the name and address of Allimpex was shown. There was an error on the form: under “Reg” the names of the two drivers, Martin Thompson and Justin Withers were set out, and under “Drivers”, “RE54 BDZ”. A handwritten two-headed arrow had been inserted on the form with the intention of interchanging the headings “Reg” and “Drivers”.

53. The second CMR document referred to the same names and addresses. The consignment consisted of 11 pallets with a total gross weight of 2,560 kg. In the original version of this CMR document, the registration was shown as “LF51 KTG”. This original version carried a handwritten note to show that an amended version had been received. That amended version showed two handwritten amendments. The registration number of the vehicle was crossed out and replaced by “LT02 SKE”, with a signature against the amendment. The second alteration was the insertion of a “Seal Number”, 088030.

54. Despite the reference to “HIA” under “Insurance” in the “Check List for Exporters VAT Information” referring to the “Customer” as Allimpex, it is not clear what insurance arrangements were in force relating to this consignment. Although a copy of parts of a joint annual policy was included in the evidence, Mr Peters indicated in cross-examination that this policy had not gone ahead. The proposal had been for the policy to be taken out by another company owned by Mr Peters, Nine One One Ltd, for the benefit of four companies, Blue Sphere Concepts Ltd, BSG, Petrel Management Ltd, and DDR Distribution Ltd, each of which was to be liable to a quarter of the annual premium of £54,000. There was no other evidence of any insurance arranged on an individual basis for BSG in connection with this Allimpex transaction.

55. Detailed transport reports were provided in evidence, covering the movements of the two vehicles concerned; these, together with the evidence from Mr Thompson, one of the drivers named in the CMR document relating to the smaller consignment, are considered later in this decision.

56. On 9 May 2006 inspection reports were provided by A1 Inspections Ltd in respect of the three categories of phone included in the Allimpex transaction. The location of the goods was specified as being at Courier Plus. In the case of the Nokia 9300i phones, the chargers were shown as being “3 Pin”, while for the other phones the chargers were shown as “2 Pin”. The original version of the report on the Nokia 8800 phones showed the colour as “Stainless Steel”.

57. On 25 May 2006 BSG’s bank account was credited with an inward sterling payment from Allimpex of £962,036. On 31 May 2006 there was a further sterling payment from Allimpex of £1,008,135. These payments totalled £1,970,171, ie £29 less than the total invoiced to Allimpex. The following CHAPS transfers to Infinity were made out of BSG’s bank account: on 26 May 2006, £962,036.16; and on 31 May, £1,222,288.84. Thus, ignoring the VAT and the minor difference between the price payable by Allimpex and the second amount remitted (presumably reduced by bank charges), BSG’s profit on the difference between unit prices on its purchase and those on its sale was £111,200 (£44 x 800 + £22 x 2,500 + £21 x 1,000). The VAT element of the price payable to Infinity was not paid until BSG made its final payment on 31 May. As with the first deal, BSG’s expectation was that the VAT (which for this deal amounted to £325,325) would be recovered by way of its input tax repayment claim. In relation to this deal there was no entry in BSG’s bank statement showing any payment made to Courier Plus to cover the cost of storage and transport of goods. There was no evidence, either in the documentation relating to BSG’s sale

to Allimpex or in that relating to its purchase from Infinity, of any arrangement for payment in a number of separate sums together constituting the amount due.

*Matters established by Mrs Orr's review of BSG's April 2006 deals*

58. BSG's VAT return for the period 04/06 was received by HMRC on 2 April 2006.

5 In that return, BSG made a claim for repayment of £1,109,976.06, of which £1,106,976.06 related to the invoices provided by Infinity for the supply of the mobile phones. The turnover disclosed in that return was in excess of £6 million. HMRC selected this return for in-depth verification. On 1 June 2006, the case was allocated to Mrs Orr.

10 59. Mrs Orr reviewed the inspection report provided by A1 Inspections Ltd relating to the Nokia 8800 Black phones. She noticed that this stated the colour of the phones to be "stainless steel". On 8 June 2006 she explained to Mr Peters that she had a concern about the inspection reports, and indicated what the query was. The next day, Mrs Orr received from Mr Peters a letter enclosing an amended inspection report, expressed to  
15 be from A1 Inspections. The revised version of the report had been provided by way of a fax dated 8 June to BSG; A1 Inspections Ltd apologised for the error and confirmed that "The actual colour of the units inspected is black as is confirmed by the language code at the end of the report on page 2." An accompanying letter of explanation, which was undated and unsigned except for a typed name "The A1  
20 Team", indicated that the stainless steel colour description in the original report had been a typing error, and that steps would be taken to prevent such errors from occurring in the future. An e-mail dated 8 June 2006 from the Administrator at A1 Inspections to BSG referred to the subject as "Apology Letter" but contained no message other than the title and signature, and did not carry any indication that there  
25 was an attachment. The time of sending the message was shown as 11.26 on 8 June.

60. As part of her investigations, Mrs Orr requested from Mr Peters an electronic record of the IMEI numbers for the Nokia 9300i, Samsung P850 and Nokia 8800 Blacks phones. These were sent for analysis by NEMESIS (the database maintained by HMRC showing records of mobile phones appearing in transactions reported to  
30 HMRC). On 5 July 2006 Mrs Orr received a NEMESIS report on 50 of the numbers sent for checking. Of these, 43 indicated that the phones had been traded in the UK on occasions both before and after BSG had despatched them to its overseas customers. In the light of this result, HMRC carried out further checks through NEMESIS on the IMEI numbers. On 18 July 2006, HMRC wrote two letters to inform Mr Peters of  
35 what they described as "the evidence of circularity". The first showed that out of the 1,400 IMEI numbers provided by Mr Peters, a total of 1053 of the 10,550 Nokia 8800 phones comprised in BSG's first deal had been identified as having previously been examined by HMRC, in some cases more than once. The second showed that out of the small percentage of IMEI numbers provided by Mr Peters, a total of 15 phones out  
40 of the 2,500 Nokia N9300I phones comprised in BSG's second deal had been identified as having previously been examined by HMRC.

61. Meanwhile, a meeting was arranged to take place at BSG's premises on 19 June 2006. Before that meeting HMRC notified Mr Peters that they were encountering difficulties in obtaining information from companies within the transaction chains in

15 62. On 4 July 2006 Mrs Orr sent a letter to BSG putting various queries concerning its transactions with Infinity. Vantis Tax responded on 10 July 2006; despite this, Mrs Orr felt that, on the basis of the information obtained up to that stage, there were sufficient anomalies and concerns to justify further enquiries and the continuation of the verification process.

20 63. On 3 August 2006 Mr Peters informed HMRC that he had prepared BSG's 07/06 return, and that this did not contain any mobile phone deals, but was for a repayment of £11,252.46 relating to other business expenses. Review of the supporting documentation showed that the majority of the input tax claim related to one invoice from Xicom Systems Ltd. The invoice was dated 30 May 2006 and was for "brokerage fees" of £62,900 plus VAT of £11,007.50. Mrs Orr was aware from her enquiries that Xicom Systems was neither a supplier to nor a customer of BSG in periods 01/06 and 04/06, and wrote to BSG to query the invoice. A response dated 15 September 2006 was received from Vantis Tax; this indicated that the negotiation and provision of brokerage fees had pre-dated the engagement of Vantis by BSG, but the explanation was that, due to the risks associated with this trade sector, Mr Peters had purchased introductions from a trusted company to a company with which it could deal and Xicom Systems had introduced BSG to Infinity.

30 64. In relation to Boston Freight, Mrs Orr was made aware that the proprietors had been arrested by the Belgian authorities in connection with an ongoing criminal investigation. Her understanding was that the proprietors were known to have falsified transport documents to support the zero-rating for VAT of purported movements of goods from the UK, including alleged consignments of mobile phones of a type not available on any market at the time. On 26 July 2006 she was informed by Simon Devine that Boston Freight had been visited, and that vehicles had been examined and found to be empty, even though the documentation relating to those vehicles indicated that they were carrying commodities. On 22 August 2006 Mrs Orr cross-referenced the details shown in the documentation relating to the despatching of the goods by BSG to Boston Freight on HMRC's system known as "OASIS" (Operation Anti Smuggling Information System), which records movements of vehicles entering and departing from the UK. She noticed some anomalies in the despatching of the goods sold to Allimpex Handels GmbH, which included the Nokia 8800 Blacks, about which there had already been concerns, specifically in relation to the report from A1 Inspections Ltd.

65. The acknowledgement of arrival of the goods at Boston Freight was contained in e-mails dated 10 May 2006 advising that the consignments in the two vehicles were “signed for 07.50 Tuesday 9 May 2006”, and that there was “no chargeable waiting time”. However, the ferry tickets provided to HMRC showed the vehicles leaving the UK on 10 May 2006 at 01.00 and 02.10 respectively. In a letter to BSG dated 23 August 2006, Mrs Orr queried the apparent suggestion that the goods had arrived at Boston Freight before they left the UK. The reply dated 12 September 2006 from Vantis Tax enclosed a copy of an e-mail dated 25 August 2006 from a person giving only the name “Dave”. This explained that the “POD” date should have been the next day, ie 10 May 2006. (Vantis explained that “POD” was a computerised freight handling system used by Advanced Transport Ltd.) The e-mail said that this had been a “minor overlook” by Advanced Transport Ltd, and that a revised POD report would be produced, referring to the date 10 May 2006. (Revised reports were also produced in relation to the delivery of the goods for the first deal.)

66. The OASIS reports for these two vehicles showed them loaded leaving the UK and empty returning to the UK. However, information subsequently received by HMRC from the Belgian authorities about Boston Freight showed that the director of the company had confirmed that no vehicles ever unloaded the goods at its premises; it had no facilities to do this, as it was a small building on a farm. Boston Freight was unable to evidence onward movement of goods into the EC, as the director claimed that a leaking roof had destroyed all the documentation such as CMRs or invoices relating to all transactions through its premises for the onward journeys.

67. In the light of various concerns relating to Universal Handels GmbH, Mrs Orr sought further information relating to that company. On 24 January 2007, she received information from the Austrian authorities relating to the onward transaction said to have been conducted by Universal Handels in relation to the goods sold to it by BSG. The documentation included a copy of the purchase order from Universal to BSG dated 21 April 2006, a copy of BSG’s sales invoice dated 25 April 2006 to Universal Handels for the 10,550 Nokia 8800 mobile phones, and copies of the CMR documentation showing a date of transport of 28 April 2006. In addition, there was a sales invoice dated 21 April 2006 from Universal to a Polish company, Tulus, for 10,550 Nokia 8800 mobile phones, as well as a purchase order dated 21 April 2006 from Tulus to Universal. There was also a fax from Universal to Boston Freight dated 25 April 2006 which stated: “You will have the following stock for Universal Handels” . . . Please prepare all goods for release to Tulus . . . ” “Please forward all documentation on receipt of goods”.

68. On 8 March 2007 HMRC’s Central Co-ordination Team sent Mrs Orr a response from the Austrian authorities regarding the business activities of Universal Handels. The Austrian authorities described how the company operated, and said that information which they had received from the Dutch authorities stated that the alleged supplies made by Universal Handels which were invoiced to various European countries did not take place as the goods were just returned direct to Great Britain. They described Jason Davis, the director of Universal Handels, as “substantially part maybe even the man in charge regarding that carrousell (*sic*) fraud”.

69. Mr Orr was not satisfied that the due diligence carried out by BSG had been adequate; the questions arising from her concerns are considered in detail later in this decision.

5 70. Mrs Orr checked the “VIES” (VAT Information and Exchange System) which enables HMRC to access details of EC member state registrations. Neither BSG nor the Xicom companies (which Mrs Orr had reviewed in the course of her investigations) appeared as suppliers to Allimpex Handels GmbH or Universal Handels GmbH in the first six months of 2006. (Mr Gibbs’ company, Blue Sphere Concepts Ltd, did appear as a supplier to Universal.) Comparison of the IMEI  
10 numbers provided by the Xicom companies with those of BSG showed that some of the Nokia 9300i phones traded by BSG and some of the Nokia 9300i phones traded by Xicom Systems Ltd had been part of the same batches of mobile phones when previously scanned leaving the UK. The batches concerned had been scanned on, respectively, 28 February 2006, two on 9 March 2006, and one on 29 March 2006.  
15 The review of the IMEI numbers prompted investigations relating to Xicom Systems Ltd, Xicom Europe Ltd, Blue Sphere Concepts Ltd (whose director was Mr Gibbs, who had left BSG), and Investortech Ltd, which had provided some of the funding for the deals conducted by BSG. Enquiries into Investortech showed connections between its director and Darren Peries. Mrs Orr also established that there were other links  
20 between the Peries family and various companies among those under review.

*Matters established in relation to Infinity Holdings after April 2006*

71. HMRC’s investigation into Infinity Holdings Ltd, BSG’s supplier for its April 2006 transactions, took a substantial time. It established that during Infinity’s 03/06 and 06/06 return periods, Infinity undertook 538 “acquisition deals”, involving the  
25 acquisition of goods direct from EU suppliers; the total cost was £266,953,910. Infinity then sold these same goods to UK based customers for a total of £269,306,808 plus VAT. (Thus Infinity’s gross profit before any expenses was £2,352,898; this was a return of approximately 0.88 per cent on the total purchase price.) These UK based customers subsequently despatched these same goods to the  
30 EU. The profit mark-ups on the goods sold by Infinity to the UK based customers were fixed at £2.00 per unit for all transactions, irrespective of the quantity, manufacturer or model of the goods, or of the identity or nature of the UK based customer involved in the particular transaction. HMRC’s investigations also showed that tax losses only occurred in the second and third months of the 03/06 and 06/06  
35 periods. In the same two periods, Infinity carried out a number of “despatch deals”, involving the sales of goods purchased from UK suppliers to customers elsewhere in the EU. Of the total of 547 despatch deals carried out by Infinity in these two periods, 356 were traced back to a tax loss, ie 65.08 per cent of that total.

72. During the same periods, all of the goods despatched by Infinity to EU-based  
40 customers were purchased by Infinity from UK-based customers only. The result was that for each of these periods, the VAT due on the returns was extremely low. For period 03/06, the amount of tax due, based on a turnover of £211 million, was £76.53. For 06/06, the tax due was £471.72, and the turnover was £343 million. Mr Devine regarded this as a “peculiar way of conducting business”.

73. Infinity's turnover, as shown by its declarations in its VAT returns, had taken the following pattern:

01/12/04 to 30/06/05 - £4 million

01/07/05 to 31/12/05 - £243 million

5 01/01/06 to 30/06/06 - £555 million

01/07/06 to 31/12/06 - £8.5 million

01/01/07 to 31/03/07 - £105,000

01/04/07 to 30/06/07 – return not yet rendered

10 74. During Infinity's VAT period 06/06 (which included the two sales to BSG forming part of the latter's April 2006 transactions) Infinity engaged in a substantial number of transactions. In April 2006 there were 240. Of these, 235 involved Infinity acquiring goods from EU based suppliers to a net value of £131,560,054, and selling them directly to UK based companies, the net value being £132,244,950. (We calculate that this produced a gross profit of £684,896, and a return of approximately  
15 0.52 per cent on the purchase price.) In relation to the remaining five transactions, HMRC were not able to establish full details. For three transactions, no information was obtained as to the location of purchase or acquisition of the goods or the persons to whom they were sold or dispatched. For the remaining two transactions, the only  
20 information obtained concerned the sale of the goods, and showed that they had been sold to UK-based companies.

75. In May 2006 Infinity was involved in 208 transactions. In 28 transactions, Infinity acquired goods directly from EU-based suppliers at a net value of £17,583,980, and selling those goods directly to UK-based companies, the net value being £17,679,500. (We calculate that this gave Infinity a gross profit of £95,520, and a return of  
25 approximately 0.54 per cent on the total purchase price.) In 164 transactions, Infinity purchased goods direct from UK-based suppliers, at a net value of £94,827,626, and then despatched them direct to EU-based companies, the net value being £95,263,388. (On our calculations, Infinity's gross profit on these transactions was £435,762, producing a return of approximately 0.46 per cent.) In relation to the remaining 16  
30 transactions HMRC were unable to obtain any information as to where the goods were purchased or acquired or the identity of the persons to whom they were sold or despatched.

76. In June 2006 Infinity was involved in 175 transactions. Of these, 35 involved Infinity acquiring goods from EU based suppliers to a net value of £18,066,060, and selling them directly to UK based companies, the net value being £18,170,844. (We  
35 calculate that the gross profit for Infinity from these transactions was £104,784, the return on purchase price being 0.58 per cent.) In 140 transactions, Infinity purchased goods direct from UK-based suppliers, at a net value of £79,325,633, and then despatched them direct to EU-based companies, the net value being £79,702,829. (On  
40 these transactions, we calculate that Infinity's gross profit was £377,196 and the return on purchase price approximately 0.48 per cent.)

77. Similar patterns were established by HMRC for Infinity's VAT period 03/06.

78. HMRC carried out a detailed examination of Infinity's acquisitions made in periods 03/06 and 06/06. In relation to 6/06, the following information was established. Of Infinity's 235 acquisitions in April 2006, 74 were from Alpha C APS, 10 from Costa Renta & Management SL, 46 from Esat APS, 38 from Racheltel SL, and 67 from Vertex Trading SARL. Of Infinity's 28 acquisitions in May 2006, 9 were from Alpha C APS, 4 from Esat APS, and 15 from Vertex Trading SARL. Of Infinity's 35 acquisitions in June 2006, 12 were from Alpha C APS, 9 from Esat APS, and 14 from Vertex Trading SARL. Similar results were obtained for period 03/06, but with some different suppliers.

79. Information concerning a number of Infinity's suppliers was obtained from HMRC's counterparts in various other EU countries. In relation to period 06/06, the following was established. Costa Renta & Management SL was visited by the Spanish fiscal authorities, and was found to be a missing trader. The fiscal authorities were unable to locate any business premises. The trader was deregistered for VAT with effect from 20 April 2006. Racheltel SL was visited by the Spanish fiscal authorities and was found to be a missing trader. Racheltel SL was deregistered for VAT with effect from 29 September 2006. It had no bank account, nor did it make any VAT declarations. In relation to Infinity's period 03/06, similar results were obtained; apart from Costa Renta & Management SL, two other Spanish suppliers from which Infinity had acquired goods were discovered by the Spanish fiscal authorities to be missing traders.

80. HMRC's examination of Infinity's despatches to EU-based companies established the following in relation to Infinity's period 06/06. Of the 164 transactions in May 2006 in which Infinity had purchased goods directly from UK-based suppliers and then despatched them directly to EU-based companies, 29 were despatched to SG Commerce EURL, 8 to Hocum Distribuicao De Electrodomesticos Unipessoal LDA, 11 to Inveraray SL, 67 to Lidingo Consulting Group AB, and 49 to Third Generation Trading AS. Of the 140 transactions in June 2006 in which Infinity had purchased goods directly from UK-based suppliers and then despatched them directly to EU-based companies, 39 were despatched to SG Commerce EURL, 32 to Hocum Distribuicao De Electrodomesticos Unipessoal LDA, 11 to Inveraray SL, 18 to Lidingo Consulting Group AB, and 40 to Third Generation Trading AS. Taking Infinity's period 06/06 as a whole, of the 304 despatch or "broker" transactions undertaken by Infinity during that period, a total of 242 involved despatch to Lidingo Consulting Group AB, Third Generation Trading AS or SG Commerce EURL. Thus 79.61 per cent of Infinity's despatch transactions involved one or other of these three companies.

81. In relation to Infinity's period 03/06, similar results were obtained; apart from Inveraray SL, another Spanish trader to which Infinity had despatched goods, Proinserco SL, was found to be a missing trader. Following a visit to the latter company's premises by the Spanish fiscal authorities, they commented: "The company has vanished. The company is related with other companies involved in fraud cases. It seems to be a fictitious activity."

82. Analysis by HMRC in relation to Infinity's 06/06 period showed the following. Of the 164 transactions in May 2006 where Infinity purchased goods directly from UK-based suppliers and then despatched them directly to EU-based companies, 58 transactions (35.37 per cent) were traced back through the UK supply chain to missing, hijacked or otherwise defaulting traders. The result was a tax loss of £5,643,047.46. Of the 140 transactions in June 2006 where Infinity purchased goods directly from UK-based suppliers and then despatched them directly to EU-based companies, 126 transactions (90 per cent) were traced back through the UK supply chain to missing, hijacked or otherwise defaulting traders. The result was a tax loss of £12,246,295.97. The tax loss total for the period 06/06 was therefore £17,889,343.43. In respect of the earlier 03/06 period, the tax loss was £12,464,374.09.

83. In the same way as for Infinity's suppliers, information concerning a number of the EU traders to which Infinity had despatched goods was obtained by HMRC from counterparts in various other EU countries. In relation to period 06/06, the following was established. SG Commerce EURL had failed to show when requested by the French fiscal authorities, and was now considered by those authorities to be a missing trader. As mentioned above, Inveraray SL was visited by the Spanish fiscal authorities and was found to be a missing trader; it was also described as having vanished. Inveraray SL was deregistered for VAT with effect from 5 July 2006.

84. Mr Devine drew attention to the information received from the Belgian authorities concerning Boston Freight, the address to which Infinity's "despatch" goods were sent during the two relevant periods. The premises were described as a small farm outbuilding with no facilities for the storage, loading, unloading or inspection of goods. He referred to the statement by Boston Freight that all the documentation had been destroyed by water leaking through the farm building roof. Evidence relating to Boston Freight had been obtained from the Belgian authorities under agreed procedures.

85. Mr Devine gave evidence of ten of Infinity's "despatch" transactions undertaken in its 06/06 period, which, he contended, demonstrated that these transactions formed part of an overall scheme to defraud the public revenue. The total amount of tax losses identified from these ten transactions was £1,100,966.03, which Mr Devine understood to be sufficient to cover the amount of input tax which had been denied to BSG in relation to the deals in which Infinity had been involved. He also gave full documentation relating to a further three sample despatch transactions also undertaken in Infinity's 06/06 period and traced back by HMRC to tax losses.

86. For the month of February 2006, HMRC identified four missing, hijacked or otherwise defaulting traders in transaction chains in which Infinity had been involved. For March 2006, two of the same traders were so identified. For May 2006, five missing, hijacked or otherwise defaulting traders were identified:

- (1) Rafik Sodawala (trading as RS Sales Agency Ltd): tax losses totalling £784,389.39;
- (2) UK Communication Ltd: tax losses totalling £1,678,960.74;

(3) Wade Tech Ltd, also known as “Grange Solutions” [*sic* – as shown on its letterhead] Ltd, having allegedly changed its name on 6 June 2006: tax losses totalling £889,778.36;

(4) AS Genstar Ltd: tax losses totalling £1,933,990.63; and

5 (5) Okeda Ltd: tax losses totalling £355,928.23.

87. For June 2006, two such traders were so identified:

(1) Rafik Sodawala (trading as RS Sales Agency Ltd): tax losses totalling £1,149,972.26, and

10 (2) Wade Tech (or “Grange Solutions Ltd”): tax losses totalling £11,096,323.71.

88. From May to October 2007 inclusive, a total of 39 letters were issued by HMRC to Infinity advising it that a number of its transactions had been traced back as originating with a tax loss.

*HMRC’s eventual decision*

15 89. As a result of the continuing delay in the issue of any decision by HMRC relating to BSG’s repayment claim while the verification process was being carried on, BSG felt compelled to seek judicial review in respect of HMRC’s failure to issue any decision. The process of applying for judicial review began in September 2006.

20 90. On 25 April 2007, very shortly before the judicial review hearing was due to take place, Mrs Orr wrote to BSG notifying it of HMRC’s decision to deny input tax; the decision affected input tax claimed on the purchase of mobile phones in period 04/06. The amount of input tax denied was £1,100,750. Following the issue of this decision, BSG abandoned its claim for judicial review. Notice of Appeal was submitted on BSG’s behalf on 21 May 2007.

25 **Arguments for BSG**

91. We summarise Mr Challenger’s main arguments at this point, and deal later with a number of further matters which he raised. He argued that in order for HMRC to demonstrate that the assessed transactions were connected with fraudulent evasion of VAT, three elements had to be shown:

30 (1) HMRC had to demonstrate a VAT loss;

(2) HMRC had to demonstrate that this loss resulted from a fraudulent evasion;

35 (3) HMRC had to demonstrate that the fraudulent evasion was connected with the BSG transactions which were the subject of this appeal. In his decision following a preliminary hearing in this appeal, the chairman, Mr Wallace, had provided the following formulation in respect of this element: HMRC had to show a direct connection between the loss and the transactions entered into by BSG.

If HMRC proved the above three elements it then had to show:

(4) that BSG should have known that its purchases were connected with a fraudulent evasion of VAT. (Allegations relating to actual knowledge were not admissible, in the light of the basis on which Mr Wallace had, following a preliminary hearing, directed that the appeal should proceed.)

5 92. He argued that there was no VAT loss. BSG had purchased its goods from Infinity and paid the invoiced price in full, including the VAT element; the goods were imports, so Infinity could not have debited any input tax from higher up the chain against receipt of the VAT from BSG.

10 93. If the allegations suggesting fraudulent trading by Infinity were established, it appeared extraordinary that Infinity was an approved registered trader. As far as BSG was aware, no veto or other adverse notice had ever been served by HMRC in respect of Infinity. Mr Challenger referred to other information concerning Infinity, which we consider below.

15 94. In Mr Devine's statement, no loss had been identified for the month of April 2006. Mr Challenger argued that losses in respect of transactions after April 2006 were not relevant; to discover such losses, BSG would have needed some means of predicting future transactions to be carried out by traders unknown to it. He also argued that BSG's April transactions could not possibly be connected with some tax loss which had not yet occurred. HMRC had failed to prove the first three elements referred to  
20 above.

25 95. On the fourth element, Mr Peters had carried out suitable and correct due diligence into the pedigree of its supplier, Infinity, and its customers in Europe. It had taken HMRC an extensive period to establish the background and evidence for this appeal. A trader, having carried through its due diligence within available market conditions, had to take a decision whether or not to proceed with the transaction. BSG had elected to proceed with these transactions in good faith and after copious and correct due diligence.

### **Arguments for HMRC**

30 96. We summarise Mr Hall's main arguments here, and deal later with various related issues which he raised. He referred to HMRC's allegation that BSG's supplier, Infinity, had been engaged in MTIC fraud and that Infinity's supplies to BSG had formed part of that fraud. The allegation was that Infinity had acted as a "contra-trader" in the relevant transactions. The concept of contra-trading had been recognised by the High Court and the Tribunal.

35 97. HMRC argued that BSG should have known that its sales in April 2006 were connected to fraud. HMRC relied on the decision of the European Court in *Axel Kittel v Belgium; Belgium v Recolta Recycling SPRL* (C-439/04 and C-440-04; [2008] STC 1537). Mr Peters had stated that he knew that there was no tax loss on the mobile phones, that he did not understand the concept of "contra-trading", and therefore that  
40 he had no reason to believe that his transactions were connected to fraud. HMRC argued that it was not sufficient for Mr Peters, who by his own admission was keenly aware of fraud in the mobile phone industry, to satisfy himself that there was no tax

loss on the mobile phones, and otherwise to “put his head in the sand”. HMRC considered that there were “striking” features in this case of third-party influence, and submitted that BSG had not safeguarded itself against the risk of being manipulated into transactions which were connected to fraud, and that BSG had ignored indicators that this was in fact the case.

98. HMRC submitted that there had been a fraud by Infinity, that BSG’s sales in April 2006 were connected to Infinity’s fraud, and that BSG should have known that those sales were connected to Infinity’s fraud.

99. It was not necessary for HMRC to prove that BSG had specific knowledge of the alleged fraud. It was sufficient that BSG should have known that its transaction was connected to some fraud, even though it did not know or have means of knowing the details of that fraud (*Honeyfone v Revenue and Customs Commissioners* (2008) VAT Decision 20667, citing Burton J in *R (on the application of Just Fabulous (UK) Ltd) v HM Revenue and Customs* [2007] EWHC 521 (Admin), [2008] STC 2123).

100. It had been argued for BSG that there was no tax loss. This overlooked two features of the evidence. First, the VAT which BSG paid to Infinity on its purchases in April 2006 was not paid to HMRC. It was set off against Infinity’s VAT repayment claim which arose from Infinity’s export deals. HMRC alleged that these deals were part of a contrived and fraudulent chain. Secondly, the acquirers of goods in Infinity’s export deal chains did not pay VAT to HMRC, ie they were “missing traders”.

101. Another argument for BSG was that its deals in April 2006 could not be connected to Infinity’s export deals because Infinity did not make any export deals in April 2006. However, Infinity did make export deals in May and June 2006, and as its VAT period ran from April to June 2006, it was able to set off the April deals with BSG against its export deals in May or June. Mr Hall argued that BSG’s April deals with Infinity permitted Infinity to disguise or launder its repayment claim in a “contra” scheme.

102. HMRC did not accept BSG’s assertions that its due diligence was “rigorous”, “copious” or “comprehensive”. The focus of the appeal should be details and documents, and not assertions.

### **Discussion and conclusions**

103. This appeal is that of BSG. In considering the actions of, and knowledge attributable to, BSG, our view is that Mr Peters as the mind and management of BSG can be regarded as having the knowledge of all matters concerning BSG. Further, any matters of which Mr Peters was aware in any capacity other than in relation to BSG can be treated as being within BSG’s knowledge. Thus we accept that knowledge and information which Mr Peters obtained through DDR and (to the extent relevant) Retronet, as well as in his own personal capacity, can also be treated as BSG’s.

104. We gratefully adopt the explanations of contra-trading set out in *Just Fabulous* at [10], in *Livewire Telecom Ltd* (2008) VAT Decision 20533 at paragraphs 4 to 6,

and in *Olympia Technology Ltd* (2008) VAT Decision 20570 at paragraphs 3 to 6, without setting these out in this decision.

105. We accept the analysis in *Olympia* at paragraph 16 of the elements to be considered. The first question is whether HMRC have suffered, and continue to suffer, a VAT loss. Secondly, was the tax loss attributable to fraud, ie did this loss result from a fraudulent evasion? Thirdly, were the BSG transactions which are the subject of this appeal connected with the fraudulent evasion? The fourth and final question, if all three of the previous elements have been established, is whether BSG ought to have known (or, to use the formulation in *Kittel* at [56], “should have known”) that its purchases from Infinity were connected with that fraudulent evasion of VAT.

106. With reference to the evidence given by Mr Stone, our views are similar to those set out in *Olympia Technology* at paragraphs 21 to 25; we do not place much weight on Mr Stone’s evidence, which at best was treated as background information, and in respect of which there was no cross-examination because Mr Stone gave no oral evidence in addition to his witness statement.

107. Both parties addressed us on the burden of proof. Since the hearing, we have had the advantage of considering the judgments of the House of Lords in two cases not cited to us in argument, *In re B (Children)* [2008] UKHL 35 and *In re Doherty* [2008] UKHL 33. In *In re B* Lord Hoffman said at [13]:

“I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.”

He continued:

“[14] Finally, I should say something about the notion of inherent probabilities. Lord Nicholls said, in the passage I have already quoted, that —

“the court will have in mind as a factor, *to whatever extent is appropriate in the particular case*, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.”

[15] I wish to lay some stress upon the words I have italicised. Lord Nicholls was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.”

108. In the same case, Lady Hale said:

“[70] My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither

the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.

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[72] As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog."

109. In *Docherty*, Lord Carswell said:

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"[28] It is recognised by these statements that a possible source of confusion is the failure to bear in mind with sufficient clarity the fact that in some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. The standard itself is, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place (Lord Hoffmann's example of the animal seen in Regent's Park), the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact. The seriousness of the allegation requires no elaboration: a tribunal of fact will look closely into the facts grounding an allegation of fraud before accepting that it has been established. The seriousness of consequences is another facet of the same proposition: if it is alleged that a bank manager has committed a minor peculation, that could entail very serious consequences for his career, so making it the less likely that he would risk doing such a thing. These are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established."

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110. We have taken these comments into account in our evaluation of the evidence.

*Whether there was a tax loss*

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111. In the chains in which BSG was directly involved, with Infinity as supplier and BSG as the "exporter" (in the sense referred to at paragraph 5 of *Livewire Telecom*), we conclude that there was no tax loss. (We comment later on the question whether events which occurred after BSG's sales to Universal may have involved other fraudulent activities which could in turn have led to other tax losses.) However, despite the absence of a tax loss in the chains leading to BSG, the nature of "contra-

trading” arrangements is such that the “clean” chain does not involve any missing traders or any losses arising from defaults by anyone in that chain. To concentrate only on the “clean” chain is to ignore the wider aspects of the other transactions to which it may be linked through the offset by the contra-trader of the input tax which would otherwise have had to be claimed in respect of the “dirty” chain.

112. In respect of Infinity’s period 06/06, which is the relevant period when considering BSG’s April 2006 transactions, there were clearly substantial tax losses in chains to which Infinity was a party. Mr Devine’s evidence was that the tax losses in respect of 184 Despatch transactions undertaken by Infinity in that period amounted to £17,889,343.43. This is the total attributable to the missing, hijacked or otherwise defaulting traders listed at paragraphs 86 and 87 above.

113. The number of transactions entered into by Infinity in its VAT periods 03/06 and 06/06 was very substantial; Mr Devine’s evidence was that the total for the two periods was 1,115. For any one Tribunal to analyse all the details of every transaction associated with all these Infinity 03/06 and 06/06 transactions would be an exceedingly arduous, perhaps almost impossible exercise, stretching over many months, if not years, as evidenced by the time taken by HMRC to investigate all these transactions. The total number of Infinity’s transactions in 06/06 alone (the relevant period to be considered with respect to BSG’s April 2006 transactions) was 623, each of which would involve its own chain requiring review. (The corresponding number of transactions for 03/06 was 492.) Despite criticisms from Mr Challenger of HMRC’s use of “sample” transactions, we cannot see any practical way of meeting the interests of justice without confining the Tribunal’s attention to only a sample of the transactions involved. We therefore analyse the involvement of Infinity in these sample transactions, and draw conclusions based on those transactions (as well as on other evidence put before us) as to the likely position in the balance of transactions undertaken by Infinity in the 06/06 period.

114. We have considered whether to use a table to display the results of our analysis of the ten deals for which HMRC supplied “deal packs”, and the other three deals mentioned in Mr Devine’s first witness statement. Our view is that a table would not be adequate to display all the elements of the deals which are relevant to our conclusions, and therefore we draw attention to these features in other ways.

115. The ten deals concerned were assigned numbers in the course of HMRC’s analysis. These were 45, 9, 12, 25, 33, 49, 57, 124, 135 and 140. The three other deals mentioned by Mr Devine were 146, 164 and 52. We have reviewed the supporting documentation and satisfied ourselves that HMRC’s analysis of all these deals is correct and supports the summaries prepared in spreadsheet form for each deal. The dates of all the transactions in each of the ten deals were, respectively, 17 May, 2 June, 2 June, 5 June, 6 June, 7 June, 8 June, 16 June, 19 June and 21 June 2006.

116. We have carried out a similar analysis of the three additional sample deals mentioned in Mr Devine’s statement, and are satisfied that the summaries of these are also correct. The dates of all the transactions in each of the three deals were, respectively, 26 May, 31 May and (with one exception) 9 June 2006. The invoice date

for the second sale in the latter chain could not be traced by HMRC, but it appears to us probable that it was also 9 June 2006.

117. We find that there is a broad pattern followed in each deal. There are either four or six entities involved in the supply chain before the goods reach Infinity. In the only one of the ten deals where there are six entities, the price increments per unit for the five stages after the initial supply are, respectively, £0.25, £0.50, £0.75, £0.75, and £0.75. (In the case of the three additional sample deals, the initial increment is £0.50 rather than £0.25.) Where there are four entities, the price increments are £0.15, £0.50, and £1 in every case. The price increment for Infinity's sale to the customer elsewhere in the EU is £2 in every case. These increments are constant, irrespective of the price or quantity of the goods concerned, and also irrespective of the type of goods; in two deals, the goods concerned were high definition DVD camcorders rather than mobile phones. The initial prices varied from £294.35 to £627.60, with Infinity's unit sale prices correspondingly varying from £298 to £631. In our view, these pricing arrangements lack commerciality in failing to take account of these significant variations between transactions.

118. In deals 9, 12, 25, 33, 49, 57, 135 and 140 the four parties in the supply chain before the sale to Infinity were identical. In deal 124 two of the parties were different, but the price increments at each stage were identical.

119. The original supplier in deal 45 was AS Genstar Ltd. In the remaining nine deals relied on by HMRC to demonstrate the tax loss alleged to support the denial of BSG's claim to input tax, the supplier was an entity using either the name Wade Tech Ltd or "Grange Solutons [sic] Ltd".

120. We accept Mr Devine's evidence that AS Genstar was a missing trader which was compulsorily deregistered on 29 June 2006 as it had vacated its premises and gone missing, and that of its outstanding VAT liability of over £48 million, the tax losses for May 2006 which are relevant to deal 45 amounted to £1,933,990.63. The output tax on AS Genstar's sale for this deal was £102,261.25.

121. In relation to the entity described as Wade Tech Ltd or "Grange Solutons Ltd", we accept Mr Devine's evidence that this was a hijacked trader with unenforceable assessments raised against it in excess of £25 million, of which £889,778.36 related to the month of May 2006 and £11,096,323.71 related to the month of June 2006. (Its tax losses for previous periods were £3,125,483.39 for February 2006 and £5,298,033 for March 2006.) The output tax on Wade Tech's sales relevant to the nine deals under consideration amounted to £998,704.78.

122. As Wade Tech Ltd was a hijacked trader, there can be no question of any legitimate claim to recovery of input tax. It is therefore unnecessary to investigate the nature of the supplies made to it.

123. In relation to AS Genstar Ltd, there was no evidence of the identity of its supplier, and thus no indication whether that supplier was UK-based. We note that in *Livewire Telecom* (at paragraph 27), the Tribunal adopted the following approach:

5 “As Mr Scorey points out there is only evidence relating to two of the Sygnet deals that the missing or defaulting trader is the importer. We consider that we should take into account the inherent difficulty facing Customs. If a trader is missing or has defaulted they cannot inspect any records in order to demonstrate that the person is in fact the importer. The person who is likely to owe VAT is the importer. We are therefore prepared to infer that the missing or defaulting trader at the head of the chains is the importer.”

10 124. In the case of AS Genstar Ltd, there is one aspect of its operations which causes us to question whether we should follow this approach taken in *Livewire Telecom*. Mr Devine’s evidence was that in VAT periods 10/05 and 01/06 it had made third party payments rather than paying its suppliers direct, despite being warned in a letter from HMRC dated 22 November 2005 not to do so, because of the risk of loss of VAT resulting from the inability of the supplier to meet its own VAT liability. On a third visit by the relevant two HMRC officers on 6 March 2006, the director of AS  
15 Genstar Ltd again confirmed that he had continued to make third party payments. No response was received to three subsequent letters from HMRC requesting bank statements to enable identification of the third party payment recipients. A final letter dated 26 June 2006 was sent to the solicitors acting on behalf of AS Genstar Ltd in relation to the freezing of its bank accounts (following action by HMRC), but this was  
20 followed almost immediately by the compulsory deregistration because of the company’s disappearance.

25 125. We would have preferred to have specific information concerning the supplier to AS Genstar Ltd in deal 45. However, it is clear from Mr Devine’s evidence that that company had engaged in a systematic practice of making third party payments. In assessing whether a tax loss has arisen in relation to a trader, as well as the size of that tax loss, it needs to be established whether that trader’s supplier was outside the UK, so that in effect the trader has not had to bear input tax on that acquisition, or whether the trader did incur input tax as a result of the goods being supplied to it by another UK taxable person. In the former case it will be clear without further evidence that  
30 any tax loss will be fully attributable to the transaction chain in question. Where the trader’s supplier is UK-based, it will be necessary to establish whether the trader has failed to account for output tax in an amount equivalent to that in dispute in the associated input tax claim proceedings instituted by the unrelated party in a position such as that of BSG.

35 126. If we make the more cautious assumption that AS Genstar Ltd’s supplier may have been UK-based (since otherwise third party payments would have been less significant to HMRC), we have to consider on the balance of probabilities by how much the output tax for which AS Genstar Ltd has failed to account is likely to have exceeded the input tax suffered on the corresponding purchase. In principle, the  
40 excess of £102,261.25 over the input tax suffered is likely to have been comparatively small. This would have the effect of restricting the tax loss to that small excess, which would mean that the transactions specifically allocated to correspond to BSG’s input tax claim would produce a total tax loss less than the amount of that claim.

45 127. Such a conclusion would depend on the assumption that AS Genstar Ltd had properly accounted for the net VAT for which it was liable to HMRC after offsetting

its input tax against the output tax charged to its customers for the VAT period which included May 2006. On the basis of its compliance history, perhaps better described as non-compliance history, we consider on the balance of probabilities that it is extremely unlikely to have accounted properly for this, and that it is therefore established that – whether or not AS Genstar Ltd’s supplier was UK-based – the full amount of £102,261.25 represents a tax loss in relation to the transactions comprised within deal 45.

128. For future MTIC cases, we consider that it would assist Tribunals for the evidence to demonstrate whether the supplier to the trader at what is shown as the beginning of the chain is a non-UK based supplier, and, if that supplier is UK-based, how the tax loss has been calculated. If such evidence is not available, then it will be helpful to have evidence to show what efforts HMRC have made to ascertain the identity and status of the supplier, and why those efforts have not been successful.

129. Although Mr Devine’s evidence was that the tax loss on the 184 Despatch transactions undertaken by Infinity during the quarter to 30 June 2006 was £17,889,343.43, our view is that we should confine our attention to the tax losses which have been put forward as relevant to this appeal. This approach of limiting the tax losses to be considered appears to us to be the best way of ensuring that any losses which may be taken into account for the purposes of this appeal are not used to support assessments against other traders, so avoiding the risk of “double counting”.

130. As Mr Devine indicated, the tax losses arising from the ten deals specified amounted to £1,100,966. This figure exceeds BSG’s refused input tax claim of £1,100,750.

131. On the basis of our conclusions as set out above, we are satisfied that HMRC have demonstrated the loss of tax in relation to all ten of these specified deals. To avoid any question of double counting, these deals should not be used in relation to assessments against any other trader. (As far as we are aware, HMRC have not given any undertaking to this effect in relation to these ten deals.)

132. We have also considered the three additional sample deals referred to by Mr Devine. These all have a trader registered as Rafik Sodawala (which later attempted to request a transfer of registration to RS Sales Agency Ltd) as the initial trader in the chain. The patterns of these chains, consisting of six stages, are all exactly the same, with the same mark-ups at each stage, even though in certain instances one or more of the actual traders involved in the chain is different. Six traders were involved in more than one of the transaction chains; all except one of those traders maintained a constant position within each chain. Mr Devine’s evidence was that Rafik Sodawala was a missing trader with VAT debts in excess of £24 million, and that assessments had been issued against him for his failure to account for the VAT liabilities arising in respect of all three of these sample deals. Although the documentation for sample deal 146 does not appear to be complete, our conclusion on the basis of the documentation provided in respect of these three deals is that they did result in further tax losses on a similar basis to those in the ten deals put forward for our review.

133. We are satisfied from the evidence as to the thirteen deals which we have examined that they indicate the probability that the much larger number of deals entered into by Infinity during the relevant period were of a similar nature; this is supported by a great deal of the remaining evidence in Mr Devine's statement, although in the interests of restricting the length of this decision, we do not refer specifically to that remaining evidence.

*Did the tax loss result from one or more fraudulent evasions?*

134. In analysing the ten deal chains in the context of tax losses, we have already considered a number of features of those chains. In the case of AS Genstar Ltd, it went missing and has been shown to have outstanding VAT liabilities of more than £48 million. The liability in question in relation to deal 45, ie £102,261.25, is a modest part of that total. In relation to Wade Tech Ltd, the unenforceable assessments against it as a hijacked trader amounted to £25 million, of which £998,704.78 is treated as relevant to the present appeal. We find that the sizes of the respective totals of outstanding liabilities are strongly persuasive evidence of the actions of these two traders in relation to the specific amounts with which we are concerned.

135. It is clear that the tax losses which have been established resulted from the actions of two parties in particular. First, AS Genstar Ltd went missing without dealing with its outstanding VAT liabilities. Secondly, unidentified persons hijacked the registration of Wade Tech Ltd and used it to facilitate transactions involving substantial sums of money, thus incurring correspondingly substantial VAT liabilities, which were not accounted for to HMRC. We find these respective parties' actions to have been fraudulent, and conclude that the tax losses concerned did result from their fraudulent evasions. We do not consider that the conduct of other parties in the deal chains is relevant to this question; where appropriate, that conduct is considered below.

*Were the transactions entered into by BSG in April 2006 connected to those fraudulent evasions?*

136. In *Livewire Telecom* (at paragraphs 9 and 11) the Tribunal referred to the difficulties involved in relating transactions in a "dirty" chain to the position of the exporter in a "clean" chain, particularly where the tax losses resulting from the actions of the missing trader would not have arisen until after that exporter's own deals had been completed. The Tribunal contrasted two positions. If the contra-trader was involved in a fraud in the sense of helping to cover up the missing traders' defaults by arranging either for a reduced repayment or for no repayment, at least the contra-trader was involved as a participant in the chain which included the exporter. If, however, the contra-trader was not so involved in helping to cover up the defaults and the only fraudsters were the missing traders, the latter were not involved in any chain that had a logical connection with the chains in which the exporter was a party.

137. We do not interpret these comments as implying that it is necessary to show that the contra-trader is itself fraudulent. All that is required to demonstrate a connection, in a case where the fraud has occurred at some point elsewhere in the chain, is for it to be established that the actions of the contra-trader facilitated the transactions which led to the tax loss, by either reducing or eliminating the contra-

trader's input tax recovery claim which would otherwise have been brought to HMRC's attention (and which as a result would thus have prompted much earlier investigation of the deal chain or chains leading to it, as well as the probable refusal of the claim).

5 138. In addition to our detailed examination of the ten specified deals and the three  
"sample" deals, we have reviewed the more general evidence put in for the purposes  
of this appeal as to the totality of Infinity's transactions. The sheer number of  
transactions, coupled with the close offset resulting in an infinitesimal liability to  
10 VAT for the period 06/06 as compared with its turnover for that period, leads us to the  
conclusion that Infinity did assist in concealing the missing traders' defaults by using  
the output tax on its "acquisition" transactions as a means of setting off the input tax  
claims in respect of its "despatch" transactions. Although not directly relevant to the  
15 period in question in this appeal, we are satisfied that the pattern of Infinity's  
transactions for the period 03/06 was similar to that for 06/06, which reinforces our  
view. There are various aspects of Infinity's trading which appear lacking in  
commerciality, in particular the examples of Infinity purchasing the same model  
phone from the same supplier for different prices on the same day, and then selling  
those same goods to different customers for different prices, always with a mark-up of  
20 £2 per item. Despite requests by HMRC, Infinity has not provided any details of its  
due diligence. Certain models of phones allegedly traded by Infinity could not have  
been traded at the times claimed because, as confirmed by the manufacturers, those  
models were not yet in production at the relevant times.

139. Mr Challenger argued that it would be inappropriate for us to make a finding  
that Infinity had been fraudulent. He argued that where there was an allegation of  
25 fraud against a *party* [his emphasis], it must be specifically pleaded and properly  
particularised. Further, the UK legal system did not permit allegations of fraud to be  
made against non-parties. He produced a letter from Infinity's solicitors expressing  
concern at the possibility that in the present proceedings, to which it was not a party,  
Infinity might be found to have been fraudulent. Mr Hall responded that it was quite  
30 normal in the most serious cases in Crown Courts (as opposed to VAT Tribunals) to  
make allegations of fraud against non-parties; Mr Challenger's submissions were not  
backed by any authority. As to the pleadings, it had never been suggested that BSG  
did not understand the nature of HMRC's case; the proceedings were in the Tribunal,  
not the High Court, and concepts of civil litigation should not be applied too  
35 rigorously in the Tribunal.

140. We question whether, given that fraud has already been established at a point  
earlier in the chain, the nature of the "connection" question requiring examination by  
Tribunals in cases of this nature involves establishing allegations of fraud against  
other particular parties. In *Kittel* at [61], the question was put as follows:

40 "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."

The test applicable at this stage (before considering whether the taxable person “knew or should have known”) appears to us to be an objective examination of any possible connection between the taxable person’s purchase and a wider transaction involving the fraudulent evasion of VAT. This does not appear to us to impose a specific requirement to establish that fraud has taken place at a series of points elsewhere in the chain of transactions, as long as it has already been objectively established that there is fraud in the chain. In order to have reached such a conclusion, we accept that sufficient evidence is required by way of proof of that proposition. As already indicated, we are satisfied on the evidence before us that the actions of AS Genstar Ltd and the hijacked trader Wade Tech Ltd were fraudulent.

141. Without further evidence as to the motivation of Infinity and the persons acting to carry out its functions, we find ourselves unable to establish whether, in carrying out its trades in this way, Infinity was itself fraudulent, although there are considerable grounds for suspicion that this may indeed have been the case. For the purposes of the present appeal (but without prejudice to the result of any appeal which Infinity may itself pursue) we consider that at the very least, Infinity must either have known or have had reason to suspect that within its transaction chains there were missing, hijacked or otherwise defaulting traders. Mr Devine’s oral evidence was that not one tax loss deal in Infinity’s VAT period 06/06, or in its previous period 03/06, had been traced to an innocent defaulter. He had no doubt that the missing traders, missing traders or hijacked traders appearing in the chains were all following the same method, whereby they had acted fraudulently. Having regard to the number of sales undertaken during those periods, we find it difficult to see how Infinity could not have been aware of this, unless it consistently turned a blind eye to the background to its transaction chains.

142. During the course of the hearing, Mr Challenger on BSG’s behalf sought disclosure of an internal record held by HMRC relating to Infinity. This had to be obtained by Mrs Orr during the lunchtime adjournment on the second of the days during which she gave her evidence. The date shown in this document was 19 August 2008. Mr Challenger drew attention to elements of the copy supplied that had been redacted, and obtained a further non-redacted copy showing what was stated at these points in the document. The overall tenor of the document appeared to be that there were no particular concerns about Infinity in relation to VAT; it was described as “Not suspect” and as not being subject to the inflated assessment regime.

143. Despite Mr Challenger’s contentions, we do not attach much significance to this document, which is not a comprehensive record of Infinity’s VAT status but merely a short form summary. We are aware that by 19 August 2008 a great deal of the investigations into Infinity’s transactions had taken place, since Mr Devine’s first statement setting out many of the matters referred to above was dated 10 October 2007 and his second statement was dated 24 January 2008. We do not view the document as any form of indication of HMRC’s view of Infinity; the evidence given by Mrs Orr was that elements of such records within the “Vision” system were no longer used and were no longer valid. She told us that the default setting for the reliability indicator was “not suspect”, but this no longer meant anything as there were now new procedures and practices which had overridden the requirement to set this

indicator. As to the redaction of certain information in this document, we comment below.

144. The ten sample transactions took place after BSG's purchase. This raises the question whether there can be a connection between a purchase in a "clean" chain and a fraudulent evasion which takes place at a subsequent point in time. Mr Challenger argued that there could not; he contended that as the alleged losses arose later than the BSG transactions, this was material both to the question of "connection" and to "means of knowledge". He submitted that HMRC's argument advanced in the appeal appeared close to an allegation that *any* party which paid VAT to Infinity for phones purchased in the relevant quarter could be said to be connected with the tax losses, even if the tax losses occurred weeks or months later. He contended that this was wrong, and put forward various arguments to support his conclusion.

145. We do not accept that a purchase in a "clean" chain can automatically be assumed not to be connected with a fraudulent evasion which in point of time comes after that purchase. Further, the question whether there was such a connection is entirely separate from the question whether an exporter in BSG's position could have known of such a connection, which should only be considered at the subsequent, fourth, stage of considering whether the exporter in that position knew or should have known of the connection (and only if all the answers to the questions at all three previous stages are in the affirmative). Logically, there can be a connection, of which the exporter may or may not be aware.

146. Having taken into account the matters set out below concerning Infinity, we consider that BSG's two transactions entered into with Infinity in April 2006 were connected to the fraudulent evasions by AS Genstar Ltd and Wade Tech Ltd, because the transactions were used as a basis for offsetting the input tax claims which Infinity would otherwise have had to make at the end of its 06/06 VAT return period in respect of the "despatch" deals for which one or other of those two entities was the supplier at the head of the relevant chain.

147. The principal points which we have taken into account in arriving at the latter conclusion are:

- (1) The reduction in Infinity's net liability to VAT for period 06/06 to £471.72 on a turnover figure of £343,000,000, with a similar position for 03/06 giving a net VAT liability of £76.53 on a turnover figure of £211,000,000;
- (2) Infinity's repeated pattern of trading (as demonstrated in particular by periods 06/06 and 03/06), under which Infinity did not carry out despatch transactions for the first month of a quarter but did so for the second and third months. We find this hard to reconcile with a normal commercial approach to business operations, suggesting a degree of contrivance;
- (3) The constant mark-up of £2 for every sale by Infinity, whatever the make, type, price or quantity of phones or camcorders sold, and whether the sales were of goods to EU customers outside the UK or to UK

customers. We find it difficult to relate this pricing arrangement to the normal commercial approach which an entrepreneur would be expected to adopt towards such variations;

5 (4) Examples of Infinity purchasing the same model phone from the same supplier for different prices on the same day, and then selling those same goods to different customers for different prices (but with the mark-up of £2). Again, we do not consider this approach to be commercial;

10 (5) Mr Devine's oral evidence that Infinity had approximately 30 customers during the first six months of 2006, and that the majority of the goods sold to those customers were sold on, as in BSG's case, to the same two EU customers, Universal and Allimpex;

(6) All the goods purchased by Infinity from EU suppliers were sold to UK customers, and all the goods purchased by Infinity from UK suppliers were sold to EU customers;

15 (7) The recommendation by Xicom Systems Ltd to BSG to trade with Infinity in circumstances where Xicom could have taken this opportunity for itself (and where Xicom Systems Ltd, having already conducted 25 deals between 21 and 28 April 2006 with a net output value of £12.5 million, purchased goods from Infinity during the following month, May  
20 2006, and sold goods on to Allimpex and Universal Handels);

(8) Infinity's own choice to sell to UK customers rather than taking the opportunity to sell to such EU customers as Universal and Allimpex, with which it was already dealing for its despatch transactions in the first six months of 2006;

25 (9) Of the 10,550 phones sold by BSG to Universal, over 1,000 were shown on a ten per cent sample inspection to have been previously despatched from the UK;

(10) The 10,550 phones sold to Universal were sold by it to a Polish company, Tolus, on 21 April 2008, and the fax relating to the release to  
30 Tolus was sent on 25 April 2006 before the inspection on BSG's behalf on 28 April 2006 had taken place, thus presenting BSG with a fait accompli and ignoring the possibility that BSG might have wished to withdraw from the transaction if it had not been satisfied with the results of the inspection.

*Should BSG have known of that connection?*

35 148. Mr Challenger linked the question of the timing of Infinity's despatch transactions, falling after BSG's purchases of goods from Infinity and sales to Universal and Allimpex, to two issues. The first, as we have already considered, was whether there was a connection. The second was that of means of knowledge. His contention was that BSG could have had no way of knowing about the transactions  
40 which Infinity had subsequently entered into.

149. We accept that a trader in BSG's position is most unlikely to have access to information of the type and extent subsequently discovered by HMRC. However, we do not think that the correct question is whether such a trader ought to have known of

that information. We endorse the approach taken in *Honeyfone* at the two paragraphs numbered 56:

5 “56. It seems to us that the knowledge (or means of knowledge) required is knowledge that there is some VAT fraud connected with the transactions which in some way those transactions assist, rather than knowledge of a particular fraud. . .” [The tribunal set out its reasons for reaching that conclusion, and continued:]

10 “56. Thus, in our view, if a trader knows or should know that his transaction is connected to some fraud even though he does not know or have means of knowing the details of that fraud, the test is satisfied.”

15 150. Although *Honeyfone* did not itself involve contra-trading, the Tribunal’s conclusion in the paragraphs cited above was based on *R (Just Fabulous (UK) Ltd) v HMRC* [2007] EWHC 521 (Admin) ([2008] STC 2123) and in particular the acceptance by Burton J at [50] of the arguments put on behalf of HMRC by Rupert Anderson QC at [43]. *Just Fabulous* was a judicial review decision relating to input tax reclaims by traders who had purchased from alleged contra-traders. We are therefore satisfied that whether or not contra-trading is involved, the test is whether the taxable person should have known that his purchase was connected to some fraud, even though he could not have known the details of that fraud. We accept the reasoning which the Tribunal adopted in *Honeyfone* as set out at the first paragraph 56 of that decision, although (rather than referring to “participating in a transaction connected to fraud”) we prefer to adopt directly the formulation in *Kittel* which we have already quoted: “participating in a transaction connected with fraudulent evasion of VAT”.

25 151. On that basis, the fact that Infinity’s despatch deals post-dated BSG’s purchases from Infinity and sales, respectively, to Universal and Allimpex, does not preclude a finding that BSG should have known that, by such purchases, it was taking part in transactions connected with fraudulent evasion of VAT. However, sufficient proof is required to establish this in the context of a trader which is the exporter in a “clean” chain, having purchased from a supplier alleged to be a contra-trader. HMRC’s attempts to establish this before the Tribunals in *Livewire Telecom, Olympia Technology* and *Brayfal Ltd* (2008) VAT Decision 20781 were not successful. We think it arguable that the question referred to at paragraph 9 of *Livewire*, namely how the Appellant in that case could have known that the missing traders did not intend to pay the tax, may have been rather more specific than the question shown by *Just Fabulous* and *Honeyfone* to be appropriate in such cases.

40 152. We consider in detail the history of BSG’s involvement in the April 2006 transactions, to determine whether BSG should have known that those transactions were connected to fraudulent evasions within the contra-chains in which Infinity, having been BSG’s supplier within the “clean” chains, subsequently participated. We consider individual details relating to BSG’s involvement, and then examine the overall position. We find it helpful to adopt the approach followed (in a different context) in the direct tax case *Hall (Inspector of Taxes) v Lorimer* [1992] STC 599:

5 “The object of the exercise is to paint a picture from the accumulation of  
detail. The overall effect can only be appreciated by standing back from the  
detailed picture which has been painted, by viewing it from a distance and by  
making an informed, considered, qualitative appreciation of the whole. It is a  
matter of evaluation of the overall effect of the detail, which is not  
necessarily the same as the sum total of the individual details. Not all details  
are of equal weight or importance in any given situation. The details may also  
vary in importance from one situation to another. The process involves  
painting a picture in each individual case.” (Mummery J at 612, approved by  
10 Nolan LJ [1994] STC 23 at 29).

Individual factors may be insufficient in themselves to lead to a conclusion that a  
trader “should have known”, but the accumulation of a whole series of such factors  
may prove to be of such weight that, on the evidence before a Tribunal, this can be the  
only conclusion.

15 153. As already indicated, we consider that information which Mr Peters derived in  
other capacities than as director of BSG is also relevant to the question what he  
should have known when acting on BSG’s behalf.

20 154. Mr Peters had had substantial experience in IT, starting at a company called  
Simtech, continuing at another company, Northamber plc, and then at Kingston  
Technology, moving from account manager to manager for UK and Ireland, heading  
up sales for “value RAM”, a memory product, and eventually taking responsibility for  
sales within Europe. He indicated in evidence that he had had no previous experience  
of mobile phones before the DDR and BSG transactions.

25 155. In his witness statement Mr Peters indicated that he had not been aware of the  
existence of MTIC fraud until the meeting with Mr Munro-Birt, the VAT officer.  
However, this is not consistent with the record of that meeting, which states that Mr  
Peters was already aware of MTIC fraud, and expressed his intention not to be  
involved with it. As Mr Peters had had a relatively senior position in Kingston  
Technology, a substantial IT company dealing in particular with computer memory  
30 chips, we consider it most unlikely that he would have been unaware of the risk of  
becoming involved in MTIC transactions. Further, he indicated in his witness  
statement that his former employers, as well as his own companies, all conducted  
what he described as rigorous due diligence in order to establish the bona fides of  
suppliers and customers and of each transaction undertaken with them. He cannot  
35 have been unaware of the reasons for requiring due diligence, in particular the risk  
that dealings with other parties might turn out to involve factors inappropriate to a  
purely bona fide commercial transaction.

40 156. We take into account the fact that, before April 2006, Mr Peters had had  
experience of mobile phone and similar transactions, initially with DDR and then with  
BSG. We also bear in mind that in period 01/06 BSG had entered into transactions  
with companies not previously mentioned to (or verified through) HMRC. Further,  
the nature of the transactions which BSG was entering into was not retail, but  
wholesale, which inevitably carried a greater degree of risk; it was not buying from  
manufacturers or from authorised distributors. In *Olympia Technology* at paragraph

16 and *Honeyfone* at paragraphs 50 to 53 the respective Tribunals considered the question whether the “reasonable businessman” was either (a) one having the skill and experience of the taxpayer, or (b) one having the general knowledge, skill and experience that might reasonably be expected of a person carrying out the taxpayer’s  
5 functions. In the case of Mr Peters and BSG, we do not consider that this distinction arises, since on Mr Peters’ own evidence he was an experienced businessman who had regularly taken precautions in transactions before April 2006 to establish that transactions were what they seemed to be.

157. Evidence had been provided to Mr Peters in HMRC’s letter dated 3 November  
10 2005 relating to DDR showing that certain of the phones traded by DDR in period 09/05 had previously been traded in the UK and that the goods had passed through businesses which did not pay the VAT due on the transactions, resulting in a substantial loss to the revenue. It is clear from the checks carried out by Mrs Orr that Mr Peters, when dealing with BSG’s due diligence, had carried out similar due  
15 diligence procedures to those previously used for DDR, without attempting to “tighten up” the procedures in order to avoid BSG suffering similar problems to those encountered by DDR.

158. In relation to the first of BSG’s April 2006 transactions, the introductory letter from Jason Davis referred to Universal’s fifteen-year experience in  
20 telecommunications. One of the documents faxed to BSG together with this letter was an official document in German setting out corporate information; this was part of the information sent by BSG to HMRC when seeking verification of Universal. The declaration relating to the setting up of the company gives the date as “03.12.2003”. BSG’s subsequent due diligence exercise was said to have been conducted on its  
25 behalf by Anne Marie Peries, although there is no evidence of her signature on the report or associated documents. We would have found the evidence of this visit more convincing if there had been a record of her involvement, together with copies of bills for travel and any necessary hotel accommodation, and if there had been a specific account rendered by Petrel Management Ltd for carrying out the exercise, possibly re-  
30 charging the travel and other costs; there was no evidence of BSG having made any payment in respect of her visit. In the “Trading Application Form” forming part of BSG’s due diligence documents, the entry for “Date Commenced Trading” was “18/12/3”, ie 18 December 2003. As there were such substantial differences between the information given in Mr Davis’ introductory letter and the latter entry, as well as  
35 Universal’s recorded incorporation date, we would have expected Mr Peters to investigate these discrepancies once he received the due diligence report. There is no evidence that he did conduct any such investigation. (If neither he nor Mrs Peries understood the German language entries, we find it surprising that they did not take steps to obtain some form of translation.)

40 159. Although Mr Peters’ evidence in his witness statement was that he had known Anne Marie Peries “for many years”, it was established in cross-examination that he had met her at the beginning of 2006. His witness statement indicated that BSG’s reason for using her services to carry out the due diligence relating to Universal was that she was doing so for “Petrel Ltd” (which we assume to be Petrel Management  
45 Ltd), the company for which she worked and which was involved in a similar

business to that of BSG. (Mr Peters described Petrel as “her company”; there was no evidence as to the ownership of Petrel.) He had told her that BSG was very concerned to carry out the most thorough due diligence exercise because there might be a large order for goods where BSG had located a potential supplier in England which was also new to it. Given the importance of the potential transactions, we think that Mr Peters was taking a considerable risk in delegating this task to someone whom he had known for approximately three months. He knew that she was the sister-in-law of Darren Peries, whom he had known from the age of 15, but he did not appear to have had a clear commercial basis for relying on her judgment. (We noticed that when Mr Hall referred to her as “Anne-Marie Jones” during his cross-examination of Mr Peters, Mr Peters did not mention that this was incorrect, even though this line of questioning continued for some time.)

160. He had not bought goods from Mrs Peries or her company, Petrel Management Ltd. The reason for his confidence in her was that he trusted her. In cross-examination he was unable to point to any expertise on her part in due diligence. His response was that he trusted her intelligence, and believed that she ran her company quite well. He did not know her company’s turnover, or the identity of her suppliers. He was aware that her company’s input tax claim had been paid, and took that as a sign that her due diligence was of an appropriate standard. As this did not take place until June 2006, after the due diligence which she carried out on BSG’s behalf in relation to Universal, it does not appear to us that he had any “concrete” basis for his view that she was an appropriate person to perform this task.

161. In the “Trading Application Form”, Universal gave two trade references. In cross-examination Mr Peters could not recall obtaining a reference from SDV Luxembourg, and accepted that he had not done so. He indicated that this was one of the jobs which he should have done and had not; his reason was that he had been occupied with a number of other tasks as director. The position was the same in relation to the other trade reference, C Com in Israel. Given the size of the deal entered into between BSG and Universal, it seems to us that anyone operating with normal commercial caution would have sought confirmation of Universal’s status from at least one, if not both, of the trade references given.

162. Various matters relating to Universal which might have been considered important to follow up were not dealt with. For example, in Mrs Peries’ report, Mr Shepherd’s name was incorrectly spelt as “Shepard”, even though his name appeared with the correct spelling in the “Authorised Signatures” section of the forms which she had placed before Universal to be signed as part of BSG’s checking procedures. The reference in the “Directors Details” page to “HMCE draft statement on practice of Joint and Several Liability” was inappropriate for a non-UK party, as was the confirmation in the Directors Details form that Universal would comply with VAT obligations “in accordance with the Value Added Tax Act 1994”. No questions were asked about Universal’s status or standing in relation to the Austrian VAT system; this would have been more relevant to assessing whether Universal was an appropriate company for BSG to do business with. Mrs Peries’ report contained even less detail than that shown in BSG’s own “Due Diligence Visit Report” forms as used by Mr Peters in relation to Infinity and Allimpex. We consider that the due diligence

exercise relating to Universal was inadequate, as was the failure to follow up outstanding questions where matters did not appear to be in satisfactory order. The exercise was not sufficient to protect BSG from the risk of involvement in transactions which might turn out to have undesirable associations.

5 163. In relation to BSG's April 2006 sale to Universal, Mr Peters' evidence was that he phoned Universal and would have been requested by Universal to supply a specific number of Nokia phones. (In giving his evidence, he used the less direct formulation "would have" on a number of occasions, which caused us to find such evidence less persuasive than it otherwise might have been.) The order of events  
10 would be contact on the phone by Universal, Mr Peters would then contact suppliers, and purchase orders would be drawn up at a subsequent stage. By the time that Universal sent its purchase order, Mr Peters already knew that BSG could buy the relevant phones from Infinity. Thus, although BSG's purchase order addressed to Infinity was dated 25 April 2006, Mr Peters' indication was that he had already been  
15 in phone discussions with Infinity "many days" earlier. When Universal sent its purchase order dated 21 April 2006, Mr Peters had already established that he could buy the required phones from Infinity.

164. Certain features of the purchase order appear odd; it was headed "Bill To", followed by BSG's name, address and VAT number. Against the heading "Terms"  
20 were the words: "Due On Receipt". At the foot, it carried the note: "All goods remain the property of Universal Handels-GmbH until paid for in full". None of these terms is suited to a purchase order; their use would be appropriate in an invoice. HMRC expressed concern that the purchase order was worded in English. Although possibly unusual, we are not convinced that this is necessarily inappropriate in relation to an  
25 international transaction between an Austrian company with one or more English or English-speaking directors and BSG, a UK company. However, our view of the purchase order is that it does not appear to be in a form suitable to a normal commercial transaction of purchase of goods. There is no evidence that Mr Peters raised any query about the form of this purchase order.

30 165. In relation to the first of BSG's April 2006 transactions, Mr Peters had been warned in relation to DDR's transactions by Mrs Orr's letter dated 3 November 2005 that all information provided by an existing or potential supplier should be viewed with caution. As stated above, knowledge of this can be attributed to BSG through Mr Peters. In the light of that attribution, we review the steps taken in relation to BSG's  
35 supplier, Infinity.

166. Darren Peries had recommended that Mr Peters should contact Mr Peries' sister-in-law Maxine Jones for information on suppliers of mobile phones. Mr Peters did not take out trade references or make a credit check on Maxine Jones' company, Xicom Systems Ltd. When he met Maxine Jones at Xicom Systems Ltd, he thought  
40 that she was "a very dynamic lady; I was quite impressed with her". He had not discussed mobile phone fraud with her. We accept that he was not aware at that stage that, according to HMRC's records, the two Xicom companies had been involved in MTIC transactions.

167. At the time when BSG made its seven-day trial investment in Xicom, Mr Peters was already aware in relation to DDR that HMRC had concerns in relation to transactions covered in DDR's 09/05 return. Given his business experience, and in particular his close knowledge and use of due diligence procedures, we would have  
5 expected Mr Peters to make more enquiries concerning Xicom before becoming involved with that company, and to have kept records of those enquiries. We think that he should have been more guarded in his dealings with Xicom.

168. There is no record of the process of arriving at BSG's decision to make the investment and enter into the seven-day trial of Xicom's exclusive broker services.  
10 We consider the agreement to be oddly constructed. It refers to "Xicom Systems Ltd and its instructed companies"; the latter expression is not defined and Mr Peters was unable to explain it. The agreement concentrates on the activities to be carried out by Xicom in its role as BSG's "exclusive suppliers and brokers for all transactions to be carried out over this seven day period". The wording of the agreement would lead the  
15 reader to assume that the principal purpose of the agreement was for Xicom to provide BSG with items ("exclusive suppliers") and to introduce BSG to other parties (ie with Xicom as "brokers"). The only part of the agreement referring to money being produced by BSG is the penultimate paragraph:

20 "Thank you for choosing Xicom Systems Ltd. I look forward to receiving your initial investment and working with you."

There is no record of the terms of the investment; in particular the agreement does not specify the amount to be "invested" or the return on that "investment".

169. In cross-examination Mr Peters explained that BSG's return had been just over one per cent. (The actual rate of return works out as 1.166 per cent.) DDR had already  
25 been involved in a transaction in which it had bought mobile phones from Xicom. Mr Peters characterised the transaction as one of investment, and confirmed that it amounted to a loan of the £136,000 for the period; BSG was not buying anything or selling anything. He said that Xicom was not setting up trades for BSG. His understanding was that Xicom had used the funds to "purchase product". His  
30 explanation for the timing was that there had been a discussion before the event, and that the documentation had followed later. (This may explain why he was prepared to enter into what appears to us to be a very peculiar agreement, which does not appear to accord with the terms as he understood them; it may also be the explanation for the timing, with the repayment being made before the written agreement had been entered  
35 into.)

170. Mr Peters confirmed that he had been given the name of Infinity as a possible supplier by Xicom; there had been a separate commission payment to Xicom for the introduction, but under a separate agreement with Xicom, which was not in writing. (We have already referred to the invoice for this and BSG's repayment claim for the  
40 period 07/06.) The commission was calculated as "a per cent of my profit". It was not his practice to show Xicom a copy of his invoices; as parties, they trusted each other enough to be satisfied that the commission was properly calculated. Neither this, nor the seven-day agreement, appears to us to be an arrangement of a type to which parties acting commercially would be prepared to commit themselves.

171. Mr Peters' evidence (despite the involvement with Xicom, including the commission arrangement, and the mutual trust between the two companies) was that he did not view Xicom's recommendation of Infinity as all that important as part of his due diligence; it played a part, as he trusted Xicom Systems. However, he relied  
5 on his due diligence on Infinity and on what he had seen. After the event, Vantis Tax initially gave the explanation that Mr Peters had purchased introductions from a trusted company to a company with which it could deal, due to the risks associated with this trade sector, and Xicom Systems had introduced BSG to Infinity. However, in a letter written about a month later, Vantis Tax stated that Xicom Systems had not  
10 encouraged or recommended Infinity to BSG and that as a result there was no documentation relating to this. In our view, Mr Peters must have regarded BSG as liable to make a payment to Xicom Systems in recognition of what the latter had done, and therefore he must have attached some significance to Xicom's introduction of Infinity as a supplier. However, as confirmed by Mrs Orr, there was no information  
15 in BSG's due diligence folder relating to Infinity to indicate Xicom's trade reference for Infinity.

172. Although the copy of Infinity's letter of introduction included in the evidence carried the fax date "Jun-2006-Tue", we conclude that this was paperwork following the event, and that the reason for Mr Peters initially contacting Infinity was Xicom's  
20 introduction. Thus he did rely on Xicom for this purpose, even if his intention was to take his own steps to satisfy himself as to Infinity's standing.

173. Based on the fax details shown at the foot of each document, the details of Infinity's incorporation, VAT registration and corporate and bank details were provided to BSG on 24 April 2006. Although Mr Peters indicated in evidence that the  
25 fax details were not reliable because fax machines might be switched off and so lose time and date settings, this was the day before the date on which he sent the request to HMRC for verification of Infinity's VAT details. However, the dates shown on all the invoices from Infinity to BSG for the supply of the total of 10550 Nokia 8800 phones was 21 April, four days before that verification request.

174. BSG's purchase order was dated 25 April, the same day as the request to  
30 HMRC for verification of Infinity's VAT details. Mr Peters' evidence was that he dealt with the purchase order to Infinity "after the event", ie having spoken to Infinity by phone, and catching up on his paperwork when he had time. This demonstrates to us that he intended to go ahead with the deal without waiting for any of the  
35 assurances, by way of verification or "due diligence", as to Infinity's standing.

175. BSG's due diligence forms relating to Infinity carried the fax date 27 April 2006, and after "To:" (for the addressee's fax number) carried the fax number shown on Infinity's letterhead. We conclude that these forms were sent to Infinity on that  
40 date. This conclusion is supported by the dates shown against "Authorised Signatures"; each signatory, "Simon", "Sarj" and "Veronica" (with no second names shown under details for "Name") gave the date of signature as 27 April. The Trading Application Form indicated that Infinity had been trading for two years and had been at that address for two years. We note that the Certificate of Incorporation provided on 24 April shows Infinity's incorporation date as 9 June 2004. There is no evidence

that Mr Peters questioned the accuracy of those periods in the Trading Application Form.

176. Under “Directors Details”, the only name given was “Palkesh Thakor”. However, Mr Peters assumed that he was dealing with Simon Thakor. (We comment further on this below.) Although Palkesh Thakor’s name was given as the director, he was not shown as an “Authorised Signature” in the Trading Application Form, in which the only names (without surnames printed) were “Simon”, “Sarj” and “Veronica”, followed in each case by (largely illegible) signatures. Under “Company Practice” there was the following question:

10                                   “Have you ever procured goods from a supplier, or to the best of your knowledge been involved in a supply chain which included a missing trader.”

The person who had completed the form had ticked “Yes”, and then crossed out the tick and ticked “No”. Again, there was no evidence that Mr Peters had followed this up.

15   177. The Directors Statement was signed by Palkesh Thakor, and again dated 27 April 2006. The form stated:

                                  “Please note the application form must be completed in full to commence any trading.”

We interpret this as referring to the Trading Application Form, which we conclude was also completed on 27 April 2006. If it was also intended to refer to the remaining due diligence forms, various details were missing from some pages of those forms. Infinity’s e-mail address and website were not shown (although these details did appear on the documentation faxed to BSG on 24 April). In answer to the question “Do you own or lease your Premises?” there was a tick for “Yes” but no indication which of these applied. Under “Bank details”, the name was shown as “First Curacao Int. Bank”, and under “Address” the only details given were “Netherlands Antilles”; the details for Post Code”, “Account No” and “Sort Code” were not completed. (We accept that more comprehensive bank details had been faxed by Infinity on 24 April.) The name of Infinity’s accountant was given as Mr Bathia at Infinity; there was no reference to any external accountants. Details of Infinity’s local VAT Office and VAT Officer’s name were not inserted, and no indication given whether Infinity’s VAT returns were quarterly or monthly.

178. At the end of the Directors Statement form, it stated: “Please send a copy of utility bill, passport and driving license [*sic*] to the above address”. The form did not carry BSG’s address. A copy of the details page from Palkesh Thakor’s passport was provided, shown as addressed to “Michael”, from “Sarj (Infinity Holdings)”. No date is shown on this copy. None of these other items was included in the evidence. No explanation was given in evidence for the faxing of the completed forms to Infinity’s number.

40   179. Mr Peters’ Due Diligence Visit Report on Infinity did not specify on which day in April 2006 he had made his visit. In oral evidence he said that he had visited Infinity Holdings’ premises before 27 April 2006. In cross-examination he indicated

180. Mr Peters recorded the name of the director as Simon Thakor; the other person present at the meeting was Sarj Cheema. Under “Documents attached” the entries were “Photos taken” and “Sarj Cheema passport copy”. No copy of the latter document was included in the evidence; as the copy of the details page from Palkesh Thakor’s passport was included together with photocopies of the photographs of Infinity’s offices, we assume that Mr Peters was referring to this copy and not to some other document. Mr Peters believed that he was dealing with Simon Thakor, although this was not the name on the passport copy; there is no evidence that Mr Peters checked the appearance of the person whom he had met against the passport picture. On a visit by Mr Devine to Infinity’s premises on 4 April 2006, Simon Thakor had informed him that he was prevented by a previous insolvency from holding a directorship and had resigned as a director of Infinity in September 2004. During the same visit, Palkesh Thakor, who had been appointed as a director of Infinity in September 2004, informed Mr Devine that he had no involvement in the day to day running of Infinity or the related companies and was employed full time by the Alliance & Leicester Bank. Mr Devine was aware that there were various suspicions concerning the previous activities of Simon Thakor, although the staying of a criminal trial had resulted in investigations being curtailed. Mr Peters does not appear to have made any enquiries into the differences between the names, thus leaving himself open to involvement with an individual whose activities were under review by HMRC before BSG’s April 2006 transactions.

181. Under “Company Premises”, Mr Peters reported:

“Company premises are located in serviced offices in Leicester and are satisfactory for the type of business they carry out.

They have been at current premises for 2 ½ years

The equipment they are using is sufficient for sales.

The company was lively and well organised in all departments.

Photos were taken of the staff and offices.”

5 Although there appears to be inconsistency between the period of 2 ½ years and the date of Infinity’s incorporation, the report on Company Personnel refers to the other two companies in the group. Infinity Distribution Ltd is shown as having been established for three years, and Infinity for two.

10 182. In the Company Personnel section of the report, one of the questions relating to personnel was: “How good is there [*sic*] knowledge of the trade? This should include technical knowledge of the products they are likely to sell to you or buy from you.” The recorded answer was: “They have a good industry knowledge and understanding of the products [*sic*] technical abilities.” Although there were stated to be four staff in this department, only three names were noted, ie “Simon Thakor: CEO; Sarj Cheema: Trader; Veronica: Trader”.

183. Under “Business Practices”, Mr Peters listed Infinity’s safeguards:

15 “Redhill Verification  
EU VAT checker. Com  
Minimum of 1 ½ years trading relationship with there [*sic*] suppliers  
Inspect all stock which includes physical check  
All stock is brand new”

20 184. In the conclusion section of the report, Mr Peters made the following comments on Infinity (before stating his final conclusion set out earlier in this decision):

25 Infinity Holdings is a well maintained organisation, with adequate staff and operation facilities to carry out the running of day to day business.  
They ensure that all suppliers and stock are adequately checked before any deals are carried out.”

Our view of Mr Peters’ final conclusion on Infinity is that, given the inadequacy and incompleteness of the review and checking exercises which he had sought to perform, he could not possibly have been “satisfied with every aspect of the company”.

30 185. In an undated letter from Infinity which appears (in the version included in the core bundle) to be marked “Copy”, and carries the fax date 27 April 2006 but does not show details of the addressee, “Sarj” provided the following confirmation to “Dear Micheal” [*sic*]:

35 “All the stock bought for our deal is imported stock. No goods where [*sic*] bought in the UK. The goods are all sound and secure as the seals are not broken.”

The letter has no handwritten signature, merely the typed name “Sarj”, and does not refer to a specific deal. On the basis that the fax date shown is 27 April, we conclude that it related to BSG’s first April 2006 deal. (The copy exhibited to Mrs Orr’s statement was faxed on 10 July 2006 to an “0207” number; as by this stage matters

were under review by HMRC, we assume that the other version is the contemporaneous one.)

186. Our view of Mr Peters' due diligence exercise relating to Infinity is that, as submitted by Mr Hall, it was not rigorous, copious or comprehensive. We do not think that it was effective. It was certainly not to the standard which might have been expected if Mr Peters had commissioned an entirely independent person to carry out the exercise for a fee. His due diligence was inadequate and carried out much too late to be of any value in relation to the substantial transaction involving the purchase of 10,550 Nokia 8800 phones, whether this took place on 21 April 2006 as evidenced by Infinity's invoices addressed to BSG and Universal's corresponding purchase order, or on 25 April as shown by the date of BSG's purchase order addressed to Infinity. In oral evidence Mr Peters explained that he tended to deal with paperwork after the event; he had spoken to Infinity and told them exactly what he was looking for, and he had "cut" the purchase order when he had had a moment to go through his paperwork. This implies that he was ready even earlier than the date of BSG's purchase order to do the deal with Infinity, ie before a number of matters relating to Infinity had been resolved. In the same way, the documents indicate that BSG was ready to accept the order from Universal and commit itself to find the necessary stock before the due diligence process relating to the probable supplier, Infinity, had been completed.

187. All that is shown by the photographs taken of Infinity's premises is that there were persons present in the offices and that those offices did bear the names of Infinity and other companies associated with it (including an entity not mentioned elsewhere named "Infinity Communication" and a sign referring to "Infinity Group").

188. Mr Peters' request to HMRC's Redhill office for verification of Infinity's VAT status was dated 25 April 2006 and recorded as being sent at 10.55 a.m., four days after the date of Infinity's invoices rendered against BSG; the "verbal verification" was shown to have been received on 27 April, two days after the date of BSG's own purchase order sent to Infinity. The request had contained the comment: "Company details are to follow." BSG had sent Infinity a "Supplier Declaration" to complete; it stated: "Unless this form is completed we are unable to carry out this transaction." This was signed by "S Cheema" with a signature date of "25/04/06". The fax transmission date may be partially missing as a result of photocopying; it is shown as "5-Apr-2006-Tue 11.30". As 25 April 2006 was a Tuesday, we find that the Supplier Declaration was sent to BSG on that date, after Infinity's invoices dated 21 April. BSG therefore waived one of its own conditions of trade by entering into the commitment with Infinity, which by Mr Peters' admission had been entered into by phone before BSG's purchase order to Infinity had been produced. The time of BSG's receipt of the completed Supplier Declaration was also 35 minutes after Mr Peters' fax to HMRC's Redhill office requesting verification of Infinity's VAT status.

189. Various other matters relating to BSG's first April 2006 transaction give rise to concern. The inspection by A1 Inspections was said to be carried out on 28 April, the date of their report and invoices (despite the Courier Plus pre-alert showing arrival date for the goods with Universal as 28 April at an estimated time of 21.00). If A1

Inspections took photographs, as indicated in one of their two invoices, where are those photographs? Mr Peters' evidence was that he had taken photographs at the premises of Courier Plus; it is not clear to us that it would have assisted matters to have two sets of photographs. The "creditsafe" report obtained by Mr Peters in  
5 relation to Infinity was dated 8 June 2006, far too late to assist in BSG's decision whether to trade with Infinity; further, it showed that Infinity had "No Rating – Financial Statements not filed / too old", and that it had "No credit limit". It showed that Simon Thakor (under the name "abahiasinh Simonthakor") was recorded as having left the Board in October 2004, and that the current directors were Rahkee  
10 Surani Thakor and Pulkesh [*sic*] Kumar Thakor. Thus there was no financial information on which BSG could have based a decision to trade with Infinity, even if the report had been obtained in advance of BSG's April 2006 deals rather than after them. In the same way, Mr Peters wrote on 12 June 2006 to an individual named "Raj" with questions following Infinity's naming of his company as a trade reference.  
15 Mr Peters' evidence, after first assuming this to be one of the sales personnel at Infinity, was that he believed this to be someone at Future Communications. As the latter was named in the Trade Reference Form carrying the fax date 27 April, why would Mr Peters have decided in June to follow up a trade reference after, rather than before, completion of deals in April?

20 190. In relation to BSG's second April 2006 deal, the starting point was said to be the approach from Allimpex in its "circular" letter dated 2 March 2006. Mr Peters confirmed in oral evidence that this was the first contact from Allimpex; it was a "cold caller". However, he did comment that DDR had done a deal with Allimpex before BSG's deal in April 2006, although he was unable to indicate exactly when  
25 DDR's deal had been carried out. The documents in German relating to Allimpex were faxed on 2 March 2006 from an "0208" number (to a fax number 08704424497, which was not BSG's fax number); Mr Peters was unable to explain this, and confirmed that as far as he was aware, Allimpex did not have any form of establishment in the UK.

30 191. The Allimpex introduction letter was oddly worded, and we think that it should have raised suspicions in Mr Peters' mind, particularly as the writer misspelt the name of his own company; the spelling does not match that in the letterhead. We find it particularly odd that, immediately on having received this fax at 14.31 on 2  
35 March, Mr Peters was prepared, apparently without further enquiry, to commit himself to going out to Berlin the following day, hardly giving him time to make the necessary travel arrangements. (There was no evidence concerning the arrangements made with Allimpex for the visit.) His visit to Allimpex was on 3 March, but he did not approach HMRC's Redhill office for VAT verification of Allimpex until 13  
40 March. We find it hard to understand why he considered it so urgent to go to the trouble and expense of visiting Allimpex before he had any way of knowing whether Allimpex's VAT status might be "safe" enough for BSG (or, for that matter, DDR) to enter into a deal with it.

192. BSG's due diligence forms relating to Allimpex were not dealt with in  
45 advance of the visit, but very significantly later. Allimpex's fax details show that BSG's other forms required before commencement of trading were completed and

sent in “June 2006”; the Directors Statement was signed and dated 21 June 2006. The outward fax details showing the destination as Allimpex’s German fax number (with the code beginning “0049”) show a transmission date of 19 June, which must mean that BSG did not send the forms to Allimpex until that date.

5 193. In the report of his visit to Allimpex on 3 March 2006 Mr Peters recorded the company as having been at the premises since 2001, although in the Trading Application Form (carrying the fax date “Jun 2006”) it was shown as having commenced trading on 10 February 2003.

10 194. In the report, Mr Peters states the director’s name as “Burhan Amar”, although the introduction letter had given the name “Mr B. Amer”. The answers to the questions raised in the visit report forms are in almost exactly the same terms as those in the visit report forms relating to Infinity, except for “safeguards” under “Business Practices”. The “Conclusion” is virtually identical, subject to the statement that BSG was awaiting verification from HM Customs at Redhill. We accept Mr Hall’s  
15 submission that the approach to these documents was “formulaic”.

195. Our comments on Mr Peters’ photographs taken at Allimpex are similar to those above relating to the photographs of Infinity’s offices, except that in the case of Allimpex, the offices have no people in them; the two individuals pictured are shown in an unidentified room, and then next to the brass plate at the entrance to the offices.

20 196. When the due diligence forms were eventually received in June 2006, long after the deal between BSG and Allimpex, the last question on the first page of the Trading Application Form had not been completed. The question was: “Do you own or lease your premises?” This was followed by spaces to tick either “Yes” or “No”. We regard this question as inadequate, if the intention is to establish whether the  
25 trader in question owns the premises, or has them on lease, or occupies them on some other basis. Mr Peters’ oral evidence was that he wanted to know this; if a trader owned its premises, this was better than leasing, although he would not necessarily disregard someone because they leased their premises. One of the trade references given was Boston Freight; as that company was not involved in actually dealing with  
30 mobile phones, this reference had minimal value, and Mr Peters confirmed that he never contacted Boston Freight. The other trade reference given was Deluni Mobile Ltd. Mr Peters’ evidence was that he “would have” contacted Deluni, but had not received a reply. The request for “Authorised Signatures” was not completed. The Directors Statement completed and signed by Burhan Amer was dated “21/06/2006”.

35 197. Various features of these forms appear unsatisfactory, particularly as Mr Peters did not do anything to follow them up. However, as these due diligence forms were dealt with so far after the event, they can have had no influence on BSG’s decision to proceed with the deal with Allimpex; BSG’s decision to open trade is clear from the “Due Diligence Report Form” dealt with at Mr Peters’ visit to Allimpex.  
40 (We should mention that in cross-examination Mr Peters stated that he believed that he had received a Trading Application Form from Allimpex before this transaction, as he had two companies; he indicated that he would check this, but gave no further evidence on the point. In the absence of such further evidence, we have to assume that

the due diligence forms were dealt with long after the April 2006 deal between Allimpex and BSG.)

198. The purchase order from Allimpex was dated 28 April 2006. BSG's invoice to Allimpex was also dated 28 April, as were BSG's four purchase orders addressed to Infinity. The four invoices from Infinity to BSG were dated 27 April, ie before the date of the Allimpex purchase order to BSG and also before BSG's corresponding purchase orders; we agree with Mrs Orr that this is not what would be expected in normal commercial practice. (This was similar to the position in the first deal between Infinity and BSG.) Infinity's "Supplier Declaration" was signed by "P Hodgson" with a signature date of 27 April; however, the copy in evidence carried a fax date of "-May-2006-Tue 10.30 From: Infinity Group", showing Infinity's fax number. (The outward fax date, which we find to be the date when the document was faxed to Infinity, was 28 April 2006 at 15.23.) The first Tuesday in May 2006 was 2 May, so the document could not have been faxed back by Infinity until that date at the earliest.

199. We assume that the incorrect date ("08-04-2006") on the "Ship and Hold" note addressed to Courier Plus was simply an error on Mr Peters' part. However, the error demonstrates that he did not take care in dealing with his paperwork. He does not appear to have questioned the form of the Courier Plus "Pre-alert" dated 9 May 2006, naming "Your Customer" as "Universal Handels Gmbh" and not "Allimpex Handels GmbH" as it should have been, despite the inconsistency between this document and the invoice dated 10 May 2006 from Courier Plus giving the correct name. Nor did he question the details of Boston Freight sent by Allimpex on a fax dated 28 April 2006 but carrying the transmission date "2-May-2006" (not "2-Mai-2006" as might have been expected on a fax from Germany), which misspelt the address for Boston Freight.

200. In his earlier dealings with HMRC, Mr Peters had given indications of BSG's expected activities. What he subsequently told the New Business Team was not consistent with the previous information about BSG's activities. He revealed the one-off sale to Denmark. In the light of the shift in BSG's activities to telecommunications, we agree with Mrs Orr that it was odd for BSG to request the public notices relating to special treatments for small businesses, as the increase in turnover would prevent BSG from participating in any of these schemes. The four companies which Mr Peters told the HMRC officer at the meeting in August 2005 that he had verified with the Redhill office were established after that meeting to be what HMRC described as "known MTIC traders". This demonstrates that merely carrying through such a verification process was not sufficient to protect BSG from the risk of involvement in transactions connected with MTIC fraud.

201. When Mr Peters wrote to provide evidence in support of BSG's application for monthly returns, this information had not been mentioned in his meeting with the HMRC officer the previous week; at that meeting he had not appeared particularly aware of trading opportunities within and outside the EU. This raises the question whether he was providing the officers with sufficiently full information at the time when he was seeking to establish BSG's telecommunications trade, having regard to his general experience in the IT sector.

202. Once Mrs Orr was involved, we accept her reasons for her eventual concern that third parties, namely Advanced Transport and A1 Inspections, had had to correct what were said to be clerical errors. These corrections did raise the question of the credibility of the documentation to which they related. We do not find the corrections particularly convincing. They were made in various documents dated 25 August 2006. The names under which the goods were “signed for” appear to us to be Anglo-Saxon rather than continental European in nature. The timings of the sailings cannot easily be resolved with the times at which the goods were said to be signed for; in particular, one is shown as signed for at 20.15, but the vehicle did not travel until the 20.25 sailing. In another case, the goods were signed for at 18.00, but the ferry ticket showed the sailing time as 19.35. We place little value on these corrections; the very need for them shows that the relevant transactions were not properly documented at the time when they were said to have taken place.

203. Mrs Orr was also concerned that the corrections made by Advance Transport Ltd cast doubt on the authenticity of the transactions themselves. Although we understand the latter concern, we feel that significantly more evidence would be needed to establish that the transactions had not taken place; in the absence of sufficient evidence to this effect, we have to work on the assumption that they did take place. Similarly, although we accept that Mrs Orr eventually had reason to have severe doubts in relation to the authenticity of the transactions conducted by BSG in its VAT period 04/06, more evidence would be required for us to make a finding that BSG’s transactions were not genuine. However, Mrs Orr’s views, suspicions, and the processes by which she arrived at them are not determinative of the primary question whether BSG should have known that by its purchases it was participating in transactions connected with the fraudulent evasion of VAT.

204. For each of the two April 2006 deals, photographs were taken of goods said to be awaiting transit. Despite the attempts to show the dates by including on some of the photographs a copy of the front page of a newspaper carrying the appropriate date, we do not consider that these photographs do much to verify that the goods in question are those specified in the lists of IMEI numbers provided. Where numbers appear on the sides of boxes, the resolution of the photograph is not sufficient for those numbers to be readable. All that the date on a newspaper can establish is that the photograph could not have been taken *before* that date. Only a few photographs show actual phones taken out of their boxes. We regard it as inadequate to have a photograph showing a box which has been opened but not inspected; there is no proof that the contents have been disturbed. In some photographs of a number of boxes it is possible to see what type of phone is being shown, but there is no way of verifying what quantity of phones is in the picture. In various cases the photographs show pallets of what may be a number of boxes covered by shrink wrapping, with a paper sticker showing a phone serial number (such as “8800”) with an “x” multiplication sign and a quantity. Without removing the shrink wrapping, it would be impossible to verify these details. We do not consider these photographs of much weight in verifying the existence of the goods, nor do we consider them to constitute enough of a commercial check to satisfy Mr Peters of this. Further, there is nothing to link the photographs to any particular location. Mr Peters may well have believed that he was doing more than other traders might have done in keeping some form of photographic

record of the packages, so showing that he had taken an extra step in carrying out his investigations, but we do not feel that the photographs add anything to the process of demonstrating that the particular goods existed, at a particular place, and on a particular date.

5 205. If the only person who took photographs was Mr Peters, this calls into  
question the credibility of the invoice from A1 Inspections referring to five  
photographs in respect of the first deal, as there was no separate set of five  
photographs provided as part of the evidence. The other doubt raised by the use of  
10 photographs is the possibility of manipulation; unless the person who took them can  
show that the originals have not been altered in any way, the photographs are of very  
doubtful value in terms of proving anything. Mr Peters might well have been satisfied  
that his own photographs had not been manipulated, but if A1 Inspections did provide  
photographs, he would have needed to check that these had not been altered from  
their original state.

15 206. Mrs Orr pointed out in her evidence that the types of checks shown by DDR's  
due diligence documents for period 09/05 as found in its VAT folder were the same as  
those carried out by BSG in its period 04/06. In her view, this showed that although  
Mr Peters had been informed that the due diligence had not been enough to prevent  
20 DDR from being involved in transaction chains which commenced with MTIC fraud,  
he had not readdressed or improved his due diligence procedures in order to try to  
prevent any further involvement with MTIC fraud. We accept that Mr Peters was  
aware, from DDR's experience in relation to period 09/05, that his existing  
procedures might not be enough to protect BSG from such involvement.

25 207. In relation to the various forms and checklists which Mr Peters completed (in  
whole or in part), such as the "Check list for Exporters Due Diligence on Shipment"  
and the "Check list for Exporters VAT Information", our view is that this was merely  
a "box-ticking exercise". We question how much it covered or achieved, and whether  
it constituted effective due diligence. It is not clear to us what was seen as the purpose  
30 of producing these pieces of paper; was it to demonstrate to other parties, such as  
HMRC, that various steps had been taken to check aspects of transactions, or was it to  
satisfy Mr Peters, as the director of BSG, that he was protecting BSG from the risks of  
being drawn into inappropriate transactions?

35 208. Our general view in relation to BSG's various checking procedures, including  
due diligence, is that Mr Peters cannot have regarded them as essential to complete in  
full before committing BSG to the two April deal chains in which it participated. We  
consider that there was a degree of inevitability to BSG's involvement in these chains,  
and that the results of these procedures cannot have paid any significant part in BSG's  
decision to enter into the commitments with Universal, Allimpex and Infinity. We  
think it material that in a previous period, 01/06, BSG had entered into transactions  
40 with Vehement Solutions Ltd and Unique Distribution Ltd, both being parties which it  
had not verified with HMRC. We also think it material that when BSG had been  
notified that one of these customers had cancelled the third of these 01/06  
transactions, BSG was apparently not left with the significant commercial problem of  
having to dispose of unsold stock, but had instead been able to cancel the remaining

linked elements of the transaction so as to be able to notify HMRC that the relevant part of that input tax claim was withdrawn. This raises questions in our minds as to the commerciality of the arrangements, as the loss of a sale would normally put a trader in a difficult position in relation to the trader's own supplier. The apparent ease with which BSG's corresponding purchase could be cancelled suggests that there may have been some form of "orchestration" in the arrangement of the deal chain. If in relation to that earlier deal it had proved easy for BSG to cancel all the elements of a transaction, this may have led Mr Peters to consider in relation to the two April deals that it was commercially acceptable to undertake the risk of committing to transactions without first being satisfied as to every element of the checking procedures, despite the substantial exposures involved in such high value transactions.

209. In this connection, it is not clear whether Mr Peters appreciated that the insurance for the first deal did not cover BSG's profit on the deal, but merely its cost, so that BSG was taking the risk on the difference of £263,750, and that there was also a £25,000 deductible for each and every loss. In the absence of any records of the terms governing the adopted arrangement of payment by instalments, it is not clear whether the transfer of title to the phones in BSG's first deal was delayed until the final payment from Universal to BSG credited to BSG's bank account on 18 May 2006 (although this is likely, as the goods were being held on a "Ship and Hold" basis); whether or not it was, there is a doubt whether the insurance cover was adequate, as the first payment into BSG's bank account was not made until 9 May 2006, more than four days after the cover started. Mr Peters confirmed in evidence that he had not obtained written confirmation that Boston Freight had adequate insurance, because he relied on Courier Plus, the freight forwarder; he appeared to have assumed that the goods would be covered under BSG's policy while they were in Belgium. We find it lacking in commerciality that there was no insurance documentation issued to BSG in advance of the shipment of the goods for this first deal; at minimum, a trader would normally expect to have some form of cover note before going ahead with a transaction. The only record was the invoice, which was dated 10 May, well after the date of shipment. The insurance document itself was dated 26 June, a considerable time after the events covered. Given the value of the goods, we cannot understand why Mr Peters did not, as a matter of ordinary commercial prudence, make further enquiries to check whether the goods would be fully covered by insurance until the risk and title passed to Universal.

210. In relation to the second deal, we doubt (despite the reference to "HIA" in the "Check List for Exporters VAT Information" Form) whether there was any insurance. There was also a poorly worded confirmation letter from HIA dated 1 May 2006, referring to a "Mater Policy Number" ["Mater" should have been "Master"]; the effective date was 1 May 2006 and the next renewal date was 30 April 2007. (It emerged in the course of cross-examination of Mr Peters that the insurance documentation before us was not fully organised into its proper order.) As indicated above, the proposed joint annual policy had not gone ahead. We do not understand how this would have worked, as Mr Peters indicated that the respective proposed joint policyholders did not know what trades the others were carrying out; he said that Blue Sphere Concepts did not know that BSG was selling to Universal and Allimpex. Another document dated 5 June 2006, naming only BSG as policyholder, is expressed

to be related to the Master Policy, and to be for the same period; the policy numbers are exactly the same. We therefore find that this was not separate from the proposed joint policy, so that it did not become effective. There was no evidence before us of any replacement policy. If there was no policy covering the risks involved in the second deal, BSG's exposure was significantly greater even than in relation to the first.

211. In relation to the carriage of goods, we question whether it would be normal commercial practice not to add any charges incurred for the transmission of goods to a purchaser to the invoice price for those goods. Infinity did not render any such charges against BSG, and BSG did not do so against Universal or Allimpex. We find it odd and inconsistent that Courier Plus made a charge for carriage in respect of the first deal, but did not do so in respect of the second. Coupled with the absence of insurance for the second deal, it does call into question whether enough was done to verify the existence of the goods for that transaction. For both deals, the inspection by A1 Inspections came well after the stage when BSG had become committed both to buy the goods from Infinity and to sell to, respectively, Universal and Allimpex; thus the inspection reports can have had no influence on BSG's decision to become committed to both deals. We are not satisfied that there was adequate "out of the box" inspection of the goods; in relation to the supply by Infinity, the letter from "Sarj" indicated that the seals were not broken, and, as we have already indicated, the photographic records did not do much to establish that the packaging actually contained the goods that were said to be contained within it. The timing of the inspection reports gave no time to check that the specifications of the goods matched the specifications in the orders from BSG's two customers.

212. It appears that Mr Peters saw no reason to ask why both Universal and Allimpex were requesting shipment of the goods to Boston Freight in Belgium, rather than to their respective addresses in Austria and Germany. Although of itself this may not have been a reason to raise substantial suspicions in Mr Peters' mind, because this may simply have been a matter of convenience for those companies, it should have prompted him to ask the question whether Universal and Allimpex were buying for their own account or were instead looking to sell the goods on; if he had obtained the latter answer, he should then have investigated further to ensure that BSG was not at risk of being drawn into a transaction involving MTIC fraud. This had been said to be the underlying objective of his checking and "due diligence" procedures.

213. In relation to such procedures, we would comment that the "due diligence" as referred to in these MTIC cases is nowhere near the standards of due diligence applied by, for example, accountants and lawyers when reviewing commercial operations or transactions on behalf of clients. However, even if the standards are somewhat less rigorous, they need to be adhered to if a trader is to protect itself from the adverse VAT consequences arising from a finding that the trader should have known that, by its purchase, it was participating in a transaction connected with fraudulent evasion of VAT.

214. As indicated above, we think it necessary to consider events which occurred after BSG had committed itself to the sales to Universal and Allimpex respectively.

We accept that once BSG had bound itself to carry out these transactions, its ability to influence or even to become aware of what happened to the goods afterwards would have been limited. However, those subsequent events do give rise to some suspicion that the arrangements relating to the goods were not as they may outwardly have appeared to be, thus further calling into question the quality and extent of BSG's checking and due diligence procedures.

215. We think that there is considerable reason to doubt whether the goods allegedly sent to Boston Freight for Allimpex were actually delivered to Boston Freight. The detailed vehicle movement report for vehicle RE54 BDZ, of which one of the drivers was Martin Thompson, showed that it was driven at speeds of up to 89 mph on the M25 shortly before 23.00 on 9 May 2006. After leaving the M25 and travelling on "A" roads, it rejoined the M25 and was driven at speeds over 70 mph and up to 93 mph. It was driven at similar high speeds on the M26 and M20. After the ferry journey to Ostend, it achieved speeds of up to 83 mph. It was carrying four pallets with a total weight of 1,039 kg. This raises in our minds the question as to how safely it would be possible to drive a "Sprinter" vehicle at these speeds with such a load. The vehicle was recorded as stopping at Koksijde Straat, north west of Veurne, at 03.16. (As confirmed in evidence, these were UK rather than European timings.) It remained there for just over four hours, and was started again at 07.22, the engine being idled for three minutes and then stopped again. After 30 minutes, it was restarted and began the journey away from Koksijde Straat. These timings are not consistent with the e-mail reports subsequently provided by Advanced Transport Ltd indicating that there had been no waiting time.

216. We are not convinced that the vehicle was moved in such a way as to enable it to be unloaded. Mr Thompson's evidence was that the premises of Boston Freight in Koksijde Straat and its former premises were both warehouse-type buildings. In weighing this against the evidence of the investigations carried out by the Belgian authorities that the building was a small farm outbuilding, we find the latter evidence more persuasive. Mr Thompson described in general terms the practice to be adopted when arriving outside a locked warehouse at 3 am; the vehicles would be parked close together, probably near the door, and the drivers would remain in the vehicles, relying on the security devices and the satellite locking doors. Mr Thompson's evidence relating to the offloading of the vehicles was couched in the form "would have"; for the reasons already given, we do not find evidence in this form persuasive. The CMR document did not have a seal number on it; his explanation was that the original would have been signed and sent back to Courier Plus. We are not convinced that goods were dealt with as they were said to be.

217. The evidence relating to the other vehicle was that it arrived at 04.58, stood for 2 hours 57 minutes, then started and travelled away from Veurne. The records show that the speeds were significantly slower than those of the other vehicle.

218. It is not clear what happened to the goods. The HMRC OASIS check showed that these vehicles left the UK loaded and returned empty. However, we think it unlikely that the goods were unloaded at Boston Freight; apart from the unsuitability

of the premises for this purpose, the vehicle “logs” do not show specific movement of a type and at a time appropriate to the unloading of goods at these premises.

219. The CMR and other documents relating to the first deal are not sufficient to establish whether or not the vehicles were loaded, as there was no evidence of what  
5 the net weight of the vehicles would have been. Thus it is not possible to compare the weights shown on the ferry tickets to see whether the difference corresponds to the total weights shown on the CMR documents.

220. The explanation for the loss of documents including CMR documents held at Boston Freight’s premises calls into question the allegation that such premises were a  
10 warehouse rather than a farm building. If the premises were a warehouse, we think that the allegation of a leak in the roof leading to the destruction of all these documents would appear less probable; it would appear much more a possibility if the building was a small farm building, as indicated in the description given by the Belgian authorities. We would point out that we do not find the “leaking roof”  
15 explanation for the loss of the documents at all convincing.

221. If the goods did not leave the vehicles at Boston Freight’s premises, it would not have been possible for BSG’s customers, who had purchased goods sent on a “ship and hold” basis, to inspect those goods and satisfy themselves that they met the  
20 description and were not faulty in any way. The absence of any such inspection casts doubt on the commerciality and genuineness of those purchase transactions, and corresponds to the apparent lack of concern on Mr Peters’ part as to what might happen to the goods once they had been despatched from Courier Plus.

222. Mrs Orr’s evidence shows that certain phones sold in these two transactions were subsequently shown to have found their way back to the UK. This suggests that  
25 further tax losses may have been involved. However, we do not think that there is sufficient evidence to establish what these losses may have been, or to show that BSG had any knowledge of the further transactions. To avoid the risk of a possible finding that BSG should have known about these other matters, we consider that as part of its procedures, BSG should have taken greater care to check matters relating to its  
30 purchasers and their transactions before it became involved in these chains.

*Conclusion on the “should have known” issue*

223. As we have already described, the process of reviewing Mr Peters’ (and thus BSG’s) actions and omissions in relation to the two April 2006 deals is one of  
35 painting a picture from the details put before us. Our overall conclusion, taking into account the deficiencies in BSG’s due diligence procedures and the dating of the commitments to buy and sell the stock, before those procedures had even been completed, is that Mr Peters did not do enough to protect himself (and therefore BSG) from the risk of becoming enmeshed in transactions which might prove to be  
40 connected in some way to fraud. The ease with which he was able to find purchasers of large consignments of mobile phones, as well as a supplier able at virtually no notice to fulfil orders for precisely the types of phones required, should have put him on notice that the arrangements called for further investigation, particularly as the invoicing for the transactions was organised to coincide on the same day for all stages

in each chain. This insufficiency of action to protect BSG leads us to the view that, in terms of the statement in *Kittel* at [61] he

“ . . . should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT”.

5 224. In arriving at our view, we take account of Mr Peters’ declared experience in the IT sector, and his reference in his evidence to the due diligence procedures which he had been accustomed to carry out when in his previous employments, particularly with Kingston Technology. Even if his witness statement had been correct in stating that he was unaware from his previous experience that supply of high value but  
10 compact sized goods could carry the risk of involvement in MTIC fraud, or what had previously been generally known as carousel fraud, he was made aware of this at the initial meeting with Mr Munro-Birt in relation to DDR. Further, he knew from HMRC’s notification dated 3 November 2005 that mobile phones traded in period 09/05 by DDR had been found to have been previously traded in the UK, so was  
15 aware of the need to ensure that any mobile phones were sourced from outside the UK and could be shown to be new and not previously supplied in the UK. As subsequently shown by the NEMESIS check of some of the phones supplied to Allimpex, he did not do enough to protect BSG from this risk; he bought phones from Infinity in the UK, rather than using a supplier from elsewhere in the EU.

20 225. We also take into account the lack of commerciality in the arrangements for the transactions entered into by BSG, and the apparent ease with which chains of transactions (not involving manufacturers or authorised distributors) could be set up or, if necessary, cancelled. We note especially the ease with which the third transaction in period 01/06 could be cancelled without any apparent adverse  
25 consequences for BSG. Infinity was willing, without any apparent evidence of having carried out any due diligence on BSG, to allow BSG to be committed to it for very substantial sums; it appears to have worked on an understanding that Universal and Allimpex would respectively be “good for the cash” due in respect of BSG’s two purchase transactions from Infinity. This appears to us uncommercial, and possibly to  
30 suggest a degree of “orchestration” on Infinity’s part. Having regard to Mr Peters’ experience of due diligence in relation to his own companies and his previous employers, we consider that the absence of any such investigation by Infinity into BSG should have raised suspicions in his mind. We find that the way in which the various transactions were linked together was not consistent with the way in which  
35 they would have needed to be negotiated if the parties had been engaged in normal commercial negotiations.

226. HMRC argued that Mr Peters had been controlled and manipulated. This might be an explanation for Infinity’s production of invoices for each of BSG’s deals before BSG had put in its purchase order, but there is little direct evidence of such  
40 control and manipulation of BSG by Infinity. The argument would require it to be shown that, in addition to supplying BSG with the goods, Infinity, or some other person prompted by Infinity, had prompted the approaches by Universal and Allimpex. This wider “conspiracy theory” would require considerable evidence to establish sufficient proof, which HMRC has not been able to establish. At most there  
45 are suspicions that some form of “choreographing” may well have taken place. We do

not find on the evidence before us that there was control and manipulation, although we do consider that Mr Peters was much too ready, without careful and detailed review and exhaustive checks of all aspects of the proposed transactions, to become committed to them. It is not correct that he turned a blind eye to the various elements of the transactions, but his enquiries were not sufficiently exhaustive to protect BSG. In *Honeyfone* at paragraph 47, the Tribunal said:

“It seems to us that in these contexts what a trader “should have known” may include what he ought to have known or had the means of knowing. Those phases [*sic*, ie phrases] indicate to us that it therefore may include what he could have found out if he had made further enquiries.”

227. We consider that Mr Peters could have made much more comprehensive further enquiries in advance of BSG becoming committed to the transactions, rather than leaving some of the checking procedures to be dealt with after the event. Apart from the various matters which we have already referred to, it would have been appropriate for him to ask the following questions, and, depending on the answers, to ask yet further questions to satisfy himself as to the position:

(1) Why was BSG, a relatively small company with comparatively little history of dealing in mobile phones, approached with offers to buy and sell very substantial quantities of such phones?

(2) How likely in ordinary commercial circumstances would it be for a company in BSG’s position to be requested to supply large quantities of particular types of mobile phone and to be able to find without difficulty a supplier able to provide exactly that type and quantity of phone?

(3) Was Infinity already making supplies direct to other EC countries? If so, he could have asked why Infinity was not making supplies direct, rather than selling to UK traders who in turn would sell to such other countries.

(4) Why are various people encouraging BSG to become involved in these transactions? What benefit might they be deriving by persuading BSG to do so? Why should they be inviting BSG to join in when they could do so instead and take the profit for themselves?

228. His failure to make full enquiries and investigations in advance meant that he did not discover information which ought to have led him into yet further investigations. In turn, the result was that BSG became committed, without sufficient protection, to enter into the transactions with Infinity linked by way of contra-trading to the other transactions derived from two traders established to be fraudulent, namely AS Genstar Ltd and Wade Tech Ltd. We think that if he had asked and obtained answers to the appropriate questions, he would have concluded that the uncommercial features of the deals being offered to BSG could only be explained by taking into account other transactions which Infinity was entering into, and that the most probable explanation was that those other transactions were connected in some way with fraud. Our conclusion is that BSG ought to have known that, by its purchases, it was participating in transactions connected with fraudulent evasion of VAT.

*Our decision on the appeal*

229. In the light of our conclusions summarised at paragraph 3 above, we dismiss BSG's appeal.

*Further comments*

5 230. We think it appropriate to comment on various aspects of the evidence. Mr  
Peters' statements contain a great deal of material more akin to an extension of the  
legal pleadings. What is required in a case of this type is to have factual information,  
so that the Tribunal can establish what happened and what the reasons were for the  
acts and omissions of the parties concerned. A review of the other side's case is a  
10 matter for legal submissions rather than for a witness statement. In relation to the  
statements made by the representatives of HMRC, the accounts of MTIC fraud and  
contra-trading in Mrs Orr's and Mr Devine's statements could easily be moved into  
appendices to such statements, and this should be considered for future MTIC  
appeals. In relation to Mrs Orr's oral evidence, particularly in cross-examination, her  
15 concern to give full and amplified answers, rather than giving a simple and direct  
answer to the question posed, had the effect of complicating the cross-examination.  
For future appeals we suggest that it would be better to keep the answers simple and  
direct, and leave it to Counsel on re-examination to bring out any appropriate  
additional information.

20 231. We were very concerned to learn of the redaction of certain information in  
HMRC's internal record disclosed in the course of the hearing. If HMRC wished to  
have any information redacted, the appropriate course would have been to make an  
application to the Tribunal so that the relevant document could be read by the  
Tribunal and a decision made as to the form in which that document should be  
25 included in the evidence.

232. We would like to put on record how useful we have found it to have the  
transcripts and certain other documents in electronic form. We think that it would be  
appropriate to consider whether this should be extended in future cases to more of the  
documentation, especially lengthy witness statements. We would also like to record  
30 our appreciation of the quality of the bundles; we encountered very few difficulties  
with the documentation.

233. As Mr Hall made no application for costs, we make no order as to costs.

**Postscript**

35 234. On 27 November 2008, Thomas Cooper wrote on behalf of BSG to comment  
on matters relating to the decision in *Brayfal* and also on matters relating to Infinity.  
They made the following points:

- (1) The *Brayfal* appeal was successful notwithstanding significantly less diligent investigation of the bona fides of suppliers and customers than on the part of BSG;
- 40 (2) In *Brayfal*, that appellant's supplier was Future Communications Ltd, which was said by HMRC to be a "vanished" trader. In BSG's case, its

sole supplier, Infinity Holdings Ltd, remained in existence and trading. This rendered BSG's appeal stronger;

5 (3) In *Brayfal*, HMRC's evidence was strong enough to support an allegation of actual fraud (although following the hearing of the evidence, both actual fraud and means of knowledge were rejected) whereas in BSG's appeal it was accepted that there was insufficient evidence to allege actual fraud;

10 (4) Infinity's own appeal before the Tribunal had been allowed in full with costs, as HMRC had been unable to prepare and submit sufficient evidence in compliance with an "unless order" from the Tribunal. Thomas Cooper argued that, as HMRC had been unable to sustain a case against either of the Infinity companies in relation to due diligence, let alone fraud, it followed that this Tribunal could not make a finding of fraud against Infinity, and that BSG's appeal must be allowed.

15 235. We question whether it is proper for a party to make an approach of this nature after the hearing, particularly when there has been no comment on HMRC's behalf. As there has been no objection from HMRC, we are prepared to record our observations on the matters raised. In relation to the comments on the *Brayfal* appeal, we do not think that much value can be placed on comparisons between cases based  
20 on possible similarities of facts. We have made various findings that BSG's investigations into the bona fides of suppliers and customers were inadequate or not made in advance of BSG becoming committed to the relevant transactions. We have found that Infinity, through its contra-trading, facilitated the reclaim of the input tax arising as a result of the "dirty" chains by offsetting against that input tax the output  
25 tax generated by its sales to BSG; this conclusion is not affected by the continuation of Infinity and its trade after the period in question. Although in *Brayfal* the Tribunal found that there was neither actual knowledge of fraud nor a case made out that the trader should have known of the connection, we are satisfied on the facts of BSG's case that the latter test is satisfied. Finally, in relation to the allowing of Infinity's  
30 appeal, we do not consider that any conclusions as to Infinity can be derived from this, as there has been no hearing of the substantive appeal.

236. For the reasons which we have already given, we confirm that BSG's appeal is dismissed.

35 **JOHN CLARK**

**CHAIRMAN**

**RELEASE DATE: 17 December 2008**

40 LON/2007/0934