



**TC00281**

**Appeal number: LON/2007/0835**

*Multiple trader intra-Community fraud – whether appellant knew or ought to have known of fraud connected to its transactions – evidence needed to establish fraud and connection*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**LIFE ENTERPRISES LTD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: DAVID WILLIAMS (Judge)  
JOHN BROWN**

**Sitting in public in London on 11, 12, 13, 14, 19 and 20 May and 10 July 2009**

**Anu Mohindru of counsel, instructed by Aegis Tax LLP, for the Appellant Company**

**Andrew Westwood of counsel, instructed by the Solicitor to HM Revenue and Customs,  
for the Respondents**

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## DECISION

### *The appeal*

1       The Appellant Company (“LE”) is appealing against a series of decisions by  
5 the Respondents (“HMRC” which includes its predecessors in title where relevant)  
refusing to refund input tax claimed by LE in respect of both intra-Community  
supplies and exports made by LE in the period from April to July 2006. HMRC  
contends that LE’s transactions on which the input tax is claimed were all connected  
10 to other transactions involving contra trading to such an extent that it is not entitled to  
any refund of VAT.

2       The tribunal adopts the terminology and descriptions, including that of contra  
trading, set out by Lewison J in [1] of *HMRC v Livewire Telecom Ltd* [2009] EWHC  
15 15 (Ch), [2009] STC 643 for this decision, save for one point. Goods cannot be  
exported or imported within the European Union. This is because there are no  
customs barriers within the European Union. Goods sold from this country to a trader  
in another European Union Member State are supplied for acquisition, not exported,  
to that trader. Goods purchased from a trader in another Member State form an intra-  
Community acquisition of goods, and are not imported. See Value Added Tax Act  
20 1994, sections 5 and 10 and Directive 2006/112/EC, Articles 14 and 20. It is partly  
because the goods do not pass through a customs barrier that situations such as those  
in this appeal arise.

3       LE claimed refunds of £3,474,815.76 in respect of supplies and exports of  
25 Nokia mobile phones between 13 April 2006 and 31 July 2006. HMRC conducted an  
extended verification of each of the supplies and exports. This led officers to conclude  
that LE knew or should have known of fraud connected to every one of those supplies  
or exports.

30 4       In so deciding, they applied the test laid down by the European Court of  
Justice in *Kittel v Belgium and linked cases*, Cases C-439/04 and C-440/04, [2006]  
ECR I-6161. The formal test (at [62]) is:

35       “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 value  
added tax, it is for the national court to refuse that taxable person entitlement  
to the right to deduct.”

40 5       In this appeal the tribunal is concerned with whether LE’s purchases were  
connected with companies engaged in contra trading. The application of the *Kittel* test  
to contra trading was examined by Lewison J in *Livewire* and by the Chancellor in  
*Blue Sphere Global Ltd v HMRC* [2009] EWHC 1150 (Ch). The Chancellor quoted in  
*Blue Sphere Global* at [26] the test set out as follows by Lewison J in *Livewire* at  
45 [102] and [103], commenting that the test does not appear to be narrower than that in  
*Kittel*:

“[102] In my judgment in a case of alleged contra trading, where the taxable person claiming repayment of input tax is not himself a dishonest co-conspirator, there are two potential frauds:

- 5 (i) the dishonest failure to account for VAT by the defaulter or missing trader in the dirty chain; and
- (ii) the dishonest cover-up of that fraud by the contra-trader.

10 [103] Thus it must be established that the taxable person knew or should have known of a connection between his own transaction and at least one of the frauds... If he knows or should have known that the contra trader is engaging in fraudulent conduct and deals with him, he takes the risk of participating in a fraud, the precise details of which he does not know and cannot know.”

15 6 At [52] the Chancellor decided that the tribunal decision in that case was misleading for two reasons, both relevant to this appeal:

20 “First the burden is on HMRC to prove that BSG ought to have known that by its purchases it was participating in transactions connected with fraudulent evasion of VAT. It is not for BSG to prove that it ought not. Second, it is not sufficient to demonstrate that BSG was involved in transactions which “might” turn out to have undesirable associations. The relevant knowledge is that BSG ought to have known that by its purchases it was participating in transactions which were connected with the fraudulent evasion of VAT; that such transactions might be so connected is not enough.”

25 7 That is the essential question for this tribunal in this appeal. Did LE know, or should it have known, that by purchasing goods from identified suppliers it was participating in transactions connected with fraudulent evasion of value added tax? Mr Westwood made plain for HMRC that it put its case on the alternative bases that 30 LE knew or that LE should have known that its transactions were linked with fraudulent evasion of VAT. He did not allege that LE, or its members and officers, were directly involved in the fraud. He does not have to do that to bring HMRC’s actions within the scope of the right to refuse LE any deduction against VAT payable for the input tax on its purchases. As HMRC has refused the deduction, it is for this 35 tribunal to apply the *Kittel* test to the evidence before it.

8 HMRC produced detailed evidence to support its contentions that there had been tax losses resulting from fraudulent evasion of VAT in chains of transactions that connected with LE’s transactions by contra trading. LE took what might best be 40 termed as a neutral stance on the detail of these contentions. It contended that if there was any fraud, it was only because another company in another chain was engaged in contra trading. LE had not been involved in such chains, was not aware of any fraud in those chains, and had no reason to be aware of them. As a consequence, Mr Mohindru offered no evidence on behalf of LE about the contended contra trading. LE 45 did not object to any of the evidence produced by HMRC witnesses about the contra trading. Mr Mohindru did not cross-examine any witness on any of those aspects of HMRC’s case.

9 HMRC produced detailed evidence to support its further contentions that LE  
knew or should have known that there was fraud connected to its transactions. Mr  
Westwood accepted that the burden of proof was upon HMRC to show the tax losses  
5 and fraud, and contended that on the evidence produced there was such fraud. LE  
objected strongly that HMRC had no reasonable grounds on which it could make  
those contentions. It had appealed each of the decisions refusing repayment of input  
tax. Mr Mohindru maintained robustly that all of the transaction chains linked with  
the supplies to LE were “clean”. There was no fraud or tax loss in any chain in which  
10 LE was directly involved, or at least HMRC could show none and LE was aware of  
none.

10 Mr Mohindru also emphasised that until April 2006 LE had been conducting  
its trade in supplies and exports of mobile phones without any formal decision being  
15 taken by HMRC against it. Refunds of all input tax claimed by LE were made by  
HMRC until and including the period ending in March 2006. The tribunal accepts that  
position, although it was given little evidence by either party of the detail of  
individual supplies, suppliers, customers, or VAT returns before April 2006. Mr  
Mohindru submitted that the refusal from April 2006 was only because of a policy  
20 change by HMRC. His client was a victim of that policy change. They had done  
nothing wrong.

11 As a result, the evidence in the appeal came before the tribunal in two distinct  
parts. One part was the presentation by HMRC of evidence of the contra trading  
25 between third parties with no active involvement by the Appellant in this aspect of the  
appeal. The other, in which the Appellant took a full part, was the presentation of  
evidence about the Appellant’s own transactions, those with whom it traded, and the  
market in which it was trading.

30 *Those involved*

12 The following persons are significant in the transactions that are subject to  
these appeals. The tribunal indicates general findings about those persons. The details  
of the British companies are matters in the public record at Companies House or  
obtainable by checking with HMRC:

35 *Short name Description and findings of tribunal about the person*

40	C&C	Come & Com Sarl. This was a company registered and resident in Switzerland but with a Spanish VAT number. The tribunal accepts HMRC evidence that the number was invalid as it was a hijacked number from a company that ceased trading some time before the period relevant to this appeal. The VAT number was a Spanish VAT number and obviously so. It was the VAT number of a Spanish company, El Privado di Ibiza, that had been deregistered by the Spanish authorities on 3 10 2005. It was not valid at any time relevant to this appeal. No valid VAT number has been produced for C&C.
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FCIB	First Curaçao International Bank BV. FCIB was based in the Netherlands Antilles. It was used by LE as its banker from 14 February 2006 until September 2006. FCIB was later closed by the Dutch authorities and its records made available to other national authorities. These records included disclosure to HMRC of LE's accounts and those of companies with which LE's transactions were connected.
5	
LE	Life Enterprises Ltd, the appellant company. Registered Company 4086097 in England and Wales on 9 October 2000. Alex Mote and Greg Mote were both appointed directors on 1 December 2003. There were four individual shareholders, each holding 25 per cent of the issued shares. Of those the only active shareholder was Alex Mote. The tribunal heard little evidence about the others. LE was registered for VAT on 1 August 2003 under VAT number 819 1657 11 and deregistered from 4 September 2006.
10	
15	
Alex Mote	Director of LE and one of its shareholders throughout the period relevant to these appeals. Aged 26 at the time in question, he had previously gained experience in the London money markets. He was the decision maker for LE in all the transactions relevant to these appeals.
20	
Greg Mote	Brother to Alex Mote. He joined LE as an employee after a short military career ended on voluntary discharge. He was employed by LE and put in charge of compliance by his brother.
25	
Simtel	Simtel Communications (London) Ltd was involved in all LE's purchases relevant to these appeals either as supplier or as nominator of Xchange as the other supplier. Registered Company 05126099 in England and Wales on 21 06 2004 under VAT number 840 1750 54. Its sole shareholder throughout the period relevant to these appeals was Simtel Communications Ltd, a company registered in England and Wales but appearing to have a Jersey residence. The tribunal was not supplied with any details of the holding company, although the tribunal finds that it was in complete control of Simtel at all times relevant to these appeals.
30	
35	
Style	Style Merchants Ltd. This was contended by HMRC to be one of the two contra traders linked with LE's transactions. LE did not challenge any of the evidence about Style Merchants, and the tribunal does not need to examine the company in detail in this decision.
40	
Xchange	Xchange Communications Ltd supplied Simtel or directly supplied LE in all the transactions relevant to these appeals. HMRC contended that it was a contra trader in connection with several of the transactions.
45	

Registered Company 047595245 in England and Wales on 9 May 2003. Directors: M Ghaffar and T Ahsan until 2006. Sole shareholder: M Ghaffar. VAT number 820 5241 69.

5 *The law*

13 The tribunal set out the test it is applying in this appeal at [4] above. It was accepted by both parties that this appeal involved no new point of law and no new substantive argument about the application of the well-known principles of law in the European Court of Justice decisions including in particular Case C-354/03, *Optigen v HMRC* [2006] ECR I-483, C-384/04, *CCE v Federation of Technological Industries* [2006] ECR I-4191, the joint cases of C-439/04, *Kittel v Belgium* and C-439/04, *Belgium v Recolta Recycling*, [2006] ECR I-6161.

14 The tribunal was taken to recent decisions of the courts hearing appeals from the tribunal in similar cases. The decision of Burton J in *R(Just Fabulous (UK) Ltd v HMRC* [2007] EWHC 521 (Admin) was relied on by Mr Mohindru, as was the decision of Lewison J in *HMRC v Livewire Telecom Ltd* [2009] EWHC 15 (Ch), the decision of Floyd J in *Calltell Telecom Ltd v HMRC* [2009] EWHC 1081 (Ch) and the decision of the Chancellor in *Blue Sphere Global Ltd v HMRC* [2009] EWHC 1150 (Ch). Mr Westwood took the tribunal to the decision of Floyd J in *Mobilx Ltd v HMRC* [2009] EWHC 133 (Ch) and to the decision of Lewison J in *HMRC v Brayfal*, unreported, 4 March 2008. Both parties cited a number of VAT Tribunal and First-tier Tribunal decisions, including decisions in which members of the tribunal were involved. The tribunal was not greatly assisted by these tribunal citations, which are not binding on it and in any event have now lost their initial importance given the extent to which the law has been considered at higher judicial levels. The tribunal was also aware, as were the parties, that a number of these decisions are under further appeal. No application was made by either party for a stay pending such appeals and both agreed with the tribunal that the hearing should go ahead.

15 As the main authorities are now well known in this jurisdiction and no new point was developed from the relevant European or United Kingdom legislation or these authorities, the tribunal does not propose lengthening this decision by making extended citations from the authorities. The tribunal adopts the analysis of HMRC's right to refuse repayment from the Chancellor's judgment in *Blue Sphere Global* at [9] to [28]. This appeal involves contra trading as did both that case and *Livewire*. Both judgments are directly relevant here.

16 The tribunal must, however, deal with specific arguments put before it about the approach it was to take. Mr Mohindru sought to persuade the tribunal that it should approach the case by seeking to identify LE's dishonesty on the basis of the principles of evidence set out in *Twinsectra Ltd v Yardley* [2005] UKHL 12, [2002] 2 AC 164. The tribunal does not accept that this case involves a direct accusation of fraud. No such direct allegation was made. HMRC put its case on the basis that it is a question about what the appellant knew or should have known about fraud by others, assuming that fraud is established. That does not take this case outside the normal civil standard of proof.

17 The parties rehearsed the issue of the burden of proof. It was accepted by  
HMRC without argument that it was for HMRC to produce evidence to the tribunal  
and to satisfy it that there was fraudulent evasion and a tax loss in the relevant chains  
5 and that there was an overall fraudulent scheme. The tribunal notes that the decisions  
binding on it are not fully consistent on the issue of the burden beyond the initial  
questions. It has set out the guidance of the Chancellor above, but it also notes the  
guidance by Lewison J in *Brayfal* that once HMRC has met that evidential  
requirement it is for LE to show that it did not know nor should it have known of the  
10 fraud.

18 That issue is complicated further in this case by two separate points. First,  
counsel for LE contended that as it did not know and could not have known of any  
fraud it was not in a position to challenge the evidence put forward by HMRC about  
15 fraud involving third parties. It therefore offered no evidence, nor challenged HMRC  
evidence, on those issues. But it also contended that the tribunal should put no weight  
on the HMRC evidence, so leaving the matter unproven. The tribunal deals with that  
issue below. Second, LE tendered less evidence than a tribunal might reasonably  
expect it to tender about its transactions, for example on the payments made to it and  
20 by it for the various purchases and sales. HMRC did tender evidence on those matters.  
In procedural terms, the case was opened by HMRC and dealt with on that basis. On  
findings from the evidence, the tribunal is content to give the appellant the benefit of  
any doubt at the margin in terms of the burden of proof whether or not it was required  
to do so. However, that applies only where there is no specific direct or strong  
25 circumstantial evidence relevant to an issue. In practice, the totality of evidence was  
such that there was little beyond the conduct of the hearing itself to which any issue  
arising from the burden of proof applied.

*The questions for the tribunal*

19 The tribunal received considerable documentary and witness evidence from  
30 both parties about LE's supplies and exports. The tribunal approached its analysis of  
the evidence by reference to the questions accepted as correct by the Chancellor in  
*Blue Sphere Global Ltd* at [29] and as applied here:

- (a) Was there a VAT loss?
- 35 (b) If so, did that loss result from fraudulent evasion?
- (c) If there was fraudulent evasion, were the LE transactions that are the  
subject of this appeal connected with that evasion?
- (d) If such a connection is established, did LE know or should it have known  
40 that its purchases were connected with fraudulent evasion of VAT?

20 It is appropriate to consider questions (a) and (b) together. LE did not seek  
until final submissions to challenge HMRC evidence on those questions. Nor did it  
provide any evidence itself about those questions. Its documentary and witness  
evidence was focussed on questions (c) and (d), and its robust approach to the appeal  
45 resisted any connection or knowledge of any kind with or of any fraud that might  
have been present in other chains.

*Evidence of tax loss and fraud elsewhere*

21 HMRC presented documentary and witness evidence to establish the answers  
to questions (a) and (b): that there was fraudulent evasion in identified deal chains  
5 causing loss of VAT. It also presented evidence in answer to question (c) showing  
that those deal chains were linked by contra trading by identified third parties to  
chains of deals involving LE.

22 Two companies were identified by HMRC as connecting “dirty” chains of  
10 transactions with chains involving LE. One was Xchange. The other was Style.  
HMRC contended that Xchange was the contra trader in every deal save deal 17.  
Style was the contra trader in that deal. Annex 1 sets out the main details of each deal,  
and shows that Xchange was involved in every direct chain relevant to this appeal.  
That is significant in itself in the tribunal’s view, as LE put its case on the basis that it  
15 was conducting an ongoing trade in the open market and had been doing so for some  
time. The tribunal was given no specific evidence of the deals made by LE in the  
period immediately before that in question.

*Deal 17 and Style*

20 23 The course of dealing in deal 17 is not fully reflected in Annex 1, and the  
tribunal therefore considered it separately in detail. The tribunal accepts HMRC  
evidence as follows. The relevant phones (1500 Nokia N70) were sold by LBS (a  
company to which, as Annex 1 shows, LE had previously sold phones and was again  
to sell phones) to Style. Style supplied to Simtel, who supplied to LE. LE sold to MP  
25 Solutions, and MP solutions sold to PPUH Kamar, a Polish company. That deal was  
documented as taking place on 25 May 2006. As with most of LE’s transactions,  
payment was made some time later. The tribunal accepts HMRC evidence, drawn  
from FCIB data, that payment took place on 17 July 2006. On that day, in a series of  
transactions executed by FCIB, a single payment was made by PPUH to MP  
30 Solutions, then by MP Solutions to LE. LE then made a payment £600 short of the  
required amount to Simtel, topping up the missing amount that day. Simtel then paid  
Xchange, not Style. Xchange paid C&C, again on the same day. The tribunal notes  
that this followed the usual pattern for both supply and payment. There was a clear  
third party payment, none of which went back to Style, while the phones - provided  
35 by Style - came from LBS.

24 The tribunal regards the combination of the swift movement of funds round  
that loop (which originally started with a Dubai company and ended with another  
Dubai company that day) and the presence of a clear third party payment by Simtel to  
40 Xchange as evidence linking Xchange and Style within an overall scheme for the  
purposes of that transaction at least. While LBS and Style issued the invoices that one  
would expect to be issued, the payment, including the VAT, went elsewhere. Style  
was the company acquiring the phones on an intra-Community acquisition. The  
tribunal also accepts HMRC evidence that Style owed HMRC considerable amounts  
45 of VAT. And in the key VAT period to June 2006, HMRC evidence showed that  
Style had made a small net repayment claim on a balanced turnover of purchases and  
sales of over £45 million each. Further, the deals in which Style engaged included

deals involving Samsung Serene phones. The tribunal accepts HMRC evidence that those phones were not available on the open market at the alleged dates of purchase. It is therefore satisfied that HMRC has shown to required standard of evidence that Style was directly engaged in fraudulent trades. It was clearly connected with Xchange. The tribunal finds as fact that Xchange and Style were parties to an overall fraudulent scheme involving this deal.

*The other deals and Xchange*

25 With regard to the deals where it was contended that Xchange was the contra trader, HMRC placed in evidence substantial volumes of documentation about supplies and exports involving both those companies and also involving other companies in chains involving those companies. Evidence was offered of VAT losses occasioned to HMRC from those chains. This was accompanied by witness statements from officer Price and officer Gellvaer with full exhibits, supported by a witness statement by Mr Bishop of Samsung, about the existence of contra trading in those chains. The evidence was supported by an analysis in the Respondents' skeleton argument and written closing submissions.

26 Mr Westwood submitted on that basis that the tribunal had before it evidence to satisfy it about the answers to questions (a), (b) and (c) in respect of all the purchases and the supplies and exports by LE that had been challenged. He submitted that the evidence showed that Xchange had undertaken several series of deals with other named traders in April to June 2006 that had led to VAT losses approaching £10,000,000. All the traders with which Xchange had been dealing had themselves failed to account for large sums of VAT. Mr Mohindru did not challenge that evidence either when the witness statements were served or at the hearing. His approach was that LE and those involved in it were unable to say whether there was a fraud up or down the chains after LE's immediate suppliers or customers.

27 As a result, the witnesses of fact as to the evidence of tax loss and fraud in the chains were not called as witnesses at the hearing, and their evidence was not subject to cross-examination. Likewise, the analysis by those witnesses, and by Mr Westwood before the tribunal, of that evidence was not subject to specific examination or challenge by Mr Mohindru. Nonetheless Mr Mohindru, in his final submissions, made a number of assertions (or, as he termed them, logical inferences) about the unchallenged evidence. And he invited the tribunal to find that HMRC had not established its case on these questions. He argued that HMRC had not established any tax losses or fraud nor connected them to chains involving his clients. Mr Mohindru accepted that the evidence was before the tribunal but considered the tribunal should put very little weight, if any, on it and accordingly find for LE.

28 Mr Westwood took strong exception to that approach. His clients had assembled the evidence and had presented both the documentary evidence and the evidence of the officers involved. He had presented his own analysis of the answers to the key questions, indexed to the witness statements and evidence. The Appellant had chosen not to challenge any specific element of that evidence or analysis, nor to present any new evidence on the issue. It was contrary to the rules of evidence and to

the principle of fairness that a party could allow this to be done by the other party and could then argue about the evidence on the basis of untested approaches produced only in closing.

5 29 This tribunal is bound by few technical rules of evidence. The Tribunal  
Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 give a tribunal considerable  
discretion about the approach to evidence in the context of the duties imposed on it by  
rule 2 of those rules. The tribunal accepts that it may have a duty to investigate in a  
particular case. But the tribunal does not consider that any duty to investigate requires  
10 or empowers the tribunal to ignore HMRC's properly tendered evidence and to  
undertake its own forensic exercise. The tribunal's starting point in these appeals must  
be that both parties are fully represented by expert solicitors and counsel. This is not a  
case where an unrepresented individual approaches the tribunal with little knowledge  
of relevant law or procedure and finds himself or herself faced with an "inequality of  
15 arms" against a fully represented government department. Where an appellant has  
instructed expert legal representatives, it is not for the tribunal to interfere in the way  
those representatives put their case to the tribunal. Here one side has properly  
disclosed and presented its evidence as it was required to do, subject to the usual case  
management. The other side had proper notice of this evidence and of the contentions  
20 of the individual witnesses. It could have asked for them to attend the hearing. It  
could have tested the evidence to explore the assumptions it claimed were made by  
HMRC or for any alleged inconsistency. It did not.

30 The appellant also sought to make points about a failure to approach third  
25 parties about the alleged involvement of those third parties in the various supplies and  
exports, and more generally in the deal chains. LE's argument appeared to suggest  
that HMRC, or perhaps the tribunal, should have involved those third parties and put  
relevant questions to the third parties. That may be appropriate in some cases. If it is,  
this tribunal has powers to receive third party evidence or to join a third party. But  
30 that is a matter for both parties in an appeal, not merely the party identifying the  
involvement of a third party. For example, LE could have asked the tribunal to issue a  
witness summons to identified third parties with relevant evidence, such as Sintel.  
The tribunal cannot be asked to speculate after the evidence has been heard about  
what might have happened if evidence had been given by a third party.

35 31 The tribunal accepts from Mr Mohindru that his instructions were that LE had  
no evidence to put before the tribunal about the supplies in the contra chains. The  
tribunal agrees with Mr Westwood's more general point. If the tribunal is asked to  
consider arguments that HMRC's evidence included invalid assumptions about  
40 evidence, then the challenge to those assumptions should have been put to a relevant  
witness. If the appellant has not challenged evidence then the tribunal does not have  
to consider it with any specific challenge in mind. At the same time, this tribunal did  
not simply assume that HMRC has satisfied it to the required standard of proof about  
the answers to questions (a), (b) and (c) without paying any attention to the evidence.  
45 It assessed whether the unchallenged evidence from HMRC establishes that it is more  
likely than not that the answers to those questions are as HMRC contends.

32 HMRC presented substantial documentary evidence that the chains involving  
LE connected through Xchange and Style and Simtel to contra trading, and evidence  
of fraud in the contra chains leading to VAT losses. LE did not challenge HMRC's  
documentary evidence or witness statements put in to support its contentions about  
5 the nature of the contra chains, the fraud in them or the VAT losses. The tribunal  
examined the evidence put forward by HMRC to see if it provided relevant evidence  
of the contentions made by HMRC. It sees no useful purpose in repeating the full  
details of all those transactions in this decision merely to show that it has done that.  
There was a similar level of evidence for each deal to that discussed for deal 17.  
10 HMRC's submissions are clear and thorough. The tribunal does not accept that the  
appellant has any sound basis for arguing that the tribunal should put no weight on the  
evidence presented by HMRC when it took no steps itself to challenge the evidence.

33 The tribunal finds as fact that Xchange was involved in every purchase by LE  
15 that gave rise to claims for input tax on the onward supplies by LE that are directly  
relevant to the key issue before the tribunal. In the first few transactions Xchange sold  
phones directly to LE. In the subsequent transactions it sold the phones to Simtel, and  
Simtel sold to LE. See Annex 1 for detailed findings. Using the HMRC deal numbers,  
the tribunal finds that Xchange purchased all the goods sold either directly to LE or  
20 through Simtel to LE in deals 1 to 16 and deals 19, 20, 21, 22 and 23 from C&C.  
These deals all involved or purported to involve intra-Community acquisitions into  
the United Kingdom from C&C. (They were not imports because C&C was using – or  
purporting to use – a Spanish VAT number.) Only in deals 17, 18 and 24 was a  
different pattern shown on the evidence. Deal 17 has been examined above. In deal 18  
25 the purchase was from E&I registered in Cyprus. In deal 24 the purchase was from  
Sarl registered in France. Both were therefore intra-Community acquisitions.

34 The tribunal finds as fact that Xchange and Style were both knowingly  
involved in “dirty” chains from which there were VAT losses in the United Kingdom.  
30 They were both, in the usual phraseology, contra traders. The tribunal is satisfied on  
the evidence produced to it that they were involved in fraud in that they were involved  
in schemes that were designed to gain from their transactions at the cost of the public  
revenues of the United Kingdom or others. And the tribunal accepts that this was  
occurring at the times relevant to this appeal. As regards Xchange, the tribunal  
35 accepts HMRC evidence of the extraordinary alleged turnover of goods by Xchange  
in the July 2006 VAT period – over £170 million. Yet it was “trade” conducted  
without due diligence checks, without proper insurance, involving in some deals  
phones that were not available on the market and therefore either were misdescribed  
or did not exist, together with (as the FCIB evidence shows) a practice of making  
40 third party payments to traders other than its suppliers and of giving substantial credit  
to its customers without any safeguards but yet somehow managing to return a rough  
balance in the sums involved between acquisitions and sales separately in the key  
VAT periods. That, of course, produces only a small net output tax or input tax total.  
The tribunal accepts that the picture painted by this evidence is of a company that can  
45 only rationally have undertaken the transactions and risks it accepted because it was  
involved in a fraudulent scheme. It so arranged its deals with others that it disguised

the nature of its trade so as to balance what was said to be output tax in fraudulent chains against the input tax it reclaimed from HMRC.

35 On that basis, the tribunal accepts the evidence from HMRC as satisfying it on  
5 the balance of probabilities that there were, as contended, overall schemes involving fraudulent evasion of VAT in which both Xchange and Style were knowingly involved in the relevant periods for these appeals. And it accepts that there was a loss of VAT to the public revenues as a result of those frauds.

10 36 The tribunal makes the following further findings based on HMRC's uncontested evidence:

(a) In 21 of the 25 deals in which LE purchased phones directly or indirectly from Xchange, Xchange purchased the phones from the Swiss based company C&C. C&C had no valid VAT number. Further, the number it purported to use was Spanish, and  
15 so should put any purchaser on enquiry. The simplest of checks would have found that to be so. Xchange must have known this.

(b) Another company with which both Xchange and Style dealt on several occasions in the contra chains was Vic Solutions. The tribunal accepts HMRC's evidence, tendered by Miss Emery from the FCIB accounts, that the sole signatory for  
20 Vic Solutions was Marc Vits. Marc Vits was also the sole signatory at the same time for two of the companies to which LE sold phones, and that were in other relevant chains: MP Solutions of Denmark and SNN Sarl of France. All three companies were closely related to the deals undertaken by Xchange and Style, and were clearly financially controlled by the same individual. The tribunal also accepts the specific  
25 evidence that in the final deal to which these appeals relate, deal 25, SNN Sarl supplied the phones to Xchange, and those phones were then supplied by Xchange to LE, and then by LE to MP Solutions, evidencing just how close the links between those companies could be. This evidence establishes probable connections between some of the "clean" chains and some of the "dirty" chains through these companies as  
30 well as through the contra-traders and adds to the weight of evidence of an overall scheme.

37 The tribunal must therefore examine whether, on the evidence, it is satisfied that LE's transactions were connected with this fraudulent evasion of VAT and if so  
35 whether LE knew or should have known that there was fraud connected to its transactions.

*The transactions in question*

38 The tribunal sets out in Annex 1 its findings about the key aspects of each of the supplies to and from LE by reference, for convenience, to the HMRC deal  
40 numbers. The data are based on the evidence from the deal bundles and deal schedules and accompanying witness evidence produced by both parties, read with the financial evidence produced by officer Emery. A blank entry in the table means that the tribunal was unable to make any finding, on the balance of probability, about that item of information.

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39 The tribunal finds as fact from the data in Annex 1:

(a) The only goods purchased and sold by LE in the relevant period were Nokia mobile phones. None were purchased from authorised distributors. None were sold within the United Kingdom. None were sold to consumers.

5 (b) All purchases were all from Xchange or Simtel, and all purchases from Simtel came from Xchange. Xchange was involved in every deal examined in this appeal.

(c) All supplies on any day were to the same customer.

(d) Taken to the nearest whole number, the mark-up on all daily supplies was 6 per cent, regardless of any aspect of the supply. This is examined in more detail in Annex 3.

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40 No fraud was alleged and shown by HMRC in any of the transactions directly involving LE in Annex 1. It is accepted by HMRC that these are, in the usual vocabulary, “clean” chains. However, the tribunal also observes that any deal in which C&C was involved using its alleged Spanish VAT number was itself a suspect  
15 deal. It accepts that LE was not shown to be aware of C&C’s position in the chain or its fraudulent issue of invoices.

#### *Deals, transactions and supplies*

41 There was some confusion in the presentation of these appeals about what were the supplies and exports against which input tax was claimed by LE. The main  
20 evidence from HMRC was presented as a series of 25 “deals”, each given a deal number and summarised in a deal schedule. Those numbers are used in Annex 1. The listing was confusing because the evidence for LE used a different series of deal numbers. For example, in the first witness statement of Alex Mote “deal 4” consists of two supplies of phones taking place on 26 April 2006. The language in his witness  
25 statement about this and other supplies and exports is the same for all the deals. For deal 4 it was that deal 4 “**was a purchase** (emphasis ours) of 3000 Nokia 6280 & 2500 Nokia N90 SIM free mobile phones.” That is consistent with the documentary evidence of that deal. There was a single confirmed purchase order for both kinds of  
30 phone made by LE to its supplier. Payment was made to the supplier in a single payment by LE, although that payment was not made until some days later. There was a single purchase order for both kinds of phone being made by LE’s customer, invoiced by LE to its customer in a single invoice. Further, the goods were held at the same freight forwarder’s warehouse and were transferred from there to the customer in the Netherlands at the same time on the same truck. In the tribunal’s view all the  
35 evidence points to this being a single supply. By contrast, HMRC scheduled “deal 4” as two separate deals, 4 and 5.

42 The tribunal raised this with the parties before they made their final submissions. Mr Westwood, responding, noted that the deal numbers were in part  
40 attributed to supplies to LE, rather than supplies from LE. This, the tribunal observes, reflects a conflict inherent in the usual MTIC case. The VAT is withheld from a claim based on either an export of goods or an intra-Community acquisition by a trader in another member state, so claims focus on supplies by the claimant. But the focus in applying the *Kittel* test is on the purchase of those goods by the claimant, so looking  
45 to the supply to the trader making the claim rather than the supply by that trader.

43 This is not merely a matter of nomenclature or of the individual facts of a case. It raises questions of law that may be relevant to the way the tribunal handles the evidence. Did LE treat each separate sale transaction of a particular kind of phone as a deal? Or did it treat all the sale transactions undertaken at the same time, including  
5 more than one kind of phone, as a deal? Applying the law of value added tax, the question of law behind this lack of consistency in terminology is whether there was on any day one supply or more than one.

44 This is relevant to the tribunal's task for several reasons. One part of HMRC's  
10 argument was that not all the phones in a deal matched the description of the deal on the paperwork. That might be of less importance if a "deal" or supply involved several kinds of phone and not just a single kind, for example because the phones were of a kind involved in a supply but not in a specific deal. That, as Mr Westwood rightly contended, is a matter of evidence. Linked with this, weight was put by  
15 HMRC on the evidence of the mark-up made by LE in undertaking a "deal". It may be evidentially important in identifying the mark-up made to decide if the mark-up was related to each particular kind of phone or more generally to a single supply made on a particular day. That gives an indication of the trader's approach to the deals.

20 45 The tribunal finds as fact that LE had "deals" involving more than one kind of phone on several days. It has examined one above, and it considers another in detail in Annex 2. In each case the evidence is that there was in reality one supply of multiple kinds of phone on one day, not multiple supplies. And if there is a single supply on a day to a customer, then it is entirely appropriate to look at the mark-up on the day's  
25 supply and not simply in isolation at the mark-up on each deal. The tribunal has done this, with the findings set out in Annex 3. However, those findings do not depend on all the deals on any one day being in law one supply – their pricing may be linked in other ways.

30 46 The identity of a supply may also go to the heart of an MTIC case in another way. HMRC's argument about individual deals is that in each case the deal chain was tainted by fraud in a contra trade. It submitted evidence linking deal chains involving LE to deal chains involving fraud. If the tribunal finds that all the deals or transactions with a single customer on one day are a single supply or export, and/or were supplied  
35 to the trader in a single supply, then it may find on the facts that if there is any connection to fraud in any part of the supply, then it is a connection to the whole supply.

47 The tribunal does not therefore accept the deal numbers given by HMRC to  
40 the various supplies and exports as definitive in determining the identity of the individual supplies. On this point it prefers the evidence in the witness statement of Alex Mote. To avoid repeating the confusion in the evidence, the tribunal uses "supply", "export", "intra-Community acquisition" and "supply for acquisition" in their technical senses. Most of the transactions were supplies for acquisition by  
45 traders elsewhere in the European Union. There were some exports. There was no occasion on which goods acquired as one transaction were divided so that some were exported and others were supplied for acquisition. There were no supplies in the

United Kingdom or to non-traders elsewhere. The tribunal does not intend any specific significance to attach to the use of either “deal” or “transaction” in this decision. Those terms are used to reflect the evidence given to the tribunal.

5 *Evidence from HMRC of LE’s transactions and their context*

48 HMRC produced evidence for each of the supplies for acquisition and exports by LE that are the direct subject of these appeals, together with evidence of other supplies made in the chains involving these supplies and exports. It also produced evidence relating to the flows of money related to those chains. Evidence was given  
10 by several officers of Revenue and Customs. Officer Warner gave evidence as the officer assigned to LE to carry out extended verification of its VAT returns in June 2006. Officer Elmer also gave evidence. She was an officer with responsibility for LE in 2004 and 2005. She gave evidence because the officer most directly involved with LE at that time was unable to give evidence. The tribunal accepted that these officers  
15 gave the best evidence available about HMRC dealings with LE in the absence of the officer who directly handled matters with LE before 2006.

49 Evidence of flows of money to and from LE and others was given by officer Emery. Mr Mohindru objected to the production of that evidence. His objection was  
20 considered at a case management hearing before the main hearing. The objection was not accepted by the tribunal and the evidence of officer Elmer and the exhibits and documentation supporting her evidence were admitted late. The tribunal gave full reasons for that at the time. It is sufficient here to note that the evidence was admitted  
25 late in part because the tribunal accepted that it was evidence obtained by the British authorities from the authorities in the Netherlands from records seized from a bank closed by that state’s authorities (FCIB). That evidence required considerable analysis before it could be presented usefully. The tribunal accepted that this had, on this  
30 occasion, prevented more timely production of the evidence and that there was little purpose in presenting the evidence before full analysis.

50 Mr Mohindru repeated his objection to the tribunal on the ground that HMRC had belatedly produced the data (in the form of documents on three CDs) supporting its officer’s evidence and that LE had had no chance to evaluate the evidence. The  
35 tribunal, after consideration, refused that application as well, and confirmed the admission of the evidence. However, it granted LE the right to bring in late evidence about that matter at any time before closing submissions if it wished to do so. It had already been agreed by the tribunal with the parties that the tribunal would adjourn the case part heard after the close of oral evidence and that the parties would be allowed  
40 some weeks to prepare and present their closing submissions both in writing and at a later hearing. The tribunal was satisfied that this would give the appellant an adequate opportunity to consider the evidence and to make any submissions or tender any evidence in rebuttal of the evidence derived, or said to be derived, from the bank records, for example from its own banking records. In the event, it was not asked to  
45 consider any further evidence at that stage.

51 Officer Emery gave oral evidence of the flows of funds through accounts at the FCIB. LE maintained an account in FCIB at all times relevant to these appeals.

The tribunal accepted the evidence of LE's bank account, and of the flows of money through that account in connection with the various supplies that are the subject of this appeal. The first transaction in the account was a credit of £70,000 on 20 April 2006, a week after the first "deal" that is the subject of this appeal. The account  
5 became largely inactive after 31 July 2006. There was no further payment into the account after that date, and only two substantial payments out after a major payment out on that date. The account was effectively in abeyance from 24 August 2006 until the bank itself was closed.

10 52 Oral evidence was offered for HMRC by Gary Taylor in support of a written report about aspects of the markets for mobile phones of the kinds traded by LE. Mr Taylor was examined on that evidence. His evidence was general evidence about the markets in which phones of the kind being supplied to and by LE were being traded in early 2006. It was accepted by the tribunal as informing it about the  
15 background to the current appeal, but not as providing it with much direct assistance about the specific deal chains in the appeal. It was of value in helping the tribunal assess the extent to which LE needed to take precautions in handling its trading transactions. For example, it drew the tribunal's attention to the need to consider if LE could, using the business methods it evidenced, properly participate in a free and open  
20 grey market to the extent it claimed in buying and selling the products with which it had chosen to deal. This was also relevant to the evidence about the contra chains.

53 A witness statement was offered by officer Stone of the strategy unit at HMRC responsible for dealing with MTIC fraud. That evidence was not challenged  
25 by LE. It gave evidence about the approach taken by HMRC to MTIC fraud cases. It added little to the existing knowledge of the tribunal.

#### *Evidence from LE*

54 LE offered considerable but patchy documentary evidence to support its case.  
30 The tribunal was given deal packs for each of the deals. These did not contain all the documents that a tribunal might reasonably expect to see in such packs. For example, there was little evidence of the standard instruction and release documents necessary when goods are shipped on hold. There was little evidence of immediate cash payments by customers that would warrant not shipping goods on hold. Indeed, LE  
35 offered little evidence about either its funding or the way it handled the money flowing to and from it during the relevant period. This double absence of evidence was of particular importance in these transactions as the LE gave evidence that it did not itself insure the goods involved in the deals. The evidence of cash movements only came before the tribunal in the form of the evidence produced by HMRC from  
40 FCIB. This showed significant delays in some payments. See Annex 1. LE offered no evidence to contradict the evidence produced in this way.

55 The documents were presented together with witness statements from the two individuals responsible for conducting the business of LE during the period in  
45 question. Alex Mote was personally responsible for the deals, and gave extensive evidence to the tribunal. The tribunal accepted both his evidence and that of his brother Greg Mote that Alex Mote was the driving force behind LE, and was the

company officer responsible for deciding on the individual transactions. Greg Mote drew on his previous experience in the Army to deal with certain security issues. He also dealt with administration of the deals. The tribunal found that his evidence was consistent with the limited role that he played in the transactions examined by the tribunal. He neither claimed nor was expected to exercise any relevant expertise about the market beyond that drawn from his military background. He assisted his brother's business initiatives and was not a prime mover with regard to any individual supply or contact.

56 The evidence of Alex Mote was central to the case put by LE both about what it knew about the market in which it was operating and about the steps it planned to take and actually took to deal with the risks of which it was aware or against which it thought it appropriate to act. He was subject to extensive cross-examination. This was recorded fully on transcript. The tribunal does not seek to repeat that and confines itself to recording general view of his evidence. Mote's evidence left the tribunal with the impression that he was unready or unable to give the tribunal the kind of specific evidence required for a full assessment of his own involvement, and that of LE, in the major transactions that formed the core of this appeal. The tribunal was told little of outside funding of the operations undertaken by LE. It noted the identity of the shareholders in LE, but was told nothing of them save in the evidence of Alex Mote. It took the view that these transactions were undertaken by and funded by this witness and/or his family and private contacts as disclosed by him. Accordingly, it assessed his approach to giving evidence in the light of the fact that he was putting his own, or his family's, assets at risk in transactions that involved trade assets valued at several million pounds as a direct result of decisions that were made entirely by him.

57 The tribunal accepts that Alex Mote's past business experience probably involved him in being responsible for handling large sums of money. It does not accept that this would render him immune to the normal reaction to be expected when an individual is personally and significantly at risk in a business. Indeed, Mote admitted his concern in his evidence. That concern was not matched by the level of the grasp of detail, or by a production of records, that a tribunal would reasonably expect of someone in his position. Assessed against that background, the tribunal found much of his evidence about, for example, the checks undertaken of companies, to be lacking in crucial detail, or to be speculation about what might have happened, or to be assertion about evidence that could be available rather than direct evidence. When he did give firm evidence, the tribunal found that his evidence contained important inconsistencies.

58 The tribunal was particularly concerned about statements made by Alex Mote under cross-examination that he could produce documentary evidence to support his oral evidence on a number of points. This arose, for example, when Mr Mote was being cross-examined about the due diligence that was undertaken about Xchange. The tribunal does not accept his evidence on this. It was of the essence of LE's case from the beginning that it conducted thorough due diligence exercises of a high standard. It stated that it had produced details of its due diligence, as it was required to do. The tribunal does not accept that it would through oversight have failed to

produce any significant evidence that was available to it. The tribunal rejects as untrue evidence by Mote that suggested that he had such evidence. That calls into question both the credibility and the reliability of the evidence that he stated was supportable in that way and, indeed, his general approach to giving evidence to the tribunal.

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59 The tribunal finds that Alex Mote's evidence cannot be accepted as reliable and is to be treated with caution. It separately formed the view that he had a limited understanding of relevant aspects of the law and of the technical nature of the international trade transactions in which he involved LE. For example, he did not know the difference between an agreement and an affidavit, and he did not understand basic legal aspects of international trade in goods. The tribunal heard and saw little evidence that he or LE had sought expert legal or technical advice on such issues until LE was in dispute with HMRC. The tribunal further finds that on any point on which there is contemporary documentary evidence that conflicts with the evidence of Alex Mote, it is the documentary evidence that is to be preferred.

60 The evidence of Greg Mote was limited. Both he and his brother accepted that he played a limited role in the activities of LE. He was at first an employee of LE, then a director. He did not take key decisions. His role was confined to certain aspects of security and certain aspects of administration. Even within those categories, the tribunal finds his role to be limited. He was alert to potential physical security problems, but less so to the kinds of risks in a market with fraud present. He was alert to basic administrative needs, but not to the kind of full record keeping that might reasonably be expected in trades such as these. Within those limits, his evidence was straightforward. Where the evidence of Greg Mote conflicted with that of his brother, the tribunal preferred the evidence of Greg Mote. Greg Mote did not hear the oral evidence given by his brother.

#### *The market in which LE was trading*

61 The tribunal heard general evidence of the commercial context of the supplies by LE from Mr Taylor and officers Stone and Warner, as well as Alex Mote. Mr Mohindru put weight in his argument on the fact that LE had had its transactions accepted by HMRC up to the start of April 2006. By contrast, Mr Westwood put weight in his argument on what LE and the Mote brothers knew or should have known generally about fraud in the mobile phone market at that time. Both are of evidential significance in deciding the key questions before the tribunal. The tribunal's view of the evidence of the context of these transactions is as follows.

62 Officer Stone in his evidence set the scene thus:

40 "When the VAT system is correctly operated an amount of VAT charged by one VAT registered trader to another VAT registered trader should be accounted for as output tax. Then the amount of VAT previously charged as output tax may subsequently be reclaimed by the purchase as input tax ... However, in MTIC fraud the output tax is not collected from the "missing" trader but is still claimed as input tax that subsequently results in a claim for a

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repayment of the VAT. The effect being a deficit in the Consolidated Fund at the Treasury.”

63 The tribunal observes that this misses a key point spotted by fraudsters that  
5 gave them a means whereby they could exploit the United Kingdom VAT system to  
their advantage. A trader introducing goods to the United Kingdom by intra-  
Community acquisition was normally required to account to the authorities for the  
VAT on imports or intra-Community supplies every three months by submitting  
10 quarterly VAT returns. A trader exporting goods or supplying goods for acquisition  
by traders in other EU Member States could arrange with the authorities to reclaim the  
input VAT on goods exported or supplied to another EU Member State on a monthly  
basis by submitting monthly VAT returns. If goods were brought into the United  
Kingdom and promptly then taken out of the United Kingdom, the company  
15 supplying from the United Kingdom might have the VAT refunded to it several weeks  
before the company bringing the goods into the United Kingdom was liable to pay the  
authorities the VAT due on doing so. That of itself provided a cash advantage to the  
trade as a whole, particularly in a growing market. It also provided an opportunity for  
the least scrupulous to arrange for the company supplying the goods out to reclaim the  
20 VAT some weeks before the tax authorities discovered that the company bringing the  
goods into the country had gone missing without accounting for the VAT or was  
otherwise unable nor not liable to pay the VAT. The key point is timing.

64 Exploitation of that timing difference was at the heart of much MTIC fraud.  
Such exploitation was not an inherent part of a value added tax system. Nor is it an  
25 issue of European Union law. It is an unintended result of the way that the United  
Kingdom authorities decided to deal with the VAT on goods moving into and out of  
the United Kingdom. Exploitation of this opportunity for fraud at first involved  
arranging that goods were supplied out of the country by a different company from  
the company that brought the goods in, so there could be no offset. It was later  
30 realised that there was an advantage in having the same company claiming input tax  
rebates on exports or cross-border supplies while also making output tax payments to  
HMRC on other supplies to a similar level to those of its input tax reclaims, as this  
both superficially hid the level of the reclaims a company was making from HMRC  
and appeared to involve the company in genuine trading. This gave rise to the  
35 obfuscatory device known as contra trading. In all cases the fraud involved ensuring  
that goods left the country promptly after arriving in it. That meant both that the  
goods were not available for seizure by the tax authorities and that the rebate on  
supply from the United Kingdom was immediately due. It involved arranging for the  
company that brought the goods in to become a missing trader. It may be assumed  
40 that the VAT collected by that company but not paid over to the tax authorities was  
siphoned off to a predetermined destination before this.

65 This requires swift movement of the goods. It must also involve other essential  
aspects of such trade. Money must move from the customer to the supplier and, in the  
45 case of United Kingdom brokers, that is a cross-border movement of funds. It must  
involve carriage of the goods. It must involve the legal agreements necessary to  
facilitate the purchase and sale, the carriage of goods, and the transfer of the

consideration for those goods. Behind that a tribunal reasonably expects to find either arrangements for, or at least active consideration of, the business risks such as insurance. The tribunal take the clear view that a significant part of that business risk at that time was the risk that there was fraud in the market.

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66 The tribunal indicated to the parties that it was minded to consider all available evidence about the goods, the money, the carriage arrangements, the legal position, and the measures taken to minimise the risks, including the risk of fraud. It emphasised that it is as important to focus on the consideration for supplies - the flows of money - as it is on the flows of goods.

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67 If fraud is alleged, then it is also relevant to consider who benefitted from the fraud. If it is contended that these were genuine market transactions, then where and when was the profit to be made? This issue was raised by the evidence of Gary Taylor and in submissions by Mr Westwood. Where did the missing VAT leave the system? The mark-ups made by anyone participating in a supply chain of the kind in evidence in this appeal, whether or not fraudulently, could come from two sources only. One is the market itself. The other is the total of VAT losses to public revenues. If there is a scheme involving several operators, it may be expected that the advantage of the fraud would be shared through the chain of supplies to which the goods are subject.

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68 The tribunal accepts that goods of the kind involved in this case were being traded outside the “white market” from manufacturer to authorised supplier to authorised distributor to final customer. In the “grey market”, as some call it, the total *market* source of finance is, in the final analysis, the sum of the difference between the price at which someone sold the goods out of the white market into that market and the price paid by the consumer buying it out of that market, together with the total of any losses sustained by any intermediate suppliers who sold goods in that market for less than they paid for them or who were defrauded of funds, or left unpaid, by someone else in the market.

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69 The only other possible source is VAT (or its foreign equivalent): either a failure of a trader to account to a tax authority for VAT collected from a customer, or a refund of VAT to a trader from a tax authority. If, to use Mr Stone’s phrase, “the VAT system is correctly operated”, then VAT will not be a source of value in a chain of transactions of this sort. It will be neutral. If it is neutral, then the only source of profit is the market itself. It follows that if there is no tax loss in a chain, directly or indirectly, then total mark-ups to all traders of goods that have at each stage been the subject of proper commercial sales and purchases must equal the difference between the sale price from an authorised distributor into the informal market and the purchase price paid by the final, non-trading, customer, together with any market failure.

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70 It also follows that the longer the chain in a fraud-free series of transactions, the lower the potential profit margin available to each participant. At the same time, as Mr Mote accepted and as the evidence shows, each transaction has significant real costs for storage and transportation of goods, money transfer, insurance and legal compliance that require a broker to make a significant rate of return before it can

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show a profit. Mr Taylor gave evidence that there was little market profitability in the distributive market for mobile phones at the time the events under appeal took place. This was in terms of the margins available in goods purchased from an authorised dealer and sold into the retail market for final sale to a private customer. Mr Stone  
5 gave evidence of the vast trade in mobile phones taking place into and out of the United Kingdom during the period from March to June 2006 and the major tax losses occurring at that time.

71 The tribunal finds from this evidence, and the evidence of the disclosures and statements made by HMRC to LE, Xchange and all similar traders, that it was public  
10 knowledge for anyone involved in early 2006 that profitability in these transactions could be derived, and was being derived, to a substantial extent from the unpaid VAT as well as the market. They knew or should have known there were no other sources of profit.

15 72 It follows that the gross profits made by LE in each of its deals – it made none without a clear mark-up of about 6 per cent in its favour – must have been funded from one or other of these two sources of profit. Given the knowledge that the tribunal finds LE had or should have had, it must be taken to have known that. It also follows  
20 that if Mr Taylor’s evidence was right, and there was little overall profitability in the market, then the profitability of a particular deal or supply must either have come from tax losses by national tax authorities or from losses incurred by other traders in the market. LE gave the tribunal no evidence of any such losses in the market, and HMRC’s evidence of the financing of the deals in question showed that there were no  
25 significant losses incurred by anyone in the chains in which LE was involved. (See for example Annex 2.). The tribunal finds that the evidence of mark-ups in Annex 1 is counterintuitive against that background save to the extent that they were funded by fraud. Given the costs of handling a chain of transactions, it simply does not make sense - unless those mark-ups reflected tax fraud in chains connected in some way  
30 with the chains involving LE. On the facts in evidence, there is nowhere else from which those mark-ups could be financed.

73 The tribunal accepts a further point from the evidence of Mr Taylor. The market for mobile phones was a short-term market. They were not assets to be held  
35 for investment or traded over a sustained period. They were in part fashion items and in part tools rapidly replaced by better tools. The period between the goods leaving the authorised white market and a genuine onward sale to a consumer in a developed market was limited. Unlike some other forms of trade, there was no room in trading products such as these for losses to be concealed or stored up to be realised later. A  
40 tribunal would reasonably expect this also to be reflected in the prices and mark-ups in a free market. The tribunal finds no such evidence in this appeal.

74 Mr Mohindru emphasised that the tribunal was required to look at events as they occurred, and not with the benefit of hindsight. The tribunal agrees. But with that  
45 in mind, the tribunal accepts the significance of the evidence of Mr Stone and Mr Taylor in the submissions of Mr Westwood. LE’s transactions in the first half of 2006 should be viewed not with the hindsight about the involvement of specific traders in

fraud that we now have, but with the reasonable foresight to be expected of someone seeking to make targeted levels of return on transactions in a market the fraudulent character and low market profitability of which were well known at the time.

5 *LE's knowledge of the market*

75 Mr Westwood relied strongly on the actual knowledge of LE and its officers of fraud in the market. LE's response to that was presented in personal terms, namely the knowledge of Alex Mote and his brother. In considering the submissions from both parties, the tribunal had in mind the reminder from Lewison J in *Livewire*, at  
10 [123] that:

“... the *Kittel* test applies to the taxable person. The taxable person was ... the company. The question therefore for the tribunal was not what a director of [the company] knew or ought to have known, but what the company itself  
15 knew or ought to have known. The knowledge of a director of the company may, to be sure, be attributed to a company, but there may be other knowledge (for example that of a senior employee) which, on the facts ought also to be attributed to the company: *Meridian Global Funds Management Asia Ltd v Securities Commission* [1953] 3 All ER 918, [1995] 2AC 500. Accordingly, in  
20 applying the test of what ought to have been known by a director with the knowledge, skill and experience of the particular director concerned, the tribunal, in my judgment, fell into a legal error. To the extent that a domestic analogy is appropriate, the tribunal applied a lower standard than that which would have been appropriate to support a finding of constructive knowledge.”

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76 Mr Westwood contended that LE and its officers had been notified both generally and specifically of fraud in the market in which LE was operating. LE was given warnings about joint and several liability on 27 August 2003, and received warning letters from HMRC. Alex Mote accepted this in evidence and confirmed that  
30 he was aware of fraud in the market. Mr Westwood also drew attention to the specific notification of the deregistration of Nu-Communications (UK) Ltd by HMRC to LE on 9 May 2005. This included an invitation to LE to contact HMRC to make further enquiries. Alex Mote accepted that LE had received this letter.

35 77 In examination Mr Westwood put specifically to Alex Mote points about Nu-Communications (UK) Ltd (“Nu-Communications”). Alex Mote accepted in oral evidence that LE had traded with the company and that he knew Mr Ghaffar was a director of that company. But in his first witness statement he had stated:

40 “I noted the Commissioners deregistration veto letter regarding NU communications UK Ltd. However, I had not traded with NU Communications UK Ltd and therefore did not see how this can affect my trades in 2006 when the letter was issued on 9 5 05.”

45 In his second witness statement he stated:

“I never traded with Nu Communications nor had any knowledge of their trading history.”

In his third witness statement, Alex Mote explained:

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“As stated in my previous witness statement I have not traded with Nu Communications Limited (Nu) in relation to the period in question April to July 2006 and have no knowledge of their trading history in reference to other customers and suppliers. In answering HMRC allegations in relation into the denial of input tax and focusing on this point, this is correct. In reference to a request for a VAT validation from HMRC for NU, this was for a trade some years earlier in 2004, when LE traded with them once.”

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He then commented:

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“Mohammed Ghaffar, a trader of both Nu & Xchange, I now know was disqualified as a company director from Nu in September 2007, years after I traded with him. When I traded with Xchange for a matter of days, we discussed Nu as a result of LE’s due diligence. I was told that Nu was being wound up as a result of personal reasons (divorce matter). Mr Ghaffar gave me no reason to doubt his bona fides, but knowing what I now know, I would not have traded with any company related to him.”

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When asked to explain the discrepancies between these statements, Mote contended that the first witness statement was true “for the period in question”, and that “never” was “probably a bad word to use”. When the point was put to Mr Mote by the tribunal, he accepted that the use of “never” was not still his evidence.

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78 Mr Westwood put to him evidence that he had personally enquired of HMRC about the VAT number of Nu-Communications on 29 October 2004, that he had given Mr Ghaffar as his contact there and that the address of the business given by him was the same as the address later used by Xchange. Alex Mote accepted that. He stated that he had asked Mr Ghaffar and Mr Dyer of Simtel, whom he stated had known Mr Ghaffar for a number of years, why Nu-Communications had gone into liquidation. But he had not asked HMRC or either of them why the company had been deregistered for VAT. Nor was he able to say when the company went into liquidation. In further evidence he confirmed that so far as he was aware LE had not carried out any searches at Companies House to establish why the company had gone into liquidation. It also became clear to the tribunal from his answers that he was not aware of the significance either of the fact that the company went into voluntary liquidation or that it did so after being deregistered by HMRC. It finds that the only information he had received he had accepted but had not questioned. This was that the arrangements had occurred because of a divorce by Mr Ghaffar.

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79 The tribunal finds from this evidence that both Alex Mote as an individual and LE as a company were aware - and were made aware by HMRC - of the extensive VAT fraud in the market in which LE was operating from 2003. The tribunal finds

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specifically that LE was put on express notice of the position with regard to Nu-Communications in 2005 by HMRC and that it had traded, and that HMRC knew that it had traded, with that company a year before. HMRC put LE expressly on notice that that company had been deregistered for VAT. LE was aware of the connections  
5 between Nu-Communications and Xchange from the use of the same address, the involvement in both of Mr Ghaffar, and that one inherited the business of the other. It was or should have been aware that Nu-Communications was put into voluntary liquidation and it should have made itself aware of what it would have been told by HMRC if it had followed up the letter in May 2005. Further, it was prompted about  
10 these issues when it conducted searches against Xchange in 2006. It did not follow them further at that time either. In considering the changing evidence of Alex Mote on these points, the tribunal takes into account the evidence noted below that LE had been asked by Simtel to make a direct payment to Xchange a few months before the period immediately relevant to these appeals, and it had done so, and that this  
15 evidence emerged after the initial witness statements had been prepared. The evidence was included in the bank statements given by LE to FCIB when opening its account with FCIB. The tribunal was not taken by LE to any bank account evidence.

80 On the basis of that evidence and those findings, the tribunal finds that the first and second witness statements by Alex Mote were plainly false in contending as at the  
20 date of signature of those two statements that “I had not traded with Nu Communications UK Ltd and therefore do not see how this can affect my trades in 2006 when the letter had been issued on 9 5 05” and “I never traded with Nu Communications, nor had any knowledge of their trading history”. While it accepts that Mr Mohindru put the point to Mr Mote in chief, and Mr Mote accepted that he  
25 had traded with the company before he was cross-examined, it does not remove the clear and misleading inconsistency between the unambiguous statements in the first two witness statements and the oral evidence. The tribunal does not accept that this was, as Mr Mote suggested, an example of his dyslexia – a condition of which he  
30 gave oral evidence but which was not particularly noticeable in any of his written statements and of which the tribunal was offered no professional evidence. The tribunal concludes from this that Alex Mote was concerned to disguise his knowledge of the events that occurred to Nu-Communications and of the links between that company and Xchange, and that his evidence on these matters is unreliable.

35 *The detail of a specific supply*

81 The tribunal examines in Annex 2 one specific supply, presented in evidence by HMRC as deals 11 and 12. It examines that supply, a supply for intra-Community acquisition, in detail in the light of all the evidence available from both parties in order to consider the more general issues in this appeal in a specific context. On these  
40 data, and given that the mark-up realised by LE was the same as the mark-up on all other sales of products supplied to LE by Simtel, the tribunal finds on the balance of probabilities that deals 11 and 12 were a single supply made to LE on terms that gave it a predetermined margin on its onward sale regardless of the actual identity of the phones involved in the supply or the actual identity of its customer. Further, that  
45 margin was to be realised not on individual phone sales but on the supply as a whole. In other words, the tribunal finds that LE knew when buying the supply of N70 and

E60 phones from Simtel the total price at which it would be able to sell them. That knowledge must have come from the supplier Simtel or a source linked to Simtel. Mr Westwood made submissions that the mark-ups achieved by LE in its transactions were evidence of fraud in the market and of an overall fraudulent scheme. The tribunal agrees with regard to this supply. It was not an arms length commercial transaction of the kind suggested by LE in its evidence. It was, or was part of, a preordained scheme.

*The products and their prices*

82 Annex 1 shows a consistent percentage mark-up of 6 per cent on all daily supplies or exports, although there is some variation on individual deals. The tribunal therefore examined the issue of mark-ups further on the evidence provided. As a start to that consideration, it rearranged the key data in Annex 1 (the prices in and prices out) by reference to the models of Nokia phones being, or allegedly being, traded. All the information in Annex 3 is drawn from Annex 1. As a technical note, the tribunal used the standard software sort facility that can be used for any table held in Microsoft Word to rearrange the data from Annex 1 to Annex 3.

83 The tribunal finds as fact its conclusions in Annex 3. More generally, read with the further details in Annex 1 for each deal, the tribunal finds as fact that the mark-ups achieved by LE on its deals are not related in any identifiable way to the specific models of phones that are the subject of any transaction, but are instead consistently based on a daily return of 6 per cent on the total price paid by LE. This applies regardless of: the relative price paid by LE for that deal compared with other prices paid for the same model in other deals; the identity of the customer to whom LE sold the phones; the quantities sold or the total value of any deal or day's transactions; or the date of sale.

84 The tribunal finds that the cumulative effect of these findings is that it does not accept that the supplies made by LE were genuine arms length commercial supplies.

85 The tribunal finds that, on the balance of probabilities, LE was accepting deals to be supplied with, and then to supply, phones from its chosen supplier (in reality it had only one at that time) to a customer that was not chosen by LE in the open market to maximise profit (or minimise loss). The transactions took place as a result of some process not in evidence to the tribunal that allowed LE to receive an agreed margin regardless of the true value, or even identity, of the goods being purchased and sold. That arrangement must have been made by LE either with its supplier, or its customer, or both, or by a ringmaster (to use the carousel jargon). In the view of the tribunal the probability is that it was a supplier-led scheme, either through Simtel or Xchange. The tribunal can see no other rational explanation for the consistent levels of mark-up in these deals when considered in the light of all the other information available both about the deals and about the market in which they occurred.

*Transactions with its suppliers*

86 This brings to the fore the submissions of HMRC about the evidence of links between LE and Xchange in all the transactions, and with Simtel in most of them.

This was the subject of evidence from several witnesses and in particular of cross-examination of Mr Alex Mote. The tribunal considered that evidence in detail because, as recorded above, Mr Mote changed his mind about his evidence under cross-examination and in doing so raised questions more generally about the credibility and reliability of his evidence on these matters.

87 The tribunal was given only a partial view of transactions that took place between LE and its suppliers before the transactions that are the direct subject of these appeals. As the tribunal has already noted, much of that limited evidence came from HMRC and was not advanced by LE.

*(a) Simtel*

88 The tribunal finds that LE had an established course of significant dealing with Simtel before the transactions in question in this appeal. That relationship was both very active and central to LE's activities in the months before the period immediately under appeal. This is evidenced by LE's bank account statements for late 2005 and early 2006, put in evidence not by LE but as given to FCIB as part of LE's application to bank with FCIB and disclosed by HMRC as part of the FCIB information given to the British authorities by the Dutch authorities. These show several large payments being made to Simtel during November and December of that year and into January 2006. Save for an isolated payment, no significant payments were made to any other third party. That isolated single payment was for £373,217.50 paid by urgent transfer to "Xchange Communic" on 6 January 2006. The tribunal was given no evidence of any direct sales and purchases between LE and Xchange at that time. It finds that this was a third party payment, and that LE was alerted by this, if by no other information, to a link between Simtel and Xchange at that time. The tribunal also finds that Alex Mote knew of personal links between Mr Dyer of Simtel and Mr Ghaffar of Xchange that had existed for some years and of strong links between Xchange and Nu-Communications.

89 The links between Simtel and LE go further back, although again the tribunal was given only partial evidence of the extent of the links. The following were in evidence:

89.1 Simtel completed an LE trade account application on 8 November 2004, signed by Russell King as a director of Simtel. The tribunal does not know whether this was the first such dealing between the two. This application stated that Simtel was incorporated and started trading on 21 June 2004 and was registered for VAT from 31 October 2004 with a monthly turnover of £5 million. Its owner was Russell King, and its company director J Butterfield. No directors were named.

89.2 In a trade account application produced by Mr Greg Mote dated 7 November 2005, Mark Dyer was named as the managing director and Toni Stevenson as the company secretary.

89.3 Mr Greg Mote produced a company report for Simtel for the accounts period to 31 May 2005. This confirmed that Mr Dyer had been director but resigned on 8

May 2005. According to those accounts, the company made an operating loss of £10,000 on a turnover of £25 million in the accounting year.

5 89.4 LE obtained Dunn and Bradstreet credit reports on Simtel on 5 September 2005 and again on 18 January 2006. The earlier of the two contains minimal information and no risk summary. The later contains a suggested maximum credit of £1,300.

10 89.5 A Creditsafe report on 1 February 2006 produced full details of the then company director and company secretary and their other directorships. The credit limit was set at £3,000.

15 89.6 There appears to be no report retained by LE between then and another report on 19 July 2006. This gave the company no credit limit or risk analysis because the financial statements were too old.

20 89.7 A Companies House report for the company was made on 27 July 2006. This showed that the accounts for that year were overdue. The shareholder register showed that the company had one shareholder, Simtel Communications Ltd, with an address in Jersey shared with that of the company secretary but registered in England and Wales. I

25 89.8 Later reports, after the period relevant to the appeal, show that Mr Priest was appointed a director on 23 February 2006. Mr Dyer is named as the owner with Mr Priest as the managing director and Mr O Harvey-Jones as the company secretary.

30 89.9 The history of relations between Simtel and LE was confirmed by a reference given by Simtel to FCIB in February 2006 accompanying the same application to FCIB as was accompanied by the bank statements just noted. The reference claimed that Mr Priest, described as the senior due diligence officer of Simtel, had known LE and its directors for three years. If that is correct, it suggests that Mr Priest knew Mr Mote before Simtel and LE started trading together, and indeed before Simtel was incorporated.

35 90 Mr Westwood examined what LE knew of Simtel in some detail with Mr Mote. In his first witness statement, Mr Mote gives only scattered details about Simtel other than mentioning it when detailing specific deals. Under “response to Commissioners’ Case” Mr Mote describes the way Simtel introduced LE to Xchange. Under “knew or ought to have known” Mr Mote contended that credit ratings were irrelevant for Simtel, and that all stock was delivered on time.

40 91 In his third statement Mr Mote clarified the position as follows:

45 “LE had previously traded with a PLC and one of their head traders, started with a new company called Simtel. I decided that we would deal exclusively with them, as part of our strategy to avoid the risk of getting involved in fraud as the trader in question had an experienced back ground with a PLC and a number of other related companies. However, the only other occasion we dealt

outside of Simtel, was with Xchange Communications Ltd. We traded with Xchange for a brief period before returning to Simtel, as explained in my earlier witness statements.”

5 92 Mr Greg Mote stated in his witness statement that he visited Simtel in early  
2005 on joining LE. He also stated that “during 2005 and 2006 I continually updated  
the Company’s due diligence on numerous visits to Simtel, our main supplier”. That  
due diligence, he stated, was exhibited to his statement. There was no supporting  
evidence of “numerous visits”. A tribunal could reasonably expect evidence of that  
10 sort to be retained given the other evidence of LE in this appeal.

93 In his first witness statement Mr Alex Mote made it clear that LE’s deals at  
that time were in reality his deals, and he made a positive statement about his  
approach to those deals:

15 “My deal chains were kept as short as possible for one very good reason. The  
reason being a short deal chain meant less risk of defaulter or missing traders  
being discovered. Therefore I would have thought HMRC would have been  
happy that our deal chains were shortened, reducing the risk of tax loss. I must  
20 also point out that while LIFE was happier dealing with short deal chains  
commercial activity beyond our control meant that could not be guaranteed.”  
 (“Knew or should have known, para iv”).

94 This suggests both that LE paid attention to the length of its deal chains and  
25 that it was aware of why it should do so. Mr Mote appeared to follow that approach  
through to the way LE dealt with Xchange and Simtel:

30 “Life Enterprises traded briefly with Exchange Communications Ltd through  
April 2006 for a period of approximately 10 days. Life Enterprises were  
introduced to Exchange by one of our supplier SIMTEL Communications  
London Ltd. This occurred, as I was informed by SIMTEL that they were  
undergoing management restructuring and for a short period of time would not  
be able to continue their supply of mobile phones to Life Enterprises.

35 I was aware that this was an unusual step for one of our suppliers to introduce  
me to one of his suppliers. To protect SIMTEL I agreed to sign an affidavit to  
the effect that I would only trade with Exchange for a short period of time. I  
was willing to sign the affidavit with Simtel as they were a creditable long  
standing supplier with good quality, competitively priced stock. It has taken a  
40 great deal of time to develop this business relationship, which I had no  
intention of effecting. I deem this affidavit justified.”  
 (“Response to Commissioners Case paragraphs 1 and 2”).

95 Later in the statement, Mr Mote returned to this point in seeking to answer the  
45 Commissioners’ case from paragraph 40:

5 “I have addressed the issue of trading with Simtel & Xchange earlier in this witness statement. However, I would point out that I operated a legally binding agreement to trade with Xchange for a short period of time. I did not breach that agreement. However, it must be pointed out that knowing my supplier’s supplier meant that I could fulfil my due diligence requirements beyond those parties either side of me in a transaction. Therefore knowing the existence of Xchange and knowing that it was a valid business meant I was more secure in knowing that there was no trade loss as far as I could tell in my transaction chains. Therefore, I fulfilled the due diligence requirements above and beyond what could normally be expected of commercial reality.”  
10 (Paragraph 3 of that response.)

15 That final evidence was consistent, according to the evidence of officer Warner, with the details given by Mr Mote in an interview with HMRC on 24 October 2006. (The witness statement was made on 24 December 2007.)

196 Mr Mote was asked to explain this in cross-examination. With regard to his knowledge of the length of the deal chains, he stated that his knowledge of that was based on two sources. The first was information he was given by the freight forwarders he used that his chains were shorter than chains in other transactions. The other was the speed with which stock was released to customers: “if, for instance, my customer was ringing me three weeks later and saying the stock still hasn’t been released, one can assume that I have a number of people in the chain.” The tribunal saw no evidence from the relevant period that illustrated this statement. He accepted in reply to a direct question that he did not know how long the deal chains were. At the same time Mr Mote told the tribunal that he knew that Simtel was not a Nokia authorised supplier and that it was buying from the grey market.

197 The tribunal finds that Mr Mote’s evidence was not consistent and was lacking in detail when he was questioned about the extent of his knowledge about the changes that took place in Simtel in early 2006. The tribunal finds that LE was alerted to the changes in Simtel at that time because Simtel was unable to supply it with stock in February or March 2006, the start of the period directly relevant to these appeals. As part of this, LE reached an unusual agreement with Simtel that it could trade directly with Xchange while Simtel was unable to supply it. Mr Mote put considerable weight on the restrictions imposed by this agreement, which he referred to as an “affidavit”. The true picture emerges from the documents produced. Mr Priest of Simtel wrote to LE on 3 April 2006. The letter stated that Simtel “are undertaking a managerial restructure” as a result of which “we are unable to fulfil your supply requirements.”  
40 The letter continued:

45 “As a valued and loyal customer whom we would be unprepared to lose, we have agreed with a major supplier to supply you directly for a limited amount of time, until our (*original error*) managerial restructuring is finalised.

If you undertake this offer you will agree to the terms and condition of this agreement. Could you please also confirm that under no circumstances Life

Enterprises Ltd will deal directly with out supplier unless prior consent is given.”

5 Alex Mote responded on 5 April 2006 agreeing to “the terms and conditions”. In giving evidence, Mr Mote accepted in evidence that there were no other terms and conditions.

98 The repeated reports about Simtel reveal a change of office holders in February 2006, but the position with regard to capital and risk remained the same.  
10 There was a single £1 share issued as capital of the company and held through Jersey. There was in every report that dealt with Simtel no current positive credit rating of any significance.

99 The tribunal does not accept Mr Mote’s evidence about the agreement with Simtel. The tribunal finds this arrangement for a temporary supplier to be a most  
15 unusual occurrence and one that in absence of special circumstances would put any reasonable trader on notice that it needed to find out in some detail what was happening. No point was made in evidence that this failure to supply was product-specific. It was a general inability of Simtel to trade. This is despite the fact that  
20 Simtel appears to have conducted its trade in the same way as LE – that is, not holding stock but passing it along the chain from Xchange or another supplier to LE via a freight forwarder. This is something of which LE was aware if it made the “numerous visits” to the Simtel premises it claimed in evidence. The tribunal finds that LE offered no reasonable explanation for its conduct with regard to trading with  
25 Xchange under the agreement with Simtel. The information available to LE suggested that in terms of its credit standing Simtel was very weak. It was given no adequate explanation of the inability of Simtel to trade at the time, and no specific evidence of a management restructuring. If LE was trading commercially in an open market as it claimed, why would it accept such an arrangement without significant consideration  
30 or without strong special reasons to do so? It was an agreement to Simtel’s advantage with no obvious commercial gain to LE. The data in Annexes 1 and 3 show that it made no difference to the mark-up it received on its deals even though the chain was shorter because of the absence of Simtel. That is consistent with the view the tribunal has taken about the existence of an overall scheme on the supply side of LE’s deals,  
35 and the conduct of LE on this point suggests that this was also part of a scheme.

100 The tribunal agrees with the HMRC case that a reasonable trader that was fully aware – as Mr Mote accepted was the case – of fraud in the market would take  
40 specific steps to find out what caused this unusual situation to arise and this unusual solution to be offered. LE must have asked itself why Simtel was unable to Act as an intermediary when Simtel clearly had close links with Xchange and could ensure that Xchange supplied LE direct. Alternatively, it could be expected to ask itself whether it should continue to trade with Simtel if Simtel had let it down. Mr Mote’s evidence presented that as a choice between continuing to trade with Xchange,  
45 despite the affidavit, and going back to Simtel. There were two obvious other courses of action: to find others to supply it or to stop trading in that particular market itself.

101 A further point was made for HMRC by Mr Westwood. Was Simtel, aside from the formal issue of its continuing corporate identity, actually the same company after the events in March 2006 as it was before those events? Mr Mote's evidence was that he dealt with Simtel to the exclusion of others to avoid fraud. It is therefore particularly important to LE that it satisfied itself why Simtel found itself unable to obtain stock, what LE found out about Xchange when it decided to trade with Xchange, and how it satisfied itself that its trade with Simtel after that time was a genuine open market trade. Applying the standard *Kittel* test to itself, how did it satisfy itself that its transactions were not connected with fraud? The reports gathered by LE show that the officers of Simtel changed, but little else. There was no recapitalisation. Indeed, there was no capital. There was no improvement in credit rating.

102 For all these reasons, the tribunal does not accept that LE dealt with Simtel at this time at arms length in a fully commercial fashion. It accepts that the probable explanation was that LE was benefiting from some broader scheme of which these transactions were part and from which it secured a regular rate of return to act as broker. The tribunal does not accept the explanation given by Mr Mote for seeking to maintain a relationship with a trader that, apparently, was unable to trade, that had no capital and no credit rating, and that stated that it had undergone a change of management structure of which there were no identified features.

#### *Xchange*

103 The tribunal accepts the unchallenged evidence from officer Warner of HMRC of links between Xchange and Simtel, and that these replaced links between Nu-Communications and Simtel when Nu-Communications ceased to supply Simtel in April 2005 and then went into voluntary liquidation the following month. Mr M Ghaffar had been the director of Nu-Communications before its liquidation and became a director of Xchange after that event. The company secretary of Xchange, Mr R H Festenstein, had also been the company secretary of Nu-Communications. Xchange took over Nu-Communications' business on its liquidation. The address was the same.

104 The tribunal has already found that LE was or should have been aware of these connections. LE produced a trade account application from Xchange dated 11 April 2006. This showed Mr M Ghaffar as the only named officer, named as managing director at that date. The application included some of the required details, including an indicated turnover excluding VAT of £10 million and an indication that the last VAT return was for 10/05, but no copy of that return or recent commodity bill.

105 A short Creditsafe report on Xchange obtained on 13 April 2006 showed the directors as Mr Ahsan from 7 April 2006, Mr Festenstein from 19 January 2006, and Mr Ghaffar as leaving on that date. It stated that the company was dormant as of 1 December 2005, had no credit limit, and was listed for dissolution (first gazette) on 1 December 2005. In the tribunal's view, the matters raised on this report would be of immediate concern to any reasonable trader who understood the significance of the information given. In particular, the gazetting of the company meant that it was at real

risk of being struck off the register if it did not comply with its corporate obligations. The evidence for LE suggests that this was either not understood or was ignored by LE at that time.

5 106 Other reports retained by LE were made at dates after those directly relevant to the appeal. A Companies House report on Xchange was obtained on 27 July 2006. This reported accounts last made up to 31 March 2004 as a dormant company and accounts and returns since then overdue. The report also showed that the then director and secretary had resigned on 4 May 2005 and confirmed that the company was  
10 gazetted for the first time on 25 October 2005. On 29 November 2005 accounts were submitted showing the company as dormant as at 31 March 2004. On 16 January 2006 the company secretary resigned. New returns were made on 9 February 2006. This showed Mr Ghaffar as the director, and 100 £1 shares issued and held by him.

15 107 Mr Mote was taken to these and similar reports by Mr Westwood. He was asked specifically both about the reports that Xchange was dormant and about the entry indicating that it had been gazetted. In reply he stated:

20 “This information on this sheet is a creditsafe.com. It is second- third- fourth-hand information. The most important information is meeting the directors directly, going to their offices, and seeing that they are currently trading and participating in trading. That’s far more important than any report here.”

The tribunal finds that this evidence is completely inconsistent with the evidence of  
25 both this witness and his brother that they had undertaken considerable due diligence on an ongoing basis into this and the other companies. It suggests that in collecting the information from Companies House, Creditsafe and others, they were undertaking a box-ticking exercise that was not a genuine part of their approach to their business. Further, it became clear in reply to later questions that Mr Mote did not understand  
30 the importance of the Gazette entry or of the company being dormant, or alternatively he chose to make no enquiries about these points. Nor did he recall having asked Mr Ghaffar why he was recorded as having ceased to be a director of the company in January or February 2006 although he had signed a standard LE trade account application on 13 April 2006 as managing director. That is all consistent with an  
35 approach to “due diligence” that suggests it was of no real importance to the way LE conducted its business.

108 The tribunal finds that this is another important instance where Alex Mote’s evidence is inconsistent and unreliable. The attitude to the checks shown in the above  
40 evidence is inconsistent with LE’s case, and Mr Mote’s evidence, that LE engaged in a high level of due diligence.

109 The tribunal therefore finds that it is satisfied that LE did have connections with both Simtel and Xchange that went beyond ordinary commercial links. It was  
45 aware of, and failed to explore adequately on an arms length basis, both the links between Simtel and Xchange and the weak commercial standing of both companies. It knew of the failure of Nu-Communications and had been put on notice to make proper

enquiries about this but preferred instead to rely on a couple of casual checks about the verbal explanation he was offered. The ineffectual nature of those checks is illustrated by an answer he gave on that point in evidence in chief:

5           “... then obviously we spoke to Xchange, to Mohammed Ghaffar and said  
“one of your previous companies is in insolvency. Can you explain?” He said  
that it was a personal matter. Unfortunately he had a divorce and the company  
he had put in ... voluntary liquidation. I had no reason to doubt that. I spoke to  
10           one of my suppliers, Simtel, who had known Mohammed Ghaffar for a  
number of years and just said, as a passing comment, “Is that correct? Is he  
divorced?” He said “Yes he is divorced” so I was content with that.

110       Mr Westwood took Mr Mote back to this in cross-examination. The tribunal  
finds from Mr Mote’s answers that LE had not followed up the letter from HMRC  
15           about problems with Nu-Communications, that LE did not know that the company  
had been deregistered for VAT, that LE did not know that the company had gone into  
a creditors’ voluntary liquidation rather than a members’ voluntary liquidation or  
whether the deregistration preceded the liquidation (as it did) or followed it (as he  
appeared to have assumed). It was also another issue on which Mr Mote represented  
20           that there was evidence on checks about the company that he had not produced. The  
tribunal endorses its previous view of this approach by Mr Mote to giving evidence. It  
does not accept it.

#### *Conclusions*

25       111       The tribunal reminds itself that it has accepted for the purposes of this appeal  
that it is for HMRC to show on the balance of probabilities that the tests set out at [4]  
and [5] of this decision are satisfied. Judged by the civil standard of proof the tribunal  
finds that HMRC has established the answers it contended to each of the questions  
30           confirmed as correct by the Chancellor in *Blue Sphere Global*. There was a VAT loss  
through the activities of Xchange and Style among others. That loss resulted from  
fraudulent evasion by those companies. The LE transactions that are the subject of  
this appeal were connected with that evasion. This applies to all the deals covered by  
the appeal, as detailed in Annex 1.

35       112       The tribunal also finds that LE had close connections with Xchange and  
Simtel and that it chose to ignore the clear messages about those companies given to it  
by its due diligence and by HMRC, stating that it preferred instead relationships  
established with individuals in and behind those companies. As a result of those  
relationships, it was able to enter a highly risky market with no proper legal advice  
40           about international trade or other aspects of its trade, no insurance, no arrangements  
for or policy about credit, no serious negotiation with any supplier, dealing with one  
supplier only, and no evidence of any active pursuit of or by customers. Yet it  
produced a consistent rate of return of 6 per cent from its daily transactions. The  
tribunal finds that the consistent receipt of such a return in that market by a company  
45           trading in that way can only have been as the result of some overall scheme from  
which it was benefitting, that that scheme involved fraudulent evasion of VAT, and  
that LE knew or should have known that this was so.

113 In this appeal LE was not undertaking a series of transactions with a series of  
different suppliers. On the contrary, it was trading with goods from one supplier,  
Xchange, or an intermediate supplier connected with that supplier, on a repeated  
5 basis. In its initial evidence this was regarded as a good thing. Only during the course  
of the collection of evidence did Alex Mote back away from his earlier evidence that  
he knew that Xchange was a constant supplier in this appeal. The tribunal accepts the  
earlier evidence as truthful. The tribunal accepts the evidence of HMRC that Xchange  
and the other suppliers linked with it were engaged in a scheme to defraud.

114 This is not a case where the tribunal is concerned whether the appellant had or  
did not have knowledge of the chains above and below its transactions beyond the  
knowledge of its immediate counterparties or other parties in the chains of which it  
actually knew. Nor is it a case where fraud was alleged directly against the appellant  
15 or individuals involved in the appellant. The tribunal does not need to make, and does  
not make, any finding that LE was involved in fraud. It is enough in this appeal that  
the *Kittel* test of “knew or should have known” can be applied directly to LE’s actual  
knowledge of its known suppliers, Simtel and Xchange, and to the knowledge shown  
to be available to it on ready enquiry about those known suppliers. The tribunal also  
20 finds that the arrangements made by LE with those suppliers were not open market  
trades but were pre-ordained deals with a fixed mark-up. The tribunal further finds  
that on all the evidence available to it the preordained mark-up of 6 per cent can have  
been financed only through fraud from schemes involving those suppliers. Further,  
the tribunal finds on the balance of probabilities that LE must have known, or at the  
25 least on the specific information available to it about both its suppliers and the market  
had available to it the clear means of knowing and should have known, that this was  
so. For the reasons detailed above, the tribunal finds as fact that LE knew or should  
have known that it was benefiting from fraud in undertaking all these deals with its  
known suppliers on the pre-ordained terms of supplies accepted by it.

115 HMRC is entitled to refuse the input tax claimed by LE on all the deals or  
transactions that are subject to this appeal.

116 HMRC is entitled to its costs for the appeal, save as otherwise directed.

35

40 **DAVID WILLIAMS**  
**TRIBUNAL JUDGE**  
**RELEASE DATE: 2 December 2009**