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Case No: CH/2009/APP/0102

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

20/10/2009

B e f o r e :

MR JUSTICE CHRISTOPHER CLARKE

Between:

Red 12 Trading Limited	**Appellant**
- and -	
The Commissioners for Her Majesty's Revenue & Customs	**Respondent**

MR F RANDOLPH QC (instructed by Mackrell Turner Garrett) for the Appellant
MISS H MALCOLM QC, MISS S LAMBERT and MISS R MARCUS (instructed by HMRC Solicitors' Office) for the Respondent
Hearing dates: 18th, 19th and 22nd June

HTML VERSION OF JUDGMENT

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Mr Justice Christopher Clarke:

1. This is an appeal from a decision of the VAT & Duties Tribunal, sitting in London, released on 16th December 2008. By that decision the tribunal dismissed, save in one respect, the appeal under section 83 (c) and/or (e) of the **Value Added Tax Act 1994** of the appellant, Red 12 Trading Ltd ("Red 12"), against the denial by the respondents, the Commissioners for Her Majesty's Revenue & Customs ("HMRC") of Red 12's ability to deduct input tax in respect of 46 transactions in the tax periods 02/06 and 03/06. The input tax in issue was £ 2,672,748.50.

2. This case concerns what is called "Missing Trader Intracommunity Fraud" ("MTIC fraud"). Anyone reading this judgment is likely to be familiar with this expression, which has been explained in several tribunal and High Court decisions. The classic way in which the fraud works is as follows. Trader A imports goods, commonly computer chips and mobile telephones, into the United Kingdom from the European Union ("EU"). Such an importation does not require the importer to pay any VAT on the goods. A then sells the goods to B, charging VAT on the transaction. B pays the VAT to A, for which A is bound to account to HMRC. There are then a series of sales from B to C to D to E (or more). These sales are accounted for in the ordinary way.

Thus C will pay B an amount which includes VAT. B will account to HMRC for the VAT it has received from C, but will claim to deduct (as an input tax) the output tax that A has charged to B. The same will happen, mutatis mutandis, as between C and D. The company at the end of the chain – E – will then export the goods to a purchaser in the EU. Exports are zero-rated for tax purposes, so Trader E will receive no VAT. He will have paid input tax but because the goods have been exported he is entitled to claim it back from HMRC. The chains in question may be quite long. The deals giving rise to them may be effected within a single day. Often none of the traders themselves take delivery of the goods which are held by freight forwarders.

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

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

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

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

7. There are variants of the plain vanilla version of the fraud. In one version ("carousel fraud") the goods that have been exported by the broker are subsequently re-imported, either by the original importer, or a different one, and continue down the same or another chain. Another variant is called "contra trading", the details of which are explained in paragraphs 9 and 10 of the judgment of Burton J in **R (on the application of Just Fabulous (UK) Ltd) v HMRC** [2008] STC 2123. Goods are sold in a chain ("the dirty chain") through one or more buffer companies to (in the end) the broker ("Broker 1") which exports them, thus generating a claim for repayment. Broker 1 then acquires (actually or purportedly) goods, not necessarily of the same type, but of equivalent value from an EU trader and sells them, usually through one or more buffer companies, to Broker 2 in the UK for a mark up. The effect is that Broker 1 has no claim for repayment of input VAT on the sale to it under the dirty chain, because any such claim is matched by the VAT accountable to HMRC in respect of the sale to UK Broker 2. On the contrary a small sum may be due to HMRC from Broker 1. The suspicions of HMRC are, by this means, hopefully not aroused. Broker

2 then exports the goods and claims back the total VAT. The overall effect is the same as in the classic version of the fraud; but the exercise has the effect that the party claiming the repayment is not Broker 1 but Broker 2, who is, apparently, part of a chain without a missing trader ("the clean chain"). Broker 2 is party to the fraud.

8. HMRC will have records of whatever returns have been made to them by companies registered for VAT and will know what has been accounted to them and what has not. Using those records and information provided by VAT registered companies they are able to trace a chain of transactions in respect of which output tax received has been accounted for and claims to deduct imput tax have been made. They can, thus, trace back from exporter E to (say) importer A. But at some stage the trail is likely to go cold. In the classic version of the fraud it will do so when HMRC gets to A because A and its documents have disappeared. HMRC will know that A has defaulted on its obligations in respect of VAT since it will not have received any of the output tax paid by B to A (as accounted for by B).

9. However, HMRC may not be in a position to know whether A is in fact the importer or whether there may have been earlier companies in the chain, either as purchasers or transferees, such that its full length was (say) Y – Z – A – B etc. In that example there will have been a defaulter (A), who will not have accounted to HMRC for VAT, but there will also have been an importer (Y). Whether or not Y or Z are liable to account for VAT may depend on the exact nature of the dealings between Y, Z and A, between whom money may not have changed hands.

10. In a chain of transactions between traders all of whom are honest each trader will account to HMRC for the output tax received (in respect of which the trader acts, broadly speaking, as agent for HMRC: **Elida Gibbs Ltd v Customs & Excise Comrs** [1996] ECR I-5339), less any input tax incurred, which he will claim from HMRC. He will, ordinarily, need most of the money received from his sales to pay his supplier and the VAT due. The full extent of any chain will be patent. Where there is dishonesty the position is different. It is in the interests of those who seek to defraud HMRC of VAT to hide the full extent of any chain by the use of buffer companies. Such persons lack any interest in seeing that they, or the companies through whom they operate, are able to account to HMRC for all the VAT that they should.

11. The tribunal noted that, in some of the chains in the present case, instructions had been given for the price (or most of it) to be paid to some third party in a Member State other than the UK. The tribunal accepted that this was evidence of two things:

(a) that the goods had been imported from the EU; and

(b) fraud, since it ensured that the defaulting trader was left with no funds from which HMRC could seek payment of the VAT liability. .

Law

12. Articles 167 and 168 of **Council Directive 2006/12/EC** of 28 November 2006 on the Common System of Value Added Tax (the "2006 Directive"), which is the successor to two earlier Directives on the harmonisation of the laws of Member States relating to turnover taxes, provide:

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

168 Insofar as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) The VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person."

13. Section 24 of the **Value Added Tax Act 1994** defines "*input tax*" as including VAT on the supply to any taxable person of any goods or services used or to be used for the purpose of any business carried on or to be carried on by him. Section 25 of the same Act provides for a taxable person to account in prescribed accounting periods in respect of supplies made by him and provides that, subject to certain provisions, he is

    "entitled to credit at the end of the period [for] so much of the input tax for the period (that is input tax for supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below"

    Subsection 25 (2) includes taxable supplies. By section 24 (1) (a) "*input tax"* includes VAT on the supply of any goods or services. The **VAT Regulations 1995** provide that a person claiming deduction of input tax must do so on a return made by him for the prescribed accounting period in which the VAT becomes chargeable.

The effect of fraud

14. In a number of cases the European Court of Justice ("ECJ") has had to consider the operation of the VAT regime in circumstances where there has been fraud. These cases establish that, in certain circumstances involving fraud, HMRC has a right to refuse repayment of input tax. From these cases a number of principles may be derived.

15. It is well established that:

    "*the question whether the VAT payable on prior or subsequent sales of the goods concerned has or has not been paid to the Treasury is irrelevant to the right of the taxable person to deduct input VAT*": see para 49 of *Axel Kittel v Etat Belge* Case C – 439/04 [2006] ECR I-6161.

Innocent traders

16. In **Optigen Ltd & Ors v Commissioners of Customs & Excise** [2006] ECR I-483 there was a carousel fraud. The taxpayers were, it was accepted, innocent parties to a number of transactions in the carousel. They had had no dealings with the trader that went "missing", and had no reason to know that they were doing anything other than buy computer chips from one company and selling them to another company in another Member State. The argument for HMRC, which the tribunal had upheld, was that the taxpayers could not claim the input tax because a trader, even though innocent of either fraud or recklessness, does not have a right to a refund of input VAT on goods which it has sold to a company outside the UK when there was a defaulting trader in the chain of supply.

17. HMRC's contention was that transactions forming part of a carousel fraud were not "*economic activities*" within the meaning of the then applicable Sixth Directive[1], which by Article 4 (1) defines a taxable person as "*any person who independently carries on in any place any economic activity*" specified in paragraph 2. By Article 4 (2) "e*conomic activities*" were defined as "*all activities of producers, traders and persons supplying services*". The transactions in issue were said by HMRC to be devoid of economic substance and outside the scope of the Directive.

18. In the course of his opinion the Advocate General said:

" 20 Crucial to the United Kingdom's line of reasoning is the view that the carousel scheme must be regarded as a whole in order to determine whether VAT applies to the separate transactions therein. I do not share this view.

27 …. carousel fraud concerns a series of consecutive activities, performed by a number of traders in a supply chain. It is an essential feature of the common system of VAT that VAT becomes chargeable on each transaction in a supply chain. Each transaction must therefore be regarded on its own merits. Consequently, the character of a particular transaction in the chain cannot be altered by earlier or subsequent events".

19. At paras 45 – 47 the ECJ held:

"45 As the Court held in paragraph 24 of its judgement in Case C -4/94 BLP Group [1995] ECR I-983, an obligation on the tax authorities to carry out enquiries to determine the intention of the taxable person would be contrary to the objectives of the common system of VAT of ensuring legal certainty and facilitating application of VAT by having regard, save in exceptional cases, to the objective character of the transaction in question

46 An obligation on the tax authorities to take account, in order to determine whether a given transaction constitutes a supply by a taxable person acting as such[2] and an economic activity[3], of the intention of a trader other than the taxable person concerned involved in the same chain of supply and/or the possible fraudulent nature of another transaction in the chain, prior or subsequent to the transaction carried out by that taxable person, of which that taxable person had no knowledge and no means of knowledge, would a fortiori be contrary to those objectives.

47 As the Advocate General observed in point 27 of his Opinion, each transaction must therefore be regarded on its own merits and the character of a particular transaction in the chain cannot be altered by earlier or subsequent events."

20. The ECJ held that transactions such as those in issue, which were not themselves vitiated by VAT fraud, constituted supplies of goods or services effected by a taxable person acting as such and an economic activity within the meaning of the relevant Articles, where they fulfilled the objective criteria on which the definition of those terms was based regardless of the intention of a trader other than the taxable person concerned involved in the same chain of supply and/or the possible fraudulent nature of another transaction in the chain**,** prior or subsequent to the transaction carried out by that taxable person of which that taxable person had no knowledge and no means of knowledge.

"52 Nor can the right to deduct input value added tax of a taxable person who carries out such transactions be affected by the fact that in the chain of supply of which those transactions form part another prior or subsequent transaction is vitiated by VAT fraud, without that taxable person knowing or having any means of knowing."

21. Similarly in **Kittel v Etat Belge** [2006] ECR I-4191 the ECJ held that:

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

Guilty traders

22. In **Kittel** the Court held that:

"53 By contrast the objective criteria which form the basis of concepts of "supply of goods effected by a taxable person acting as such" and "economic activity" are not met where tax is evaded by the taxable person himself ……

54 As the Court has already observed, preventing tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive …Community law cannot be relied on for abusive or fraudulent ends..

55 Where the tax authorities find that the right to deduct has been exercised fraudulently, they are permitted to claim repayment of the deducted sums retroactively… It is a matter for the national court to refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent ends…

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

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

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

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

23. In **HMRC v Livewire Telecom Ltd** [2009] EWHC 15 (Ch), para 76 Lewison J summarised the state of European jurisprudence contained in **Kittel**, together with **Teleos Plc v HMRC** [2007] ECR I-7797 and **Netto Supermarket Gmbh v Finanzamt Malchin** [2008] ECR I-771, as well as **Commrs of Customs & Excise v FTI** [2006] ECR I-4191 and **Garage Molenheide BVBA v Belgian State** [1997] ECR I-7281 as follows:

(i) The objective of preventing evasion of VAT is an objective

encouraged by the Sixth Directive (***Kittel,*** para 54);

(ii) This objective precludes the recovery of input tax where the tax is evaded by the taxable person himself (**Kittel,** para 53). In such cases where the right to deduct has been exercised fraudulently the deduction may be retrospectively disallowed (**Kittel**, para 55);

(iii) This objective sometimes justifies stringent requirements as regards suppliers' obligations, but any sharing of risk must be compatible with the principle of proportionality (**Teleos***,* para 58);

(iv) It is disproportionate and contrary to Community law to require a person who is a careful and honest trader to assume liability for the frauds of others (**Teleos**, A-G's opinion para 77, footnote);

(v) It is also disproportionate to hold a taxable person liable for the fraudulent acts of third parties over whom he has no influence (**Netto**, para 23);

(vi) A trader who takes every precaution that could reasonably be required of him, and does not realise that he is participating in VAT fraud must be entitled to rely on the legality of his own transaction (**FTI**, para 33);

(vii) A person who knew or should have known that by his purchase he was taking part in a transaction connected with the fraudulent evasion of VAT is to be treated in the same way as a person who fraudulently exercises the right to deduct (**Kittel,** paras 55,56);

(viii) It is not contrary to Community law to require a supplier to take every step that could reasonably be required of him to satisfy himself that the transaction which he is effecting does not result in his participant [sic] in tax evasion (**Teleos**, para 65; **Netto**, para 24);

(ix) Likewise a taxable person can be expected to act with all due diligence and care (**Netto**, A-G's opinion, para 45);

(x) Whether a taxable person knew or should have known that he was participating in a transaction linked with the fraudulent evasion of VAT must be determined having regard to objective facts or factors (**Kittel,** para 59);

(xi) Community law does not prohibit presumption, but presumptions must be rebuttable by evidence (**Garage Molenheide**, para 52; **FTI,** para 32).

Presumptions

24. In **Commrs of Customs & Excise v FTI** [2006] ECR I-4191 the ECJ dealt with the extent to which Member States might enact legislation which rendered taxpayers liable if they knew or suspected that some or all of the VAT payable in respect of the supply of goods or services to them or to someone earlier or later in the chain of supply would go unpaid.

25. Section 18 of the **Finance Act 2003** added section 77 A to the **VAT Act 1994.** It related to telephones and computers and equipment such as parts, accessories and software relating to computers. Section 77 A (2) entitled HMRC to serve a notice on a taxable person to whom a taxable supply had been made where at the time of supply the person supplied knew or had reasonable grounds to suspect that some or all of the VAT payable in respect of that supply, or on any previous or subsequent supply of those goods, would go unpaid. The notice was to specify the amount of VAT that was unpaid and its effect was that the person upon whom it was served was to be jointly and severally liable to HMRC for the amount in question.

26. By section 77 A (6) it was provided that a person should be presumed to have reasonable grounds for having that suspicion if the price payable by him for the goods in question :

"(a) was less than the lowest price that might reasonably be expected to be payable for them on the open market, or

(b) was less than the price payable on any previous supply of those goods."

The presumption was rebuttable on proof that the low price payable for the goods was due to circumstances unconnected with failure to pay VAT. The purpose of these provisions was to combat MTIC fraud, including carousel fraud.

27. The Court held:

" 28 Article 21 (3) of the Sixth Directive therefore permits, as a rule, Member States to enact measures under which a person is to be jointly and severally liable to pay a sum in respect of VAT payable by another person made liable by one of the provisions of Article 21 (1) and (2).

29 However, when they exercise the powers conferred on them by Community directives, Member States must comply with the general principles of law which form part of the Community legal order, which include, in particular, the principles of legal certainty and proportionality …

30 With more particular regard to the principle of proportionality, it must be pointed out that, whilst it is legitimate for the measures adopted by the Member States, on the basis of Article 21 (3) of the Sixth Directive, to seek to preserve the rights of the public exchequer as effectively as possible, such measures must not go further than is necessary for that purpose (see, to that effect, Molenheide and Others, paragraph 47).

31 In that regard, the national measures at issue in the main proceedings provide that a taxable person other than the person who is liable can be made jointly and severally liable to pay the VAT with the latter person if, at the time of the supply to him, the former knew or had reasonable grounds to suspect that some or all of the VAT payable in respect of that supply, or of any previous or subsequent supply of those goods, would go unpaid. A person is presumed to have reasonable grounds for suspecting that such is the case if the price payable by that person was less than the lowest price that might reasonably be expected to be payable for those goods on the market, or was less than the price payable on any previous supply of those goods. That presumption is rebuttable on proof that the low price payable for the goods was attributable to circumstances unconnected with failure to pay VAT.

32 While Article 21 (3) of the Sixth Directive allows a Member State to make a person jointly and severally liable for the payment of VAT if, at the time of the supply, that person knew or had reasonable grounds to suspect that the VAT payable in respect of that supply, or of any previous or subsequent supply, would go unpaid, and to rely on presumptions in that regard, it is none the less true that such presumptions may not be formulated in such a way as to make it practically impossible or excessively difficult for the taxable person to rebut them with evidence to the contrary. As the Advocate General observed in point 27 of his Opinion, those presumptions would, de facto, bring about a system of strict liability, going beyond what is necessary to protect the public exchequer's rights.

33 Traders who take every precaution which could reasonably be required of them to ensure that their transactions do not form part of a chain which includes a transaction vitiated by VAT fraud must be able to rely on the legality of those transactions without the risk of being made jointly and severally liable to pay the VAT due from another taxable person (see, to that effect,Optigen …… para 52)…."

28. In **Garage Molenheide**, to which the ECJ referred in **FTI**, the ECJ was concerned with four cases raising the legitimacy of certain provisions of Belgian law which allowed the fiscal authorities to retain, as a protective measure, refundable amounts of VAT. The relevant Belgian legislation (a Royal Decree) dealt with the situation if at the end of the calendar year there was a refundable amount of VAT because authorised deductions exceeded the VAT due.

29. Two sub-paragraphs of the Decree provided for two different rights of retention. The first provided that any excess claimed to be due was deemed to be claimed only subject to payment of any unpaid tax debts. This right of retention provided that, if those tax debts were not, in whole or in part, "*certain, payable and definite*" the tax credit was nevertheless to be retained by the authorities. That retention was to take effect as a preventive attachment until the dispute had been definitively resolved, either in an administrative procedure or by a final court judgment. The condition laid down by Article 1413 of the Judicial Code (that a preventive attachment may be carried out only in cases where prompt action is required) was deemed to have been satisfied.

30. Under the second right of retention, if there were serious grounds for presuming, or there was evidence that the taxpayer's returns in relation to previous periods contained inaccurate information and such grounds or evidence pointed to the existence of a tax debt which could not be established before the time for the payment order in respect of the refund no payment order was to be made and the tax credit was to be retained in order to permit the administration to verify the accuracy of the information.

31. These retentions had the effect of a preventive attachment within the meaning of Article 1445 of the Judicial Code.

32. The relevant Belgian authority contended that there were serious grounds for presuming that Molenheide's VAT return for 1993 contained incorrect and incomplete particulars. A retention notice was served on Molenheide. Molenheide contested it. In the case of a Mr Schepens the authorities served a retention notice contending that there were serious grounds for presuming that there was some MTIC carousel fraud going on involving the export by the taxpayer of expensive cars from Belgium, a claim by him for repayment of input tax and a failure to account for VAT by any of the taxpayer's suppliers.

33. The ECJ held that Member States might, in principle, adopt such measures, but, since such measures would impact on the national authorities' obligation to make an immediate refund, the Member States, in accordance with the principle of proportionality, had to employ means which, whilst enabling them effectively to attain the objective pursued by their domestic laws, were the least detrimental to the objectives and principles laid down by the relevant Community legislation. The Court said:

    "Accordingly, whilst it is legitimate for the measures adopted by the Member States to seek to preserve the rights of the Treasury as effectively as possible, they must not go further than is necessary for that purpose. They may not therefore be used in such a way that they would have the effect of systematically undermining the right to deduct VAT, which is a fundamental principle of the common system of VAT established by the relevant Community legislation."

34. The appellants had submitted that the effect of the first right of retention was that it was compulsory and admitted of no exceptions. This was because of the deemed satisfaction of Article 1413. By virtue of that the court was not required to consider whether such a retention was necessary or whether the matter was urgent because those conditions were irrebuttably presumed to be satisfied. They contended that the second retention had the same effect.

35. The ECJ said:

    "51 It must be held that, where a preventive attachment procedure constitutes a derogation from the ordinary law applicable to preventive attachments, in that necessity and urgency are irrebuttably presumed, doubts may legitimately be

entertained as to whether it is an indispensable instrument for ensuring recovery of sums due.

52 *It must therefore be held that an irrebuttable presumption, as*

opposed to an ordinary presumption, would go further than is necessary in order to ensure effective recovery and would be contrary to the principle of proportionality in that it would not enable the taxable person to produce evidence in rebuttal for consideration by the judge hearing attachment proceedings."

Events giving rise to this appeal

36. On 4th July 2007 HMRC notified Red 12 that the transactions set out in an appendix to their letter of that date formed part of an overall scheme to defraud the Revenue as a result of which HMRC denied Red 12's right to deduct input tax in respect of the purchase of mobile telephones. The decision affected tax of £ 980,920.50 in respect of 20 transactions in period 02/06 and £ 1,691,828 in respect of 26 transactions in period 03/06. The notice set out the information and features of the trade which HMRC had taken into account in making its decision. By a letter of 26th July 2007 Red 12's solicitors asked HMRC to reconsider its decision. By a notice of 3rd August 2007 Red 12 appealed to the Tribunal against that decision.

37. The hearing by the Tribunal of the appeal took place between 7th and 25th July and 1st – 3rd September 2008. By a decision released on 16th December 2008 the Tribunal rejected the appeal in respect of 45 of the 46 transactions.

Grounds of appeal

38. There were six original grounds of appeal. The tribunal is said to have erred in law in:

(a) deciding that HMRC did not need to prove that the defaulter was the importer of the goods;

(b) rejecting the submission that Red 12 must be in a position to refute HMRC's evidence;

(c) accepting that a taxpayer should be in a position where he can rebut any presumptions which are made, but limiting the application of that proposition to presumptions as to the taxpayer's knowledge or means of knowledge;

(d) holding that HMRC were entitled to rely on ex post facto evidence;

(e) failing to look at the deals in isolation;

(f) reaching erroneous conclusions as to the evidence

39. In order to address those grounds of appeal, and, in particular, the last, it is necessary to summarise the tribunal's findings.

Burden of proof

40. In addition, a question has arisen as to the incidence of the burden of proof. It is for the appellant to show that he is entitled to the credit which he claims. But, if he shows that he has paid input tax on a taxable transaction he has, prima facie shown that he is entitled to credit for it. The question is as to what burden, evidential or legal, lies on him and HMRC thereafter.

41. In the tribunal case of **Dragon Futures v HMRC** [2006] UKVAT V19831 the VAT & Duties tribunal, differently constituted, held (para 85) that it must be shown by the appellant that the taxable person neither knew nor had the means of knowing of any fraud, which was to be tested by seeing if the taxable person that had no direct knowledge of the fraud had taken proportionate steps to enquire.

42. In **Mobile Export 365 Ltd v HMRC** [2007] EWHC 1737 (Ch) Lightman J said:

"7. The burden placed upon the Commissioners in MTIC cases of this kind is to demonstrate that, on the balance of probabilities, there has been a fraudulent tax loss and that the transactions giving rise to that loss are connected to the "taxpayers" transactions. It is then for the "taxpayer" to show that it nevertheless has a right to reclaim VAT because it did not know and could not have known of the connection to fraud."

43. In para 9 (1) of its decision in the present case the tribunal said that it adopted the approach put forward by Miss Helen Malcolm, QC, Counsel for HMRC, that there was an initial burden on HMRC to show that there had been a fraud and to raise a case "*requiring an answer from Red 12, and, having done so, then the burden shifts to Red 12*".

44. In **HMRC v Brayfal Ltd** (Unreported) CH/2008/App 082 Lewison J said that:

"In cases of this kind, the burden is on HMRC to establish a fraudulent tax loss and that the transactions giving rise to that loss are connected to the taxpayer's transactions. If that is established, then the taxpayer must show that it did not know and could not have known about the fraud."

45. In **Calltell Telecom Ltd v HMRC** [2009] EWHC 1081 (Ch) Floyd J held that:

"7. The mere fact that a transaction forms part of a chain in which fraud occurred is not enough to justify the refusal of repayment of income tax. To justify such a refusal the tax authorities must prove that the taxpayer was himself being fraudulent, or knew or had the means of knowledge of fraud by others."

46. On 22nd May 2009 the Chancellor handed down judgment in **Blue Sphere Global Ltd v HMRC** [2009] EWHC 1150 (Ch) , in which he upheld a trader's appeal from a decision of the tribunal upholding the Commissioners' refusal to repay input tax. In the course of his judgment he held that the test used by the tribunal to determine whether the trader had the requisite knowledge that it was participating in transactions connected with the fraudulent evasion of VAT was misleading. That test had been expressed by the tribunal *inter alia* as follows:

"We consider that the due diligence exercise relating to Universal [one of the trader's purchasers] *was inadequate, as was the failure to follow up outstanding questions where matters did not appear to be in satisfactory order. The exercise was not sufficient to protect BSG from the risk of involvement in transactions which might turn out to have undesirable associations."*

47. That test was, the Chancellor held, misleading for two reasons. First, the burden was on the Commissioners to prove that the trader ought to have known that by its purchases it was participating in transactions connected with the fraudulent evasion of VAT. It was not for the trader to prove that it ought not. Secondly, it was not sufficient to demonstrate that the trader was involved in transactions which *might* turn out to have undesirable associations. The relevant knowledge was that the trader 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 was not enough; paras 51 and 52.

48. The Commissioners also had to prove that the trader ought to have known that earlier transactions, with which the seller of the mobile phones to the trader was connected, were transactions involving the fraudulent evasion of VAT: paragraph 53.

49. The Commissioners, who are appealing the Chancellor's decision in **Blue Sphere,** contend that, insofar as the Court intended to alter the burden on HMRC in a simple MTIC case (**Blue Sphere** was a case of contra trading) the decision is in conflict with earlier domestic and ECJ authority not cited to the Chancellor.

50. In **Calltell Telecom Ltd v HMRC** [2007] UKVAT V202666 the tribunal considered the burden of proof in the following terms:

"67 Mr Cunningham made the point that it was for a trader seeking to exercise the right to deduct to show that he was entitled to do so: Rompelman v Minister van Financiën (Case 268/83) [1985] ECR 655. He did not concede that, in a case such as this, the burden shifted to the Commissioners; rather, he said, the rule remained as it had been since the decision of the High Court in Tynewydd Labour Working Men's Club and Institute Ltd v Customs and Excise Commissioners [1979] STC 570 that, save in prescribed cases of which this was not one, the burden of proof before this tribunal lay with the appellant. Nevertheless, he accepted that it was for the Commissioners to establish the chain of transactions, the relevant default and the fraudulent purpose of the default. So much was decided by the tribunal in Bond House and that allocation of the burden has been generally accepted, including by the Commissioners themselves—see, for example, paragraph 82 of the decision in Dragon Futures. For those reasons Mr Cunningham was willing to lead the Commissioners' evidence first.

68 Where the burden lies of establishing knowledge, or means of knowledge, and whether the Appellant has taken "every precaution which could reasonably be required of them", to adopt the words of Kittel, is more problematical. In Dragon Futures, at paragraphs 85, the tribunal said that it

"sees no inherent excessive difficulty in a taxable person establishing what it did or did not know at a particular time, and the steps that it took before and at that time to ensure it met to the required standard the obligation put on it to enquire."

69 Then, after dealing with the burden of establishing the fraudulent nature of the transactions, a burden it agreed rested on the Commissioners' shoulders, it continued, at paragraph 86:

"… on other matters, and in particular on the issue of establishing whether proportionate action has been taken, the burden should rest on the Appellant."

70 Though we agree with the thrust of that proposition, we think it slightly over-simplifies the questions the tribunal must answer in cases of this kind. Any trader in the position of these Appellants will say, as the Appellants did, that he can look no further than his own supplier and customer. If there is no evidence that either the supplier or the customer was the perpetrator of the fraud, demanding of such a trader that he establish that he knew nothing of another trader, earlier in the chain, requires him, as Mr Patchett-Joyce pointed out, to prove a negative. All he can say is that he did not know. He can give evidence about the quality of his enquiries, but enquiries into his supplier, however good, will not, of themselves, tell him anything about a trader several steps removed. And knowledge cannot always be inferred merely because the enquiries made were of poor quality.

71 For those reasons we think it is incumbent on the Commissioners to raise a case, not necessarily amounting to proof but sufficient to demand an answer, that there were facts or circumstances which support, or at least are consistent with, the

conclusion that the appellant knew, or should have known, of fraud in the chain. The mere fact that there was fraud will not be enough; there must be some reason which might lead the tribunal to conclude that the trader knew or could have known of it, or that he should have taken precautions. Although, as we have already pointed out, the Court of Justice, at paragraph 51 of its judgment in Kittel, referred to traders "who take every precaution" as those who are not liable to forfeit their right to deduct, it should be borne in mind that most traders do not, and do not need to, carry out extensive enquiries into the honesty and creditworthiness of their suppliers and customers. But if the Commissioners are able to mount a case which demands some explanation, the burden shifts to the appellant to show that he took the precautions which could reasonably have been required of him and that, despite his having done so, he did not know, and could not have known, of the fraudulent purpose of others."

51. That position is, it is submitted, appropriate since the facts and matters relevant to the question of knowledge are peculiarly within the knowledge of the appellant.

52. In the event it does not seem to me necessary for me to decide the incidence of the burden of proof since, as will become apparent, the tribunal's conclusions were, as it seems to me, not dependent upon it: see paras 72 and 75 referred to in para 60 below.

53. Were it necessary to reach a conclusion I should be in agreement with the Chancellor. The ECJ authorities emphasise the importance of the taxpayer's right to deduct input tax in respect of what, viewed objectively, are taxable supplies, whilst recognising the right of public authorities to refuse repayment if the taxpayer knew or ought to have known that its purchases had a fraudulent connection. In these circumstances it seems to me that, if the Commissioners seek to deny the taxpayer a right to repayment of input tax paid on taxable supplies on the grounds of the taxpayer's knowledge (actual or constructive) of a connection to fraud, it is for them to establish that. If, in the light of all the evidence, including that of the taxpayer, the tribunal is not satisfied that he had or ought to have had the requisite knowledge, the taxpayer will be entitled to recover. In practice before a tribunal the stage may be reached at which the evidence calls for an answer, in the sense that, if the taxpayer gives no evidence that he made any inquiries, the tribunal could conclude that he had the requisite knowledge because he either had or ought to have had knowledge of the fraudulent nature of the transaction. But, at the end of the day, it remains for HMRC to convince the Tribunal that it should so conclude.

The agreed facts

54. The Tribunal had before it an agreed statement of certain facts. These included the following. According to Red 12's VAT returns its turnover was as follows:

(a) £ 8,903,690 in the period 05/11/03 to 30/04/05;

(b) £ 55,331,299 in the period 01/05/05 to 30/4/06;

(c) £ 11,742,623 in the period 01/05/06 to 30/04/07.

Red 12 started to export mobile phones in October 2004. In the tax period 02/06 it carried out 20 deals in which it purchased mobiles from UK suppliers and then exported them abroad in respect of which it claimed an input tax credit of £ 980,920.50. During this period it bought from 5 suppliers, exported to 8 customers (in Switzerland and Dubai) and sold to 4 UK customers. In the tax period 03/06 it carried out 26 deals in which it purchased mobiles from UK suppliers and then exported them abroad in respect of which it claimed an input tax credit of £ 1,691,828. During this period it bought from five suppliers, exported to 9 customers (Dubai, Swiss and Danish companies) and sold to 4 UK customers. Red 12 was aware of the identity of

the supplier and customer in each transaction. It did not purchase the mobiles in which it traded directly from the manufacturer. Neither it nor any of its suppliers in respect of the 46 transactions was an authorised distributor. It was further agreed that officers of the HMRC had first visited it on 20th April 2004 and had issued it with VAT Notice 728 on Joint and Several Liability in the Supply of Specified Goods. A further 13 visits were made between 20th April 2004 and 27th October 2006.

55. The Tribunal found a number of background facts (paras 13-19) about the history of the company. It then identified each of the 46 transaction chains, which are set out in a schedule produced by HMRC attached to its decision. Each of those chains had been traced back to a trader who had gone missing, or had used a hijacked VAT number, or who had otherwise defaulted on its VAT liabilities. Twelve defaulting traders were involved. In the case of each of the chains Red 12 acted as the broker i.e. it was the last UK company in the chain and exported the goods so as to be able to claim back the VAT from HMRC.

56. The Tribunal approached its task in this way. It first looked at each of the chains of transactions to see (a) whether there was evidence both that the goods were imported from the EU and that they were imported by the defaulter; and, if not (b) whether there was evidence, including circumstantial and "similar fact" evidence, which the tribunal accepted, sufficient to show that the goods were imported from the EU. The tribunal accepted, as I have said, evidence given to them by Mr Roderick Stone that third party payments i.e. payments made on the instructions of the defaulter for payment to be made to a third party, usually out of the jurisdiction were often a feature of MTIC fraud, since an honest trader would not usually cause to be paid away monies which he needed in order to pay his supplier and the VAT to HMRC. Such payments often involved the defaulter only receiving a fraction of the price as a "commission" for participating in the fraud. They also accepted that on some occasions it was not possible to identify the original acquirer from Europe because some freight forwarders deliberately omitted the details of the missing trader or because the buffer traders had not kept sufficient records. In addition to its initial analysis of individual deals, the tribunal looked at the inter-connectedness of the companies, what they must have known, and the probability in the circumstances of any of the particular deals being genuine.

57. In respect of the 12 defaulting traders the Tribunal made findings as to whether or not there had been fraud. In order to do so it sought to determine whether there had been a tax loss attributable to a defaulter i.e. a failure by the defaulter to account to HMRC for VAT, and whether there had been "*an EU acquisition*" i.e. whether the goods the subject of the chains of transactions had originated from somewhere in the EU other than the UK. In some cases there was direct evidence of EU acquisition by the defaulter; in others that was what the Tribunal inferred from all the circumstances. In their decisions on individual deals the tribunal found "*MTIC fraud*" or "*fraud*" or a "*fraudulent tax loss*". It is clear from the terms of paragraph 21 and 77 of the decision and the tribunal's findings in relation to the individual deals that, in cases where there was an EU importation, being all cases save one (Samson Traders Ltd – Deal 32), the fraud which the tribunal found was an MTIC fraud. Appendix 1 to this judgment identifies the defaulting traders involved, the deals with which they were concerned, the tribunal's conclusions as to whether there was a tax loss, EU import and fraud, and brief details of the basis for the tribunal's finding.

58. The tribunal heard extensive evidence occupying some 12 days. In paragraph 22 of its decision it referred to the additional matters relied on by HMRC to show fraud namely (i) that all Red 12's suppliers and all save three of its customers banked (as did Red 12) with an offshore bank in the Netherlands Antilles whose accounts and dealings were frozen in July 2006 owing to its involvement in fraud; and (ii) that in the majority of the deals, which involved different telephones, the mark-ups achieved by each successive trader were consistent in whole pence and the increment in mark-up between each trader was consistently divisible by £ 0.05.

59. In para 23 the Tribunal set out the evidence relied on by HMRC, all of which it accepted (see para 73) to show Red 12's state of knowledge. In paras 25- 42 it summarised Red 12's evidence; in paras 43- 56 it addressed Red 12's case; and in paras 57- 67 it addressed HMRC's case. In paras 68-77 it set out its reasons for decision and its decision.

The tribunal's findings

60. In essence the tribunal concluded:

(a) that Red 12 was well aware that its suppliers and customers would not let it down because the transactions had all been pre-arranged; (para 72)

(b) that, whilst there was a genuine grey wholesale market in mobile phones, Red 12 was not engaged in it; all the transactions in which Red 12 engaged in deals 1-46 were wholly artificial; (para 71)

(c) that Mr Nadhan Singh, Red 12's sales manager since April 2004 and its director since 5th November 2004, whom they did not find to be a reliable witness (para 40), was well aware that some other trader further up the chain of supply would fail to account for output tax, while the remaining traders between the defaulter and Red 12 would not; (para 72)

(d) that HMRC had demonstrated that Red 12 acted unreasonably in respect of checking the validity of its various transactions. It had taken little or no commercial care with regard to them and could not escape the inference that it was deliberately closing its eyes to the possibility of fraud ; (para 75)

61. So far as Red 12 not being any part (as an arbitrageur) of the genuine grey wholesale market the tribunal accepted the contra-indicators given by Mr Gary Taylor, an expert witness called by HMRC whose evidence the tribunal found reliable, namely:

(i) if it was carrying on business by way of arbitrage in respect of Nokia stock, Red 12 would be dealing in stock for which no price difference exists since, as the tribunal accepted, Nokia sets homogenous prices across all territories;

(ii) Red 12 did not source stock from the original equipment manufacturers or their authorised distributors and would therefore be extremely unlikely to have profitable arbitrage opportunities because of the small margins available and the substantial length of the chains – additional traders in chains reduce profits. Red 12 must have known at least that there was a chain of (i) manufacturer; (ii) authorised distributor; (ii) its supplier; (iv) itself; (v) its purchaser and (vi) a retail seller (save in two cases where Mr Singh suggested that his Dubai customer had a retail outlet);

(iii) Red 12 was buying handsets from countries with a higher than average (worldwide) selling price (e.g. Germany) and selling them to a country with a lower than average selling price (e.g. Dubai and Denmark which accounted for 26 deals) which would be unlikely to amount to exploiting profitable arbitrage opportunities; Red 12's profit margin for sales to Switzerland, Denmark and Dubai was almost identical – between 7.5 and 7.7%. Such mark-ups were not feasible given the differential between the prices in those countries;

(iv) Red 12 was trading an unrealistic volume of Nokia phones representing an unrealistic market share of the total volume of phones available from authorised distributors (as opposed to being sold direct by Nokia to Vodaphone). The maximum possible opportunity for Red 12 to purchase the Nokia 7610 handset in March 2006 was for the 17,657 provided to authorised distributors. That month Red 12 actually sold 13,600, giving it a 72% share of all distributed handsets in Europe and the

U.A.E. With that level of sales Red 12 could have negotiated a deal with the manufacturers or an authorised distributor or approached Nokia to become one;

(v) The generic product description on the purchase orders and invoices left traders at risk of acquiring handsets which were not adequately enough specified to meet customer requirements. They did not include a whole raft of matters (set out in para 23 (ii) (g)) which a purchaser would expect to see.

(vi) Red 12 never appeared to be holding any stock despite the fact that some of its deals were for odd amounts; there was never any example of a customer rejecting the telephones Red 12 was supposed to have sold which, given the curious nature of some of the goods revealed in the inspection reports, cast doubts on the legitimacy of the deals (para 35).

62. The further grounds on which the tribunal reached its conclusions were as follows. Firstly, the tribunal decided that there was a "*sheer improbability of [the 46] trades being genuine*" having regard to the following:

(i) the exponential increase in Red 12's turnover despite its having no capital, no assets, and little experience;

(ii) the inadequacy of Mr Singh's checks on his suppliers despite the fact that he had been operating in the field for long enough to know the considerable risk of fraud;

(iii) the inadequacy of the invoices;

(iv) the lack of any value added by Red 12;

(v) the length of the deal chains;

(vi) the volume of trade given Mr Taylor's evidence as to the

availability of new telephones;

(vii) the peculiar circumstances of many of the deals, in particular deal 25;

(viii) Mr Singh's lack of credibility and lack of care with regard to his own terms and conditions, in particular in respect of potential liability.

63. As to (i) the figures are set out in para 36 above and are huge, particularly for a company with, so it appears, no staff other than a director and a company secretary and modest capital. The tribunal was given no explanation for the volume of the trades, other than that Mr Singh claimed to trust his suppliers and to be on good terms with them: (para 72). He was unable to explain why such large quantities of telephones were available, why he was able to source the precise number of telephones required by his would be purchasers, why he never had any surplus phones, why he had not tried to become an authorised distributor or why on occasion he was buying telephones originating in countries where phones were more expensive than in this country and selling them on to places where they were as a rule less expensive:(para 72). Over the period April 2004 to August 2006 Red 12 made profits of £ 4,216,527.30 and losses of no more than £ 12,770. No real explanation was given by Mr Singh as to how Red 12's remarkable success came about.

64. As to (ii) the tribunal recorded (para 23(6)) that, despite repeated requests, Red 12 did not provide HMRC with due diligence on its suppliers until July 2007 and then only in respect of two companies. One of them had a credit reference of just £ 500

but Red 12 traded with it in millions and did so before carrying out any checks. It also observed that Mr Singh was completely unconcerned as to the fact that he might not be supplying what his customer wanted, was prepared to deal with customers of whom he had scant knowledge, and proceeded to trade with companies where his knowledge indicated that the trader was unlikely to be legitimate. It held that his actions were not those of a man concerned that he was operating in an area he knew to be rife with fraud, and that the very best that could be said of him was that he closed his eyes to those aspects which were unwelcome to him (para 72). No checks had been made with the freight forwarders as to where the telephones had come from or as to how many previous traders had handled them. No checks were made (such as those suggested by HMRC in VAT Notice 726) even though telephone chargers had plugs unsuitable for the UK.

65. Evidence of due diligence was not produced for the purpose of the hearing before the tribunal until the disclosure of a supplemental bundle of documents which HMRC regarded as inadequate. Some were in Arabic or German, which there was no evidence that Mr Singh spoke. One company to which Red 12 had sold phones in February 2006 did not have a working phone number. Its registration had in fact been cancelled by the Swiss authorities by 31st December 2005 and it was run by a Belgian who lived in Marbella and was suspected of involvement in carousel fraud (although the tribunal accepted that Mr Singh may not have been aware of these matters). A Veracis report on one company (The Fones Centre Ltd) dated 9th March 2006 showed that it had a high risk credit rating and County Court judgments against it: (para 23 (6)). A similar report, dated May 2005 but appending documents dated 2006, on another company (London Mobile), with which Red 12 had done more than £ 2.7 million worth of business between June 2005 and January 2006, contained a number of negative indicators and showed that it was suspected of being engaged in circulating goods: (para 23 (7)). The report contained no evidence that it was actually prepared for Red 12 (it was described as "*prepared for the purpose of obtaining legal advice*"). The tribunal found improbable Mr Singh's evidence that he had paid Veracis £ 3,000 at the outset and Veracis then subtracted the cost of reports from the sum which they held on account. No invoice, evidence of payment or covering letter from Veracis was produced. Mr Singh, the tribunal held, ignored Veracis' unfavourable reports in respect of those with whom he wished to trade in the case of three companies. He started trading with Reya without waiting for the report he had commissioned: (para 38).

66. Red 12 did not take down any of the IMEI[4] numbers of the phones with which it was dealing, which would make it possible to trace carousel fraud. Mr Singh rejected the advice of Mr Rupert Moyle of a firm of VAT consultants on 1st March 2006 that he should take samples of some 10% of the numbers and retain them. A large quantity of the phones sold by Red 12 in Deal 37 had previously entered and left the UK. Had Red 12 noted the IMEI numbers it would have been aware of this. Mr Moyle ceased to act for Red 12 after he had told Mr Singh, at a meeting with HMRC, that he would not act as adviser unless Red 12 was doing proper checks:(para 37).

67. As to (iii) the tribunal described the majority of invoices produced by Red 12 as "singularly uninformative to such an extent that their commercial usefulness is highly questionable. They expose Red 12 and other traders in these chains to considerable commercial and legal risks" (para 35). Some of the invoices showed anomalies between the dates of purchase orders and sales invoices. When questioned before the tribunal Mr Singh showed that he did not know what accessories the various telephones came with or whether the telephone was Bluetooth enabled or not (something which makes a considerable difference to its value) and seemed to regard the precise specification as almost irrelevant. The tribunal recorded that in several cases the specifications in Red 12's purchase orders and sale invoices were "woefully inadequate", listing no more than the make and model, quantity and price, when mobile phone specifications cover much more e.g. the size of the memory: (paras 30 + 35).

68. As to (iv) the facts spoke for themselves. Red 12 did nothing but sell the mobiles on. "*Spectacular amounts of trade were engendered at a time when Red 12 had no capital*": (para 23 (1)).

69. As to (v) the chains involved up to 10 companies from defaulter to ultimate importer from the broker. The tribunal said that it made no sense, as for example in deal 2, for 1000 mobile telephones to be imported, not by any authorised dealer, and then pass through seven different traders before reaching Red 12; and that the extensive chains had no commercial rationale. It held (para 32) that Mr Singh must have known that he was part of a chain of at least five (down to Red 12). He claimed to be ignorant of the fact that telephones were coming into the UK from the EU but the tribunal held that that had been shown to be untrue on several occasions (para 32). Red 12 deals seemed to have been part of an extraordinary number of back to back deals in a single day (e.g. deal 2 with 9 transactions) which could ordinarily be expected to give rise to difficulty in the passing of legal title: (para 33).

70. As to (vi) the figures for turnover were enormous, particularly having regard to the number of telephones realistically available to Red 12: (paras 36 and 61 (iv).

71. As to (vii), deal 25 involved the sale to Red 12 of 1457 Nokia 8800 phones, 1400 of which had come down one chain and 57 down another. Although Red 12's invoice showed that 1457 were made in Germany, an inspection report of 7th March showed that 1020 were made in Germany and 437 in Korea. The phones were said to have 3 different types of charger. The software in respect of 1020 phones was recorded as being in 9 languages; and in respect of the others in 11. None of these languages was Danish although Red 12 was exporting them to Denmark The inspection report for the goods did not list Danish among the options for the software languages (para 35). There appeared to be two contradictory inspection reports one of which recorded a 100% inspection between 11.25 and 12.10. The Danish purchaser sold on to a French purchaser although none of the software incorporated French: (para 30). Deal 11 involved invoices in the chain with contradictory information as to specification and key pad (para 30).

72. There was no example of a customer ever rejecting the telephones sold despite the curious nature of some of the goods as revealed in the inspection reports.

73. A large proportion of the stock in which Red 12 traded had two pin plugs for the charger. Mobile phones are not manufactured in the UK; and the UK does not have a 2-pin plug system. There was no obvious reason why such goods should have been imported into the UK when they must have been intended for sale outside it: (para 23 (2)).

74. In 12 deals up to and including deal 21 Red 12 purchased from NTS. In 10 subsequent deals a company called Reya Ltd, which was founded by a husband and wife team who had been in the jewellery business for 25 years and operated above a jewellery shop they still owned, was interposed between NTS and Red 12. Reya Ltd only started trading in mobile phones in September 2005. In March 2006 Red 12 had already purchased £ 5 million worth of telephones. It did not obtain a Veracis report until April 2006. The relevant deals in the chain all took place on the same day. The effect of interposing Reya in the chain was that Red 12 lost £ 87,000. Red 12 could have been expected to have contacted NTS and asked NTS for the relevant telephones before contacting Reya. Red 12 knew that there was a link between NTS and Reya since Reya is shown as a trade reference on the due diligence performed in respect of NTS. There was no evidence of any attempt by Red 12 to source from cheaper suppliers: (para 23 (10)).

75. Mr Singh claimed that he always obtained 100% inspection reports before finalising a deal and that he always (with the exception of two deals) requested them on the date of the deal. The tribunal found that in respect of 21 of the 46 deals the reports were

dated more than a day after the deal date; that in respect of two deals the report arrived at Red 12 at 22.42 hours which made it unlikely that it influenced a contract made that day. In several deals the quantity of phones involved and the timing of the inspection was such that the sequence of instructions – report – purchase on the same day could not have been followed. Mr Singh had no idea of the time it took to perform an inspection. No copies of the inspection reports had been produced prior to the hearing other than one invoice dated 31st March 2006.

76. An inspection report, provided by ASR Logistics and put forward as an example of a full and helpful report, was described by Mr Taylor as largely "*spurious and unhelpful*", containing a meaningless reference to "MMC" (Multi Media Memory Card), whose cost can vary between £ 10 and £ 100, and not stating the size of the memory – a matter of great commercial importance. The goods had been shipped by the time the report was produced. It was impossible to tell when the deals were closed; who owned the goods up to the point of inspection, and who would be liable for the cost if the goods were rejected. There was, the tribunal held, "*no sense of commercial reality in the way Red 12 conducted its affairs"* since the nature of the trade would require the parties to be very certain where liability lay.

77. As to (viii) the paperwork did not enable it to be ascertained at any one time in the course of the deals who owned the goods and who would suffer loss in the event of an accident or other cause of a loss of supply. The purchase orders and invoices did not follow one after another: (para 23 (4). Inspection reports involving 100% inspection of the phones (in one case 6,000 of them) were often said to have been completed on the day of the request for them, which was impossible. In some cases, according to the documents, the inspections took place *after* the goods had been sold on or goods were exported by Red 12 *before* being released to it by its supplier, or the inspection report was not faxed to Red 12 until days after the deal was done. No evidence of insurance in the relevant period was provided (para 23 (8)). Red 12 was said to rely on the freight forwarder's generic insurance, not specific to any of the deals in question.

78. A copy of Red 12's terms and conditions (applicable whether it was supplier or customer) was provided for the purposes of the hearing, but had not previously been provided to HMRC. In them Red 12 warranted that each of Red 12's suppliers had conducted all the enquiries and information set out in Schedule 2 (not attached or produced) and had obtained a warranty from its own supplier. The basis upon which Mr Singh felt that the terms were met was that he had done due diligence on his own suppliers. The terms did not specify when the goods became the property of Red 12. They appeared to make Red 12 responsible for the payment of insurance, which was contrary to Mr Singh's evidence. The terms provided that the buyer would not transfer funds to any bank account held off - shore in the seller's name. Since all of those from whom Red 12 was buying, Red 12 itself, and all but 3 of Red 12's customers, had accounts with FCIB in the Netherlands Antilles, Red 12 was, the tribunal held, in breach of its own terms on every occasion it traded.

79. Mr Singh was unaware what CIF stood for, even though in at least one deal there was a reference to the sale being on those terms. There was no independent evidence that the terms were ever given to any of the suppliers and no copy was found at any of the suppliers' premises. (Mr Singh's evidence was that the terms were sent to everyone who enquired about trade with Red 12 by e-mail: (para 28)). The tribunal described the terms as deficient in that it was not possible to tell whether or when they referred to Red 12 as supplier or when as purchaser at any particular point:(para 23 (9))

80. The tribunal found that Red 12 acted on occasions as buffer trader rather than broker in respect of the same type of telephone, which made little commercial sense given the different profit levels. Mark-ups appeared to remain the same regardless of the unit price of the goods without variation to reflect quantities, age or desirability of the

phones. No log was kept of telephone calls and e-mails (said to be very numerous) in respect of any deal despite advice to Mr Singh that he should do so, at least for a couple of deals. The tribunal described Mr Singh as intelligent and resourceful but found that, because of all the inconsistencies in his evidence and the commercial unreality of his trading patterns he was not a reliable witness.

The grounds of appeal

The first ground

81. Red 12 contends that the Tribunal was wrong in law to hold that in appeals concerning the non-payment of input tax HMRC did not need to prove that the defaulter was the importer of the goods. What the tribunal said on that topic was this (para 74):

"Whilst it is usual in MTIC fraud for the importer to be the defaulter, we can see no reason why this is a matter of legal necessity. If it were the case that all the various parties in a particular chain had conspired to defraud the revenue, for example by means of a third party payments to a trader outside the United Kingdom, this would be no less a case of MTIC fraud. The earliest cases uncovered by the commissioners were cases where the defaulter had been the importer, but none of the authorities say that it has to be so."

82. Mr Fergus Randolph, QC, for Red 12, relies on a number of authorities in which the description of MTIC fraud includes a statement that the defaulting trader is the importer, as does the summary at paragraph 2 of this judgment, and the summary in paragraph 91 of Lewison, J's judgment in *Livewire*.

83. The fact that descriptions[5] of the classic or simplest form of MTIC fraud habitually refer to the defaulter as the importer (or vice versa) does not mean that a right to deduct input tax on the ground of MTIC fraud can only be denied if HMRC establishes that the defaulter was the original importer. No domestic or EU authority establishes that that is so, and such a requirement would, in my judgment, be contrary to principle. As the ECJ held in **Kittel**:

" *a taxable person who knew or should have known that, by his purchase he was taking part in a transaction connected with the fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud"*

and

" it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or ought to have known that, by his purchase he was participating in a transaction connected with fraudulent evasion of VAT.

84. In many cases of MTIC fraud the defaulter, i.e. the company which fails to account for VAT and beyond which HMRC will not have been able to trace the chain, will be the actual importer. But it need not be so. Y may be the actual importer who sells (or transfers possession of) the goods to A who sells to B. Both the actual importer and A may go "missing" and make no payment to HMRC at all (as was the case with deals 12-14: see para 21 (iv). The goods may bypass the defaulter and be allocated by the freight forwarder directly to one of the buffer companies (as happened in deal 1) although input and output tax is accounted for by a buffer company earlier in the chain. The buffer company serves its function of preventing HMRC tracing back to the original importer. Third party payments may be made by purchasers in the middle of the chain cutting out those above. What is needed for an MTIC fraud to work is an importation without payment of VAT, a trader who disappears without accounting to

HMRC for the output tax it has received[6], and an export which generates an entitlement to claim back input tax. The original importer will make the most profit from failing to pay over output VAT. For that reason the defaulter is usually the original importer; but any company in the chain which defaults at any stage in the chain will make a profit from not accounting for the VAT, assuming that it has sold on at a profit. In order to justify denial of the right to deduct input tax there must be knowing participation in a transaction connected with fraudulent evasion of the tax. If that is established, the right is lost. It would be inconsistent with that principle, and an unmerited boon to fraudsters, to require the authorities to prove that the defaulter was the original importer. In the present case the tribunal had evidence as to who was the defaulter in each of the 46 chains, and HMRC proved a full tax loss i.e. not just the difference between an input tax paid and an output tax not accounted for. None of the defaulters had accounted for output tax or claimed input tax.

Ground 2

85. At paragraph 43 of its decision the Tribunal recorded that it did not accept Mr Randolph's submissions that the evidence relied on by the Commissioners to show MTIC fraud should be evidence which the appellant was in a position to refute. It repeated this rejection at para 73 where it said that it was of the nature of cases of this kind that there was evidence which was known only to the Commissioners and which could not be known to the appellant. It followed the reasoning set out in paras 50 and 51 of **Calltell** where the tribunal held that it was not incumbent on HMRC to show that the taxpayer knew, or had the means of knowing, the defaulter's identity.

86. Red 12 submits that the following propositions may be derived from the European jurisprudence:

    (a) Member States must comply with the principles of legal certainty and proportionality: **Optigen and Others***,* para 45; **Teleos***,* para 45; **Netto** , para 18; **FTI** ; para 29;

    (b) In the case of rules liable to entail financial consequences, the principle of legal certainty must be observed all the more strictly, in order that those concerned may know precisely the extent of the obligation which such rules imposed on them; **Teleos**, para 48;

    (c) It would be contrary to the principle of proportionality to hold a trader liable for a shortfall in tax caused by fraudulent acts of third parties over which the trader has no influence; **Netto,** para 23;

    (d) Any presumptions relied on by a Member State could not be formulated in such a way as to make it practically impossible or excessively difficult for the taxable person to rebut them with evidence to the contrary. Were it to be otherwise, those presumptions would bring about a system of strict liability going beyond that which is necessary to preserve the public exchequer's rights; **FTI**, para 32

87. These propositions may all be found in the cases relied on, none of which addresses the question of the evidence which the authorities may adduce in any determination of whether or not the conditions for denial of a right to deduct input tax are made out, that being primarily a matter for the national court. None of them supports or leads to the conclusion which Mr Randolph seeks to draw. His submission, as I understood it, was that it was not open to HMRC, in seeking to establish before the tribunal that there was fraud, to rely on any evidence which the Commissioners had secured, e.g. as to the details of the deal chains and the defaulter, which, whether as a matter of law or practicality, the appellant was unable to dispute or which was unknown to the appellant at the time of the transactions into which it entered.

88. I can see no principled basis for such a requirement. No rule of law or practice precludes a party to litigation from calling evidence which his opponent or another party cannot in practice rebut (either because it is in truth unassailable[7], or because he has no material with which to gainsay it, or because he cannot secure the attendance of the relevant witnesses, or for some other reason), or which was unknown to him at the time of the transaction to which he was a party. In cases such as the present, as the tribunal observed, "*there is always evidence which can only be known to the Commissioners*" (para 43), such as invoices, freight forwarder documents, and banking details which HMRC discover in their investigations; or the fact of default.

89. The articulation of such a rule would not be conducive to justice. HMRC may, for instance, discover that the taxpayer has been a participant in a series of transactions with extremely long chains. The length of those chains may itself be a powerful, albeit not conclusive, factor in showing that there is fraud. It would be unacceptable for HMRC to be denied the right to prove those chains if the taxpayer claimed (possibly wrongly) that he knew nothing about the participants in the chain other than his supplier and customer. Such a rule would also place a premium on wilful blindness. A taxpayer who studiously avoided any inquiries which, had he made them, would have shown him that there was fraud, should not be allowed to deny the authorities the ability to establish the fraud by asserting total ignorance of, and an inability to refute, the facts that establish it. There could also be much scope for debate as to whether such evidence was "*irrefutable*", given that the taxpayer can seek to adduce evidence from any or all of the participants in the chain of their good faith.

90. It is important to remember that the right to deduct input tax cannot be denied unless HMRC establishes the requisite knowledge (actual or constructive) on the part of the taxpayer. Proof of facts unknown to the taxpayer as part of the proof of fraud will not itself disentitle the taxpayer to a refund. Proof of knowledge (actual or constructive) must, by definition, be proof of what the taxpayer knew or which, had he used reasonable precautions, he ought to have known. He will be able to give evidence of what he knew and what checks he made; and thus, if he can, to refute the allegations of knowledge made against him.

91. What, as **FTI** and **Molenheide** make clear, are not acceptable are "presumptions formulated in such a way as to make it practically impossible or excessively difficult for the taxable person to rebut them with evidence to the contrary" since these would "systematically undermin[e] the right to deduct VAT, which is a fundamental principle" by bringing about a form of strict liability.

92. In the present context no irrebuttable presumption applied. The taxpayer was not precluded from challenging any of the evidence adduced, or its alleged significance, or from adducing its own evidence both in relation to the allegation of fraud and its supposed knowledge of it. The tribunal reached its conclusions, both as to fraud and knowledge, on the totality of the evidence; and found, but not on the basis of any irrebuttable presumption, the necessary knowledge established. The taxpayer was not, in practical terms, facing a regime of strict liability.

Human rights

93. There is in my judgment nothing in the tribunal's approach which offends the principles of European jurisprudence. Much less is there any infringement of the taxpayer's right to a fair trial under Article 6. I did not derive assistance in this connection from the case of **De Haes and Gijsels v Belgium** [1997] 25 EHRR 1, where the ECHR held that there was a breach of Article 6 when journalists, defendants to a defamation action brought by judges of the Belgian Court of Appeal in respect of an article criticising them for awarding custody of children to their father, a Belgian notary who had been alleged to have abused and committed incest with them, were refused disclosure of court expert reports. The judges had had access to

them; the journalists had cited them as sources but did not have copies. So there was inequality of arms.

94. Nor did I derive assistance, for present purposes, from the opinions of the Lords of Appeal in **SOS for Home Department v AF** [2009] UKHL 28 in which the issue was whether the procedure for making a control order satisfied the appellant's right to a fair hearing when the judge making the order relied on material which the appellant never saw. Red 12 saw all the material that was deployed against it and had full opportunity to challenge the case made against it that it knew or ought to have known that it was involved in a fraud.

Ground 3

95. Red 12's third ground of appeal is that the tribunal was "wrong to limit the principle entitling Red 12 to seek to rebut presumptions relied on by HMRC only to those presumptions as to Red 12's knowledge or means of knowledge", which is said to have breached the principles of legal certainty and proportionality. This ground arises from paragraph 75 of the Tribunal's decision where the Tribunal said:

"We entirely accept Mr Randolph's proposition that a taxpayer should be in a position where he can rebut any presumptions which are made, but that applies only to presumptions as to his knowledge or means of knowledge. Red 12 could have rebutted the presumption that it knew about fraud in the chain by taking any of the steps referred to by the Commissioners".

96. No authority is cited for the first sentence quoted above, which appears in the middle of a paragraph discussing whether or not Red 12 had taken due commercial care, and it is not entirely clear to me what the tribunal was seeking to say. They cannot have intended to say that it was acceptable for the taxpayer to be in a position where, *as a matter of law,* it was not permitted to rebut or contest evidence that there had been fraud, not least because there is no such law. They must, I think, have been meaning that it was not inconsistent with European law principles for a taxpayer to be in a position where the tax authorities adduced evidence which the taxpayer could not in practice rebut from which fraud was to be inferred. If so, this ground of appeal adds nothing to ground 2.

97. In any event the tribunal did not make (and was not invited to make) any presumptions as to the fact of fraud. HMRC had accepted that the burden was on it to show fraud: (para 9 (1)). It is not wholly clear what the tribunal meant by the reference to "*presumptions as to his knowledge or means of knowledge*". It would seem either to have been a reference to an evidential burden shifting to Red 12, or to inferences of knowledge arising from the evidence. It is likely to be the latter because a little later in the same paragraph the tribunal observes:

"Whilst we do not say that there is a positive duty on a trader to take all the steps set out in the Commissioners' Notice 726, where a trader, such as Red 12, only carries out the barest minimum, it cannot, without more, escape the inference that it was deliberately closing its eyes to the possibility of fraud"

An inference, which is a conclusion from established fact is to be distinguished from a presumption, properly so called, which may arise without the establishment of facts or upon the establishment of a limited set of facts.

98. Whatever the tribunal meant, it did not apply any irrebuttable presumption. On the contrary it accepted that it was necessary for HMRC to prove fraud and to raise a case on knowledge which required an answer (para 9). In that case an evidential burden would fall upon the taxpayer, such that, in the absence of evidence the tribunal could (and would be likely to) conclude that the requisite knowledge had been

shown. In para 57 the tribunal records that HMRC had to show that the fraud was connected to Red 12 and that Red 12 had the requisite knowledge that its transactions were linked to that fraud. Even if, which I do not accept, the tribunal in proceeding in the way it did can be said to have applied a presumption of knowledge (as opposed to drawing an inference), it was neither impossible nor excessively difficult for the taxpayer to rebut it (assuming that the truth permitted such rebuttal). The taxpayer knew all about its business practices and deals and what inquiries were made. Mr Singh was fully able to give evidence and answer questions about the extent of his knowledge.

99. The tribunal was satisfied on evidence which it set out (particularly in paras 23 (1) – (11) and 68 ff) that the Commissioners had established an MTIC fraud (para 72 & 74), that all the transactions in which Red 12 engaged were wholly artificial (para 71), that, at the very best, Mr Singh shut his eyes to aspects of the transactions which were unwelcome to him (para 72), that Red 12 was well aware that its suppliers and customers would not fail it because the transactions had all been pre-arranged (para 72) , that Mr Singh knew that some other trader further up the line would fail to account for output tax, and that Red 12 had acted unreasonably (para 72) such that it could not escape the inference that it was deliberately closing its eyes to the possibility of fraud.

100. The evidence on which the tribunal relied and its conclusions are set out in the decision and have been summarised above. I do not accept that the tribunal's decision is based on any erroneous application of a presumption, let alone an irrebuttable one.

Ground 4.

101. The fourth ground relied upon is that the tribunal was wrong to hold that HMRC was entitled to rely on *ex post facto* evidence in order to justify its earlier decision to deny Red 12 its input tax. In para 65 of its decision the tribunal said:

"With regard to admitting new evidence, it was not the case that the Tribunal was only able to look at evidence available to the Commissioners at the time of their decision. It would create enormous costs to the public purse and unfairness to the Commissioners if that were the case"

102. That decision, it is submitted, is in clear breach of the principles of fair administration. Red 12 relies, in particular, on two domestic authorities:

(a) **R (Goldsmith) v. London Borough of Wandsworth** [2004] EWCA Civ 117:

"the court has to look at the decision at the time it was made and at the manner in which it was communicated to the person or persons affected by it." (paragraph 91);

(b) **R(CD) v. Secretary of State for the Home Department** [2003] EWHC 155 (Admin):

"It is well established that the court should exercise caution before accepting reasons for a decision which were not articulated at the time of the decision but were only expressed later, in particular after the commencement of proceedings." (paragraph 18).

103. I do not accept this contention. An appeal to the VAT tribunal from a decision not to allow a repayment of input tax is an appeal on both the law and the facts and the determination by the tribunal is a rehearing of the question whether or not the appellant is entitled to reclaim VAT. It is not simply a review of whether the decision of the Commissioners was reasonably made in the light of the material that they then

had. The Commissioners are at liberty to adduce evidence which shows that there was a fraud and that the taxpayer was involved or connected with the fraud and knew or ought to have known of it, whenever the evidence came to hand and whether it was available at the time of the relevant transactions. Rule 28 of the **Value Added Tax Tribunals Rules 1986**, as amended, permits the tribunal to allow evidence of any fact to be given in any manner it may think fit and requires it not to refuse evidence tendered to it on the grounds only that such evidence would be inadmissible in a court of law. Similarly the taxpayer may show that HMRC was wrong in any of its conclusions on those points by adducing evidence or making submissions that HMRC had not previously known about or received.

104. If the tribunal may only consider evidence that was before HMRC when it made its decision there would be a risk of unfairness (quite apart from wasted cost) to both sides if the appeal could be dismissed or allowed despite the availability of exculpatory or incriminating evidence. In the present case, as the Tribunal pointed out, most of the evidence of Red 12's due diligence was produced after HMRC's decision. Further HMRC are under a duty to keep investigations under review: per Lightman J in **R (UK Tradecorp) Ltd v HMRC** [2005] STC 138 at para 18.

Ground 5

105. The fifth ground of appeal is that the tribunal was in error in drawing from behaviour in one set of transactions inferences in respect of another set, and in failing to look at each deal in isolation.

106. Red 12 relies on the following passages from the judgment in **Optigen:**

"... an obligation on the tax authorities to carry out inquiries to determine the intention of the taxable person would be contrary to the objectives of the common system of VAT of ensuring legal certainty and facilitating application of VAT by having regard, save in exceptional cases, to the objective character of the transaction in question.": paragraph 45;

"*An obligation on the tax authorities to take account, in order to determine whether a given transaction constitutes a supply by a taxable person acting as such and an economic activity, of the intention of a trader other than the taxable person concerned involved in the same chain of supply and/or the possible fraudulent nature of another transaction in the chain, prior or subsequent to the transaction carried out by that taxable person, of which that taxable person has no knowledge and no means of knowledge, would a fortiori be contrary to those objectives.": paragraph 46;*

"As the Advocate General observed in point 27 of his Opinion, each transaction must therefore be regarded on its own merits and the character of a particular transaction in the chain cannot be altered by earlier or subsequent events." paragraph 47.

and on the discussion by Lewison J of **Optigen** at para 43 of his judgment in **Livewire**:

"The ECJ held that each transaction in the chain had to be examined on its own merits and that a transaction that was not itself vitiated by VAT fraud constituted a supply of goods or services effected by a taxable person acting as such and an economic activity:

' where they fulfil the objective criteria on which the definitions of those terms are based, regardless of the intention of a trader other than the taxable person concerned involved in the same chain of supply and/or the possible fraudulent nature of another transaction in the chain, prior or subsequent to the transaction carried out by that

taxable person, of which that taxable person had no knowledge and no means of knowledge.' (para 51)

'Nor can the right to deduct input VAT of a taxable person who carried out such transactions be affected by the fact that in the chain of supply of which those transactions form part another prior or subsequent transaction is vitiated by VAT fraud, without that taxable person knowing or having any means of knowing.' (para 52)"

107. Red 12 submits that the tribunal breached these principles by relying on data unknown to Red 12 such as the fact of third party payments (which the tribunal took as evidence of fraud) and on late evidence adduced by HMRC which was unknown to Red 12 at the time of the trades, including, for instance, evidence of the fraudulent activity of a company of which, as the tribunal admitted, Red 12 might not have had knowledge.

108. In **Optigen** the assumed facts were, as Lewison J recorded in **Livewire,** that the trader was "*an innocent buyer of the goods who had no knowledge of a defaulter at an earlier link in the chain*". HMRC had sought to argue that the transactions in a chain involving MTIC fraud were not genuine economic activities at all because their purpose was to misappropriate VAT. The ECJ rejected that and held that a taxpayer who supplied goods and accounted for the output tax to HMRC was not to be denied the right to deduct the input tax because someone else in the chain had a fraudulent intent of which it had neither knowledge nor the means of knowledge. It is in that context that the court spoke of the need to examine each transaction on its own merits.

109. Examining individual transactions on their merits does not, however, require them to be regarded in isolation without regard to their attendant circumstances and context. Nor does it require the tribunal to ignore compelling similarities between one transaction and another or preclude the drawing of inferences, where appropriate, from a pattern of transactions of which the individual transaction in question forms part, as to its true nature e.g. that it is part of a fraudulent scheme. The character of an individual transaction may be discerned from material other than the bare facts of the transaction itself, including circumstantial and "similar fact" evidence. That is not to alter its character by reference to earlier or later transactions but to discern it.

110. To look only at the purchase in respect of which input tax was sought to be deducted would be wholly artificial. A sale of 1,000 mobile telephones may be entirely regular, or entirely regular so far as the taxpayer is (or ought to be) aware. If so, the fact that there is fraud somewhere else in the chain cannot disentitle the taxpayer to a return of input tax. The same transaction may be viewed differently if it is the fourth in line of a chain of transactions all of which have identical percentage mark ups, made by a trader who has practically no capital as part of a huge and unexplained turnover with no left over stock, and mirrored by over 40 other similar chains in all of which the taxpayer has participated and in each of which there has been a defaulting trader. A tribunal could legitimately think it unlikely that the fact that all 46 of the transactions in issue can be traced to tax losses to HMRC is a result of innocent coincidence. Similarly, three suspicious involvements may pale into insignificance if the trader has been obviously honest in thousands.

111. Further in determining what it was that the taxpayer knew or ought to have known the tribunal is entitled to look at the totality of the deals effected by the taxpayer (and their characteristics), and at what the taxpayer did or omitted to do, and what it could have done, together with the surrounding circumstances in respect of all of them.

112. In short I do not regard this ground of appeal as well founded.

Ground 6

113. The sixth ground of appeal is that the tribunal "*wrongfully exercised its discretion*" in respect of 17 separate conclusions which it reached on the evidence. This categorisation of the grounds of appeal is misconceived. The Tribunal did not exercise a discretion. It made findings. The appellate jurisdiction of the High Court which Red 12 invokes is to determine whether the tribunal has erred in point of law: section 11 (1) of the **Tribunals and Inquiries Act 1992**.

114. In **Mobilx (in administration) v HMRC** [2009] EWHC 133 (Ch), Floyd J considered the limitations on the scope of an appeal from the VAT and Duties Tribunal in the following terms:

"14. In Georgiou v Customs and Excise Commissioners [1996] STC 463 CA at 476, Evans LJ refers to excerpts from the speeches of Viscount Simonds and Lord Radcliffe in Edwards v Bairstow [1956] AC 14, 14-15) and observes (at 476 f-g) that

"…it is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure to the High Court to be abused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but <u>was there evidence before the tribunal which was sufficient to support the finding which it made</u>? In other words was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled." [Emphasis added].

15. At page 476H Evans LJ set out a four stage process of examining challenges to findings of fact:

"… the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and fourthly show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make."

18. Subject to these very tight limitations, it is not open to the High Court to conduct a review of the evidence to see whether it would have reached the same conclusion. An appellate court is poorly placed to assess the value of oral evidence given before the Tribunal. Moreover, if the analysis of the evidence is such that reasonable judicial minds might differ on the outcome, there is no basis for saying that the decision of the tribunal of first instance is wrong."

115. In **Edwards v Bairstow** [1956] AC 14 Viscount Simonds had said:

"For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarized by saying that the court should take that course if it appears that the Commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained. ... The primary facts, as they are sometime called, do not, in my opinion, justify the inference or conclusion which the Commissioners have drawn: not only do they not justify it but they lead irresistibly to the opposite inference or conclusions. It is therefore a case in which, whether it be said of the Commissioners that their finding is perverse or that they have misdirected themselves in law by a misunderstanding of the statutory language or otherwise, their determination cannot stand." – p.29

116. Lord Radcliffe referred to the words of Lord Normand in **Inland Revenue Commissioners v. Fraser** [1942] S.C. 493 at 497-8:

"In cases where it is competent for a tribunal to make findings in fact which are excluded from review, the Appeal Court has always jurisdiction to intervene if it appears either that the tribunal has misunderstood the statutory language – because a proper construction of the statutory language is a matter of law – or that the tribunal has made a finding for which there is no evidence or which is inconsistent with the evidence and contradictory of it."

117. He went on to say:

"I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test." – p.36

118. His speech concluded with the following words:

"As I see it, the reasons why the courts do not interfere with Commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the Commissioners of greater experience in matters of business or any other matters. The reason is simply that by the system that has been set up the Commissioners are the first tribunal to try an appeal, and in the interest of the effective administration of justice their decisions can only be upset on appeal if they have been positively wrong in law. The court is not a second opinion, where there is a reasonable ground for the first. But there is no reason to make a mystery about the subjects that Commissioners deal with or to invite the courts to impose any exceptional restraints upon themselves because they are dealing with cases that arise out of facts found by Commissioners. Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado." – p.39

119. It is necessary, therefore, to consider whether the determination of the tribunal is, on the grounds relied on or any combination of them, inconsistent with, contradictory of, or insufficiently supported by, the evidence presented to it, or, put more shortly, whether the tribunal's conclusion was one which, properly directing itself, it could not have reached. An appeal to this court is not a rehearing; nor is it the court's function to determine whether it itself would have reached the same conclusion.

120. I am quite satisfied that the conclusions which the Tribunal reached were conclusions which were open to it. They were reached after seeing and hearing the witnesses, including Mr Singh, whom they did not find credible. The material to which I have referred in paras 62-80 above provided ample support for their conclusions as summarised in para 60 above. This ground of appeal is, in truth, an attack on the tribunal's findings of fact veiled in the diaphanous garb of an issue of law.

121. I set out in Appendix 2 to this judgment the 17 separate points and my observations upon them. After the conclusion of the argument I was supplied by the parties with 10 pages of cross references to the transcript, which I have, perforce, considered. This did not alter the view I had provisionally formed in the light of the submissions.

122. It is said that a number of the points raised in this appeal are not covered by authority from the European Court and that, insofar as there may be doubt upon

them, I should refer a question to the European Court. I do not regard any such reference as necessary. I am not left in doubt on any matter upon which the judgment of the European Court would be of assistance.

123. Accordingly I shall dismiss the appeal.

APPENDIX 1

	Defaulter	Deals	Conclusion	Basis
1	Steven Phillips t/a First Call	1	Tax loss EU import Fraud	Invoice specified EC origin Substantial evidence Phillips was a fraudster. French freight forwarder's documents show phones bypassed defaulter and Buffer 1 and were allocated to Buffer 2.
2	Global Dotcom	2-4 6 11	Tax loss EU import Fraud	Deals 2 & 3: 3rd party payment by Buffer 3 to Alfa Tradezone, a French company. Deals 4 & 6 involve payment to Alfa. Deal 11: country of manufacture is Germany; payment to Alfa; and chain similar to deals 3 and 1. [In deals 4, 6 and 11 the chains are identical. In all deals the first 3 in the chain are the same]. Global Dotcom operated for 1 month from a flat until licence ended for non-payment. Deals 2-4 all on same day. Unpaid tax on all deals was c £ 12 m; total unpaid tax liability > £ 25m.
3	Puwar Ltd	5	Tax loss EU import Fraud	All known suppliers to it based in EU Evidence of Puwar issuing 3rd party payment instructions. Puwar trading in huge quantities of mobiles and computer chips. Sales of c £ 149 million within 3 weeks. One of its known customers was defaulter 4. VAT loss on deal 5 £ 46,156.25; Puwar VAT debt : > £ 74 million.
4	Storm 90 Ltd	7-10 12-16 20	Tax loss EU import (indirectly) Fraud	Deals 7-10, 12-14 and 20 involved 3rd party payments to Danish company on Storm 90 instructions. Freight forwarder documents for deals 12-14 show a chain Com4U - Storm 90 – Adworks - NTS-Red 12 and that Com4U imported from a Dutch company at the time of the deals.

				Deals 15 and 16 have identical chain up to Red 12. Red 12's sales invoice for deal 20 says mobiles made in Finland.
5	Cosys Services Ltd	17, 19 25-6	Tax loss EU import Fraud	Cosys was – it was agreed - supplied by a Danish company and owed HMRC £ 25,493,414.97 on sales to Buffer 1.
6	NTS Telecom	18	Tax loss EU import Fraud	Red 12's invoice shows Finland as country of manufacture. NTS owes HMRC £ 859,292.66; and had huge sales with no capital. NTS appears in half the deal chains in a similar position. Inspection report faxed to Red 12 almost a month after deal.
7	Stock Mart Ltd.	21, 23-4 27- 31	Tax Loss EU import Fraud	3rd party payments requested by Stock Mart in all deals save 27 to Sunico in Denmark and/or IQ Trading and Amira Development Inc. Every deal chain, including 27, markedly similar. Deal 21 and 24 mobiles made in Germany; deal 27 & 30 mobiles made in Finland. 1,000 of deal 30 mobiles part of a carousel trade.
8	Adwork.com Ltd	22, 35 (part)	Tax Loss EU import Fraud	Adworks made 3rd party payments in its deals with Storm 90 and Stock Mart and was involved in 16 out of 46 deals [7-10, 12-16, 21, 23-4, 27-31]. 16 seems to be a mistake for 17.
9	Samson Traders Ltd	32	Tax Loss Fraud No evidence Of EU import	Samson owed £ 36.7 m for VAT for 1.3.06 – 21.4.06. It gave 3rd party instructions to pay what appears to be a UK company.
10	Fonestyle Ltd	33-7 35 (part)	Tax loss Fraud EU import	HMRC assesses £ 2.1 million for undeclared sales. Payments for deals 33-4 made by Fonestyle to a Danish company. Release notes 4 months later exist from a German company to Fonestyle. Mobiles for deal 37 were the subject of carousel trading. Mr Irshad, a director of Fonestyle repeatedly lied to HMRC.
11	Attic Attack UK Ltd	38-9 44-5	Tax loss MTIC Fraud EU import	Accepted that there was evidence of fraudulent default. Evidence of 3rd party payments to EU companies for deals 38, 44-5 and of carousel trading for deal 44.

12	KEP 2004 Ltd	40- 43 46	Tax loss MTIC fraud EU import	KEP owed VAT to HMRC on these deals of £ 145,787.25. A director of KEP denied that trades had taken place despite purchase orders on KEP from Buffer 1 in whose favour he had signed release notes for £ 291 million of goods although describing it as "two lads sitting in a semi-detached house near Heathrow". Evidence of a carousel fraud in deals 40-1.

APPENDIX 2

The points made in ground 6

Point 1

1. The Tribunal found in para 15 that HMRC's centre at Redhill:

"*specifically advises companies involved in the trade sectors associated with MTIC fraud on the validity of the VAT registration details of any company with which they intend trading. It does not serve to guarantee the status of suppliers and purchasers, and specifically states that confirmation of the validity of a VAT number is not authorisation to trade*".

Red 12 contends that that was a finding that failed to have any proper regard to a passage in the evidence of Stephen Jenner, the senior officer in charge of RED 12's VAT affairs. I have read the passage relied on by Red 12, and the context in which it appears. It does no more than consider the possible reasons for Mr Jenner having carried out as part of an MTIC team a post-registration visit to Red 12. He was being asked about a note which read:

"Trader visited at request of Terry Mendez as a result of its VAT number attempted to be cleared by AB International".

His evidence was that there must have been some contact between AB International ("ABIT") and HMRC in Redhill when ABIT was seeking to clear Red 12's VAT number; and that it could happen that someone like Mr Mendez, an HMRC officer, would ask his team to "*pop round*" because someone had tried to clear a number at Redhill.

2. Mr Jenner's evidence about the role of Redhill was as follows:

(a) In chief: (Day 3, pages 11-12)

Q. Fair enough. He was also, it says, instructed

24 to clear all deals with Redhill?

25 A. Correct.

12

1 Q. What does that mean?

2 A. Redhill is a branch of Revenue & Customs where,

3 particularly for MTIC deals, they will receive in

4 phone calls and fax messages from traders in order

5 to confirm that a particular trader who they are

6 thinking of trading with is VAT registered at that

7 point in time. So it allows them to check that

8 somebody is VAT registered if they want to trade

9 with them.

10 Q. Does it tell you anything else?

11 A. Well, I don't ring up and ask, but my

12 understanding is, no. It really is just checking

13 to make sure that somebody is still VAT registered

14 at that point in time.

15 Q. Did you ever tell, as far as you recall, either

16 this gentleman, Deshpal Singh, or Nadhan Singh

17 later on that the Redhill check meant anything more

18 than that?

19 A. No, I wouldn't.

(b) In re-examination he said that Redhill's role is "*simply to advise the … parties making the inquiry that the VAT registration number of the trader they are enquiring about is valid at that time, and that is all it says*". Contacting Redhill is "*a crucial first step*" and one of the checks for the trader to decide whether they continue to deal with a company or not (pages 148-149).

(c) There was further evidence from other witnesses for HMRC, particularly Mr Rod Stone, who set up the Redhill system. In re-examination (Day 6, page 52), Mr Stone gave the following evidence:

2 Q. What is the effect, as far as a trader is

3 concerned, of checking a VAT number with Redhill?

4 A. It goes slightly beyond that, Redhill take

5 the registration details, so that would be the

6 name, address, the traders normally provide a copy

7 of the VAT certificate, the letter of introduction

8 that has been provided by whoever it is that they

9 want to validate, and Redhill will then look at

10 those details to see whether or not they match the

11 records held by Revenue and Customs.

12 Q. If all that is provided is the name of the

13 company and a VAT number, or in some cases, just

14 the VAT number, not even the name of the company,

15 what can Redhill check?

16 A. Well, it would be able to look to see whether

17 or not the number is still valid, and look to see

18 what other information is held in respect of that

19 trader, perhaps what the trade class would be, so

20 if the trader phoning up is someone who dealt in

21 mobile phones but the trade class of the person

22 they were seeking to trade with was fireworks, you

23 may query that, before you would actually validate

24 the registration.

(c) Mr Stone explained that the Redhill checks all came with a caveat and that the validation was not an authorisation to trade. See pages 55-57:

1 Q. Thank you. The one other thing about Redhill

2 checks, it is now suggested by the appellant that

3 the Redhill check was what is being described as a

4 seal of approval by Customs for any company about

5 which he enquired.

6 A. No --

7 Q. May I just finish, and implied that in every

8 case, Customs had visited that company and checked

9 them as legitimate.

10 A. No, not at all. Each of the replies normally

11 carries a caveat anyway which informs the trader

12 that it is ultimately his commercial decision on

13 whether or not to proceed and the clearance or the

14 validation through Redhill is in no way an

15 authorisation.

…

(d) The Tribunal was provided with a sample copy of the Redhill validation with the caveat; and one of its members asked a clarificatory question

4 MRS SALISBURY: May I ask one question, just to be

5 absolutely clear, in terms of the volume of

6 information given to Redhill, if a trader gives the

7 VAT registration number, the address, the headed

8 notepaper and so on, at the end of the day, they

9 will still only get back from Redhill confirmation

10 of the VAT registration with the caveat?

11 A.

12 Yes.

Point 2

3. Red 12 contends that the Tribunal erred in deciding that, in respect of deal 1, proof of importation was provided by an invoice from First Call which included the words "*Country of origin: EC*". That, it submits, is insufficient evidence of importation from the EU by the defaulting company. In my judgment it was open to the Tribunal to treat this invoice as evidence of importation from the EU. The Tribunal also referred to the fact that documents from the freight forwarder showed that the phones were allocated by Zetec SARL, a French company to Nirvana Trading Ltd, which supported that contention. The Tribunal said that it reached its conclusion because of the invoice. But that does not mean that, in considering whether its decision was unsupported by evidence, the allocation by the freight forwarder can be ignored.

Point 3

4. In relation to deals 2 and 3 the Tribunal held that:

"*With regard to evidence of importation, there is clear evidence of a link to the EU in respect of deals 2 and 3 where there is a third party payment (as evidenced by the Bank statements) by Blue Star Trading to a French company called Alfa Tradezone …we accept that third party payments are evidence of fraud*".

Red 12 objects that this evidence does not demonstrate that the goods in question were imported into the UK from another Member State. In my judgment the tribunal was entitled to accept the evidence of third party payments by Blue Star to a French company as evidence of importation. It was also entitled to accept the evidence of Mr Rod Stone, the expert called by HMRC, that third party payments are evidence of an MTIC fraud (i.e. a fraud involving importation from the EU): see para 21 of the decision.

Point 4

5. In respect of deals 4 and 6 the Tribunal accepted evidence of third party payments to Alfa Tradezone. Red 12 makes the same submission, which merits the same answer.

Point 5

6. In relation to deal 11, Red 12 submits that the Tribunal's reliance on the country of manufacture as being Germany was insufficient proof of EU importation. In my judgment that was some evidence of EU importation. The Tribunal did not rely on that evidence alone. It also took into account third party payments to Alfa Tradezone and said that "*We are prepared to draw an inference from the fact that the first three traders in the chains are identical either to deal 3 where an EU link can be shown or to deal 1, that all of them can be traced back to an EU acquirer*". I am not sure that the Tribunal's expression is quite accurate. The first three companies in the chain are the same in deals 2, 3, 4, 6 and 11. The three companies preceding Red 12 in the chain are the same in deals 4,6,11 and 1. That was supporting evidence of importation in the case of deal 11. Indeed the similarity between all these chains together with the other evidence of importation was evidence that they were each part of an MTIC fraud.

Point 6

7. Red 12 submits that the conclusion cited under point 6 was based on inadmissible facts or, if admissible, then the inferences drawn were incapable of being drawn. I do not accept that evidence as to the similarity of the chains was inadmissible on the question of fraud; or that the tribunal was not entitled to reach the conclusions that it did, based, inter alia, on the similarities in the chains.

Point 7

8. The tribunal went on to say that they were prepared to draw that inference particularly in view of the fact that Global Dotcom [the first in deals 2,3,4,6, and 11] was a missing trader. Red 12 complains that there was no attempt by the tribunal to link that contention with the acquisition by that company of the products from a Member State. It is true that the mere fact that a trader goes missing does not necessarily mean that he, or his predecessor in the chain, was an importer. But when the company goes missing in circumstances in which it is at the start of several long chains with no apparent commercial purpose in which are included several companies in the same order, with other indicators of importation from the EU the probability shifts towards the chains constituting an MTIC fraud. It was open to the tribunal to think so. Insofar as the contention is that the defaulting trader must be shown to be the actual importer, I have already rejected it.

Point 8

9. This concerns deal 5 about which the tribunal said the following

"Documents in the Commissioners' possession show that in fact Puwar was issuing third party payment instructions, although the tribunal saw no direct evidence to that

effect. On 6 January 2006 Puwar confirmed to the Commissioners that they had not yet completed any sale. By 27 January 2006, three weeks later, they had completed sales worth £149,019,489. That figure was set against purchases worth more than that, resulting in a claim for repayment from the Commissioners of £239,091.38. The company was recommended for deregistration, calculations showed that there was VAT due of £13m for the month of January. A witness for the Commissioners, Katie Finn, who did not give evidence, exhibited an undated note from an Officer Smith, which contained the following: The company was trading in large quantities of computer chips as well as mobile phones. At the time of the appeal it had a VAT debt of over £74m and there has been no contact with either director since August 2006. Since 26 January 2006 100,000 mobile phones had been purchased from European suppliers by Puwar, as shown by release notes at the freight forwarders. Those same notes show that Puwar was issuing third party payment instructions which meant they would not be left with enough money to pay the VAT due. All the known suppliers to Puwar were based in the European Union. One of its known customers was Storm 90, defaulter 4 below. The VAT loss on deal 5 was £46,156.25. On the basis of the above, we accept on the balance of probabilities that the mobile phones were imported from the EU. We find that there was evidence of a fraudulent tax loss."

10. Red 12 submits that the tribunal was unable properly to make that finding which involved reliance on (i) documents of the defaulter said to be in the possession of HMRC giving third party payment instructions; (ii) a large amount of sales being completed in a short time; and (iii) an undated note from an officer of HMRC, asserting that the defaulter had in the past purchased phones from EU suppliers and that all its known suppliers were based in the EU.

11. The tribunal had Officer Finn's witness statement before it. She was a member of the MTIC team at the Leeds office responsible for Puwar. No application was made for her to be cross-examined. It was she who exhibited the note from Officer Smith who was one of several officers who had had contact with or made visits to Puwar. Para 10 of her statement read:

    "A recommendation for action was completed by Officer Smith (undated). I now produce a copy of the recommendations as Exhibit KAF10. This recommendation outlined the reasons why he thought Deregistration was appropriate. These reasons being:

    a) Release notes obtained from freight forwarders showed at least a further 100,000 mobile phones had been purchased from European suppliers.

    b) Evidence from Puwar as a result of the first Regulation 25 action showed that Puwar were issuing 3rd party payment instructions which would leave Puwar with not enough money to pay their VAT obligations.

    c) The manner in which Puwar were trading was considered to be out of control and could only possibly result in a default situation.

    d) Puwar was not just selling mobile phones but computer chips as well."

12. I am told that that evidence was not challenged. I have also been referred to the following passage in the re-examination of Mr David Taylor, one of HMRC's witnesses:

    Q: Does page 297 record

    23 that since 26th January 100,000 mobile phones had

    24 been purchased from European suppliers by Puwar,

25 release notes at the freight forwarders showing

1 that?

2 A. Yes, that is what it states.

3 Q. Does it also state that at the time Puwar

4 were issuing third party payment instructions?

5 A. Yes.

6 Q. Not leaving them enough money to pay the VAT

7 due?

8 A. That is correct, yes.

9 Q. And those were two of the reasons at

10 paragraph 10 to which I directed your attention in

11 the first place for deregistration?

12 A. They are referred to in that summary, yes.

13 Q. So from that can you tell whether Puwar was

14 importing mobile telephones from Europe?

15 A. From this information, yes. Puwar were

16 importing phones.

17 Q. If you look, still on page 297, the

18 investigation paragraph, to transactions, do you

19 see a list of known suppliers?

20 A. Yes.

21 Q. All of them EU?

22 A. All of them are based in the EU, yes.

23 Q. Three of them are very familiar to us, IQ

24 Trading, Sunico and Orange and Green Traders?

25 A. That is correct, yes.

13. It seems to me that the tribunal was entitled to reach the conclusions that it did in reliance upon the totality of the evidence which it identified. This included the release notes to which it referred and the fact that one of Puwar's customers was Storm 90 (as to which see below).

Point 9

14. Red 12 submits that the tribunal's finding that the products involved in deals involving Storm 90 had been imported from other Member States ignored clear evidence from Officer Wride, to which the tribunal did not refer, that from the records she had seen of Storm 90 it had never been an acquirer of goods and had never imported any goods into the UK. HMRC submits that whether Storm 90 had ever imported goods was not the relevant question, which was whether the goods had ever been imported from the EU. I agree. I also do not accept that the tribunal ignored Officer Wride's evidence. It found that:

"*On the balance of probabilities these telephones were imported from the EU although there is no evidence that they were imported directly by Storm 90*".

Further her evidence was that no information was provided to HMRC by Storm 90 about these transactions which would evidence what the position was.

15. As to importation the Tribunal relied on the following:

(a) in respect of Deals 7-10, 12-14 and 20, the sales were carried out using third party payments to IQ Trading in Denmark, the instructions being given to Adworks by Storm 90[8]. HMRC also invited the Tribunal to find (as it recorded) that Deals 15-16 were funded in the same way, and that third party payments were made, because the deal chains were identical. [see Transcript Day 8/p 89/line 19ff].

(b) Red 12's own invoice in respect of deal 20 described the Nokia 6680 telephones the subject of the deal as being made in Finland;

(c) Freight forwarder records produced by Mr Taylor during the course of the trial which showed that in at least 3 deals (12-14) Storm 90 bought from Com4U, which on 17th February 2006 imported from Power Com BV, a Dutch company on six occasions and sold the telephones so imported to Storm 90. [see Day 8/p99].

Evidence was also given that the phones were of European specification, which were not manufactured in the UK: [Transcript Day 8/p 94].

16. That evidence, taken as a whole, was sufficient evidence from which the Tribunal could conclude that the phones had at some point in the chain been imported from the EU. I do not accept that any of that evidence was inadmissible (it was not suggested at the hearing that it was) or that the evidence did not permit the tribunal to reach the conclusion that it did.

Point 10

17. In respect of deal 18 the tribunal found evidence of EU importation in an invoice of Red 12 describing the products as having been manufactured in Finland. That, Red 12 submits, is insufficient evidence of importation from another Member State. I disagree. The tribunal also referred to, and must have accepted, HMRC's reliance on the similarity of all the other chains involving NTS in which a link to the EU had been clearly demonstrated (deals 7-10, 12-16, 19-24, 27-31 and 33-37). It also referred to other evidence of fraud. It was entitled to reach the conclusion that there "*was evidence of both fraud and EU importation in respect of this deal, although the evidence is indirect*". The tribunal ignored, so it is said, Officer Wride's evidence in

cross-examination that the defaulting company, NTS had not imported any goods. It was not, however, necessary for HMRC to establish that and her evidence was that there was an absence of information.

Point 11

18. The Tribunal found that 4 deals involving Stock Mart involved products which were said to have been manufactured in the EU. There were however 8 deals involving Stock Mart, and accordingly, so Red 12 submits, there was no evidence relied on by the tribunal for its finding in relation to the latter 4 deals.

19. I do not regard this as an accurate summary of the position. The tribunal relied on the following:

    (a) third party payments were requested by Stock Mart of Adworks its customer in every deal except 27; principally to its supplier Sunico in Denmark and/or to IQ Trading as well as an entity called Amira Development Inc;

    (b) every deal chain involving Stock Mart is markedly similar;

    (c) in deals 21 and 24 the phones were manufactured in Germany, and in deals 27 and 30 they were manufactured in Finland;

    (d) 1,000 of the 3,000 telephones exported by Red 12 as part of deal 30 to Dubai came back to Heathrow as part of a carousel trade.

20. That evidence justified the tribunal's conclusion.

Point 12

21. Red 12 submits that in respect of deals involving Adworksuk.com Ltd, the tribunal reached its conclusion that the products were imported from another Member State because of that company's involvement in other deals in which it was not the defaulting importer, and that such a conclusion was untenable. I disagree. What the tribunal relied on was the following:

    (a) Adworks was involved in 16 out of the 46 deals;

    (b) In deals 7-10 and 12-16 it purchased from Storm 90 and sold on to NTS;

    (c) In deals 21, 23-26[9] and 27-31 it purchased from Stock Mart and sold on to NTS; it also sold on to NTS in deals 22 and 35.

    The tribunal relied on the similarity of the facts surrounding the chains in which it was involved, which on the tribunal's findings were chains constituting MTIC fraud, to support the inference that the chains in respect of deals 22 and 35 were also connected to fraud, by which the tribunal must have meant MTIC fraud involving importation from another Member State. Again it seems to me open to the Tribunal to have drawn that inference.

Point 13

22. Red 12 contends that it was not open to the tribunal to rely, in respect of deals 36-37 involving Fonestyle Ltd, on circumstantial or similar fact evidence in relation to other deals to conclude that the products had been imported from other Member States.

23. The Tribunal relied on the following evidence:

(a) Payments made by Fonestyle to a Danish company in respect of deals 33 and 34;

(b) Release notes to Fonestyle from a German company dated July 2006;

(c) The fact that a large quantity of the phones traded by Fonestyle in Deal 37 had previously circulated in and out of the UK in carousel trading before they were exported by Red 12;

(d) Recent data from the FCIB which showed evidence of payments made to a bank in the Netherlands.

24. This was evidence from which the Tribunal could properly infer an EU importation. It was not necessary to establish that the trader assessed as the defaulter had itself imported the goods.

25. The Appellant objects that the evidence relied on by the Tribunal is circumstantial. To ask HMRC to find direct evidence of an EU import in every case where an MTIC fraud is alleged would be to allow the fraud to continue to operate successfully where fraudsters stymie HMRC's investigations simply by disappearing.

Point 14

26. Red 12 submits that the tribunal was in error when it said at para 23 (11) that Mr Gary Taylor had read all the papers, when his own evidence was that he had only read parts of the disclosure and not all the exhibits to the witness statement of David Taylor, HMRC's main factual witness. The Tribunal is also said to have erred in accepting Mr Taylor's evidence that Nokia set homogeneous prices across all its territories; and in deciding that that evidence, unvouched by any documentary evidence, was borne out by discussions he said he had had with major handset distributors when no evidence from them was produced. The tribunal also failed to refer to the fact that Mr Taylor admitted in cross-examination that there was no Nokia documentation he was aware of to support his contention, despite having looked for it, that his dealings with the handset distributors had been as an advisor to KPMG (and not as an employee in the industry) and that he had not discussed the issue of pricing homogeneity with Nokia. Further the tribunal did not refer to the fact that Nokia phones were being sold on the IPT website which showed that prices were not homogenous.

27. In my judgment the tribunal was entitled to accept Mr Taylor's evidence about homogenous prices. They described him as "*very knowledgeable*" and said that they had "*no hesitation in relying on his evidence"* which, save as to his evidence about price homogeneity, was backed up by independent evidence. In relation to that topic they observed that no independent evidence to the contrary was produced. I have read through the several references which Red 12 supplied in relation to this point and they do not persuade me that the tribunal had no proper basis upon which to base its conclusion.

Point 15

28. Red 12 submits that the tribunal erred in finding, at para 27 that Mr Singh naively expected the Commissioners to advise him to stop trading with certain companies, when HMRC were aware, as appeared on cross-examination, of certain indicators of MITC fraud in connection with companies with which Red 12 wished to trade.

29. The evidence before the tribunal was that every confirmation from the Redhill office that a company's VAT number was extant was accompanied by a caveat warning the

inquiring company that confirmation was not an authorisation to trade: (Day 6/55-8). It is the responsibility of the trader to take all reasonable precautions to establish that he is not becoming involved in fraud. As Floyd J put it in **Mobilx v HMRC** [2009] EWHC 133 (Ch), [87]:

"*The company has to exercise independent judgment, not delegate its judgment to HMRC... as the Notice [726] explained, HMRC's advice is not intended to create a shield for fraud.*"

The tribunal was entitled to regard it as naïve for Mr Singh to think that he could be absolved from making the appropriate checks on the footing that HMRC would advise him if he should stop trading with any of those with whom he traded. The fact that HMRC may have had indicators of fraud in respect of some traders does not alter the position. .

30. The Tribunal is also said to have erred in placing substantial weight on the informal practices and small nature of the business: see paras 28-9, 35 and 39. "Informal practices" is not a full statement of the inadequacies which the tribunal found in Red 12's practices which included the following:

    (a) Red 12 failed to provide telephone records to back up the assertion that it made 100-200 calls per day [para 28].

    (b) No copy of the terms and conditions - which Red 12 claimed it sent to all those who enquired about trading with it - was found in any of the records of the companies with which it traded [para 28].

    (c) Mr Singh was unable to provide an explanation for its abnormal success [para 29].

    (d) Mr Singh was not well-informed about the handsets he sold or their market, and did not appear to know matters which made a considerable difference to the price of the phones [para 29].

    (e) The majority of the invoices produced by Red 12 were singularly uninformative to such an extent that their commercial usefulness was highly questionable [para 35].

    (f) Some of Red 12's invoices showed anomalies between the dates of purchase orders and sales invoices [para 35].

    (g) There was no example of any customer ever rejecting the telephones Red 12 allegedly sold, a matter which given the curious nature of the goods as revealed by the inspection reports itself cast doubts on the legitimacy of the deals [para 35].

    (h) An inspection report produced by the Appellant was described by HMRC's expert as largely "*spurious and unhelpful*" [para 35].

    (i) By the time that inspection report was produced the goods had already been shipped [para 35].

    (j) It was impossible to be certain when any of the deals was actually closed; there was no sense of commercial reality in the way the Appellant conducted its affairs; the nature of the trade would require the parties to be very certain where liability lay, which was not certain at any point [para 35].

    (k) Mr Singh did not appear to regard his own terms and conditions as important [para 39].

(l) The terms and conditions appeared to say that Red 12 was responsible for the payment of insurance, which was contrary to Mr Singh's own evidence on behalf of the Appellant [para 39].

(m) Mr Singh did not appear to understand what "CIF" stood for, or that it meant he had agreed to pay for the insurance [para 39].

(n) Red 12 was in breach of its own terms and conditions, which required that the buyer would not transfer funds to any off-shore bank account, every time it traded [para 39].

31. These were all findings which were open to the tribunal on the evidence; as was the finding that because of all the inconsistencies in his evidence Mr Singh was not a reliable witness and that "*the very best that could be said of him was that he closed his eyes to those aspects which were unwelcome to him*"; and, hence the finding in para 72.

Point 16

32. Red 12 submits that the tribunal erred in finding that Mr Singh's evidence as to knowledge of phones coming into the UK from other EU countries was untrue. The tribunal recorded that his claim not to know that phones were coming into the UK from the EU was shown to be untrue on several occasions. It gave as an example deal 34 where the report from the freight forwarders said that the phones were manufactured in Germany and Mr Singh suggested that they might have been sent to China and come back.

33. These submissions do not sit easily with Mr Singh's own evidence in chief (Day 14/189/line 3):

3 Q. ... Now, you confirmed that because

4 mobiles are not manufactured in the UK someone had

5 to have imported them. Makes sense. Yes?

6 A. *That's correct, yes.*

34. The tribunal is said to have "*erred in its discretion*" in relying on contested evidence as to whether recording of IMEI numbers was necessary. But it was for the tribunal to decide what evidence to accept and what weight to give to it. In the light of the totality of the evidence the tribunal was entitled to find that Mr Singh was well aware that some other trader further up the chain of supply would fail to account for output tax. The fact, relied on by Red 12 in its submission, that Mr Singh's evidence was that Red 12 complied with HMRC's instructions; ceased trading with companies once warned by HMRC of problems with them and that Mr Taylor agreed that Red 12's paperwork in terms of purchases and sales "stacked up" and that it did not know about third party payments, does not make that conclusion untenable.

Point 17

35. The tribunal is said to have erred "*in its discretion*" in finding at para 75 that Red 12 acted unreasonably because, so it is said, the evidence indicated full cooperation with the Commissioners. This is a final generalised assertion that the tribunal reached a wrong conclusion of fact without any indication of any error of law, in circumstances where the tribunal has spelt out in its decision, in para 75 and elsewhere, its reasons for concluding that "*in effect little or no commercial care was taken by Red 12".*

Note 1 The current directive is the 2006 Directive. [Back]

Note 2 Article 2 of the Sixth Directive provides for taxable transactions to include supplies of goods and services effected for consideration by taxable persons "*acting as such*". [Back]

Note 3 By Article 4 (1) of the Sixth Directive a "*taxable person*" means any person who independently carries out an economic activity. [Back]

Note 4 International Mobile Equipment Identity [Back]

Note 5 Such as by the ECJ in Optigen (para 13); FTI (paras 10-12); and by the VAT & Duties Tribunal and the High Court in Calltell (paras 5-6); Mobile Export 365 Ltd v HMRC [2009] EWHC 797 (Ch) (para 5); Livewire (para 5); Olympia Technology Ltd v HMRC [2008] UKVAT V20570 (para 6); Honeyfone v HMRC [2008] UKVAT V20667 (para 3); Mobilx v HMRC [2009] EWHC 133 (Ch) (para 7). [Back]

Note 6 See Lewison, J at para 91 of Livewire: "*Unless there is a missing trader somewhere further down the chain (or a parallel chain) there is no fraud … unless the …trader knows or should have known that there was (or was likely to be) a missing trader somewhere in the dirty chain I do not see how it can be said that he knew or should have known that his transaction was connected with fraud*". [Back]

Note 7 Such as, to take one of Mr Randolph's examples, the fact that some of the phones had two pin plugs, which was used as evidence of importation. [Back]

Note 8 Storm 90 had produced invoices calling for the full amount to be paid to Barclays. Separately there were instructions for all but about £ 5,000 to be paid to IQ Trading. [Back]

Note 9 The reference to deals 25 and 26 seems erroneous. [Back]