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VAT – Input Tax – Dealer in mobile phones – MTIC fraud – Whether defaulter has to be the importer – Whether fraudulent tax loss shown – Admissibility of evidence – Whether third party payments evidence of MTIC fraud – Whether similar fact evidence admissible – Whether delay relevant – Whether Appellant had knowledge or means of knowledge – Relevant test – Whether Appellant entitled to recover input tax paid to buffer traders – Appeal allowed in part

LONDON TRIBUNAL CENTRE

RED 12 TRADING LTD

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE & CUSTOMS Respondents

**Tribunal: MISS J C GORT (Chairman)
MRS L SALISBURY**

Sitting in public in London on 7-25 July and 1-3 September 2008

Mr Fergus Randolph of counsel, instructed by Mackrell Turner Garrett, for the Appellant

Miss H Malcolm QC and Miss S Lambert and Miss R Marcus of counsel, instructed by the Solicitor’s Office, for the Respondents

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DECISION

1. This is an appeal by Red 12 Trading Ltd (“Red 12”) against a decision by the Respondents (“the Commissioners”) contained in a letter dated 1 July 2007 to deny Red 12 the ability to deduct input tax claimed in respect of transactions in the tax periods 02/06 and 03/06. The input tax credit claimed was in the sum of £2,672,748.50. The Commissioners’ grounds for that decision are that the input tax incurred by Red 12 was done so in a transaction or transactions in connection with the fraudulent evasion of VAT and that Red 12 knew or should have known of this fact.

2. The grounds of appeal contained in the Red 12’s notice of appeal dated 3 August 2007 state:

“The decision by HMRC to reject Red 12’s right to deduct input tax is wrong because Red 12 took all proper steps to ensure the validity of the transactions entered into. A copy of our unanswered letter to HMRC of 26/7/07 is attached for full details.”

We do not propose to set out here the matters contained in that letter.

3. In the statement of case it is specifically pleaded that Red 12 “knew or had the means of knowing that the 46 transactions comprised part of a scheme intended to defraud the public revenue through MTIC fraud.” In the decision letter it is stated that Red 12 knew that the transactions were “contrived for the purposes of a (sic) MTIC fraud chain”.

4. MTIC trading has been described in many recent tribunal decisions and in particular in some detail by Burton J in *R (Just Fabulous UK Ltd) v HMRC* [2007] EWHC 521 (Admin). Having referred to that case, the Tribunal in the case of *Mobilx Ltd* (Decision 20687) gave an abbreviated description as follows:

“... In short, goods – commonly computer chips and mobile phones, though other commodities are also used – are imported into the United Kingdom by one trader and change hands, usually within the space of a single day, several times before they are exported again, usually but not always to another Member State of the European Union. The importing trader does not account for the output tax due on its sale, either by “going missing” or by masquerading as an innocent, unconnected trader and “hijacking” that trader’s VAT registration; in either case it is known as a “defaulter”. The traders, known as “buffers”, between the defaulter and the exporting trader, who is known as “broker”, account correctly for the output tax due on their respective sales while claiming credit for the input tax they have incurred on their purchases. Usually they make a modest profit, and correspondingly make small payments to the Commissioners. The broker pays VAT on the price of the goods to the buffer from which it has bought them, but (assuming the transactions are all genuine) is entitled to zero-rate its sale; it then seeks ... payment from the Commissioners of input tax credit generated by its purchase.

... . For the scheme to work, all of the participants, which are almost invariably limited companies, must be VAT-registered, or must have hijacked a genuine registration.

- 5 The above is the classic pattern but in recent years those involved in this type of fraud have become more sophisticated and there are variations. A particular question arises in this case as to whether the importer has to be the defaulter.

The law

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5. Articles 167 and 168 of Council Directive 2006/112/EC of 28 November 2006 provide:

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“167 – A right of deduction shall arise at the time the deductible tax becomes charged.

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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:

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- (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.

6. The Value Added Tax Act 1994 (“VATA”) provides:

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24-(1) Subject to the following provisions of this section, “input tax”, in relation to a taxable person, means the following tax, that is to say –

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- (a) VAT on the supply to him of any goods or services;
(b) VAT on the acquisition by him from another member State of any goods, and
(c) VAT paid or payable by him on the importation of any goods from a place outside the member States;

Being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.

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...

- (6) Regulations may provide –

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- (a) for VAT on the supply of goods or services to a taxable person, VAT on the acquisition of goods by a taxable person from other member States and VAT paid or payable by a taxable person on the importation of goods from places outside the member states to be treated as his input tax only if and to

the extent that the charge to VAT is evidenced and quantified by reference to such documents as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases.

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25-(1) A taxable person shall –

- (a) in respect of supplies made by him, and
- (b) in respect of the acquisition by him from other member states of any goods;

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Account for and pay VAT by reference to such periods (in this Act referred to as “prescribed accounting periods”) at such time and in such manner as may be determined by or under regulations and regulations ay make different provision for different circumstances.

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(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

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26-(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be 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.

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(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business –

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- (a) taxable supplies;
- (b) supplies outside the United Kingdom which would be taxable supplies if made within the United Kingdom;
- (c) such other supplies outside the United Kingdom and such exempt supplies as the Treasury may by order specify for the purposes of this subsection.

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7. The VAT Regulations 1995 provide as follows:-

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“29-(1) Subject to paragraph (2) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT becomes chargeable.

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(2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall if the claim is in respect of –

- 5 (a) a supply from another taxable person, hold the document which is required to be provided under regulation 13;

10 Provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a Claimant shall hold [or provide] such other ... evidence as the Commissioners may direct.”

8. We were referred to the following cases:

15 **ECJ Cases**

1. Case 268/83: *Rompelman* [1985] ECR 655
2. Case C-224/01: *Kobler* [2003] ECR 1-10239
3. Joined Cases C-354/03, C-355/03 and C-484/03: *Optigen* 12 January 2006
20 4. Case C-384/04: *FTI* 11 May 2006
5. Joined Cases C-439/04 and C-440/04: *Kittel* 6 July 2006
6. Case C-409/04: *Teleos* 27 September 2007
7. Case C-271/06: *Netto* 21 February 2008

25 **Domestic cases**

8. *Tynwydd Labour Working Men's Club v Customs and Excise Commissioners* [1979] STC 570
9. *Dragon Futures Ltd v HMRC* [2006] VAT Decision 19831
30 10. *Megantic Services Ltd v HMRC* [2006] EWHC 3232
11. *R (on the application of Just Fabulous (UK) Ltd and Others v Revenue and Customs Commissioners* [2007] EWHC 521 (Admin)
12. *Calltell Telecom Limited and Another v HMRC* (2007) VAT Decision 20266
35 13. *Mobile 365 v HMRC* [2007] EWHC 1737 (Ch)
14. *Livewire Telecom Limited v HMRC* (2008) VAT Decision 20533
15. *Olympia Technology Limited v HMRC* (2008) VAT Decision 20570
16. *Honeyfone v HMRC* (2008) VAT Decision 20667
17. *Moblrix Limited v HMRC* (2008) VAT Decision 20687
40 18. *HMRC v Brayfal Ltd* (unreported) 4 March 2008 in High Court

The Issues

9. Whilst the principal issues in this case are whether in respect of the deal chains
45 there was sufficient evidence of an MTIC fraud and whether the Appellant knew or had means of knowledge (and there was disagreement between the parties as to the appropriate phrase to be used here which we will deal with later) that he was

participating in a transaction connected with the fraudulent evasion of VAT, there were other issues which the Tribunal will have to decide as follows:

5 (i) On whom is the burden of proof? Whilst it was accepted by the Commissioners that there was an initial burden upon them to show that there had been a fraud, the Commissioners had contended that the burden was entirely on Red 12 in relation to knowledge and means of knowledge. However it was subsequently accepted by Miss Malcolm that the proper approach was for the Commissioners to raise a case requiring an answer from
10 Red 12, and having done so, then the burden shifts to Red 12. We adopt that approach.

15 (ii) Whilst both parties accept that a tax loss must be shown to have occurred, and that tax loss must be attributable to fraud, there was an issue between the parties as to whether or not the defaulter has to be the importer.

20 (iii) Whether the Tribunal may infer behaviour from one set of transactions in respect of another, or whether the Tribunal must look in isolation at each and every deal carried out by Red 12. Mr Randolph relies on the case of *Optigen and STI* for his submission that each deal must be looked at in isolation.

(iv) Whether third party payments are evidence of fraud.

25 (v) Whether the question of delay by the Commissioners is relevant and whether or not in this case there has been undue delay (Mr Randolph relied for this proposition on the case of *Sosnowska*).

30 (vi) Whether all or any of the above matters should be referred to the European Court of Justice.

10. In deciding these issues we bear in mind that in principle the broker is entitled to the payment it claims, but there is an exception to this entitlement relied on by the Commissioners which, however, should be treated strictly in accordance with the
35 generally accepted EU law on exemptions and exceptions. The European Court of Justice (“the ECJ”) in its judgment dated 6 July 2006 in the joint cases of *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL* (C-439/04 and C-440/04) stated:

40 “51. ... traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud, be it the fraudulent invasion of VAT or other fraud, must be able to rely on the legality of those transactions without the risk of losing the right to deduct the input VAT

45 “52. It follows that, where a recipient of a supply of goods is a taxable person who did not and could not know that the transaction concerned was connected with a fraud committed by the seller, Article 17 of the Sixth

5 Directive must be interpreted as meaning that it precludes a rule of national law under which the facts that the contract of sale is void, by reason of a civil law provision which renders that contract incurably void as contrary to public policy for unlawful basis of the contract attributable to the seller, causes that taxable person to lose the right to deduct the VAT he has paid. It is irrelevant in this respect whether the fact that the contract is void is due to fraudulent evasion of VAT or to other fraud.”

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

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

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

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

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

35 **Agreed facts**

11. An agreed statement of facts was provided dated 9 July 2008 as follows:

40 Red 12

(1) Red 12 was incorporated on 5 November 2003 and registered for VAT on 26 February 2004 with effect from 5 November 2003.

45 (2) Mr Nadhan Singh (“Mr Singh”) was appointed director of Red 12 on 5 November 2004. Mr Singh had been sales manager for the Appellant since April 2004.

(3) According to Red 12's VAT returns, its turnover was as follows:

- (a) £8,903,690 in the period 05/11/03 to 30/04/2005 (the first return being submitted in April 2004;
- (b) £55,331,299 in the period 01/05/05 to 30/04/06;
- (c) £11,724,623 in the period 01/05/06 to 30/04/07 (no turnover since September 2006).

The transactions

(4) Red 12 started to export mobile phones in October 2004.

(5) In the tax period 02/06 Red 12 carried out 20 deals in which it purchased goods from UK suppliers and then exported them abroad, in respect of which it claims an input tax credit of £980,920.50.

(6) Red 12 bought goods from 5 suppliers during this period:

- (a) The Fones Centre Ltd
- (b) Letting Solutions (UK) Ltd
- (c) G Comms Ltd
- (d) NTS Telecom.Net Ltd ("NTS")
- (e) RS23 Ltd

(7) Red 12 exported goods to 8 customers during this period:

- (a) Asia Power Sol GmbH (Switzerland)
- (b) Digi Trading GmbH (Switzerland)
- (c) Futures Brokerage Inc (Switzerland)
- (d) Al Saqr Telecom FZE (Dubai) ("Al Saqr")
- (e) High Level Trading (Switzerland)
- (f) Blue Cell FZE (Dubai)
- (g) Imaani International Trading LLC (Dubai)
- (h) Al Basha Communication (Dubai)

(8) Red 12 also sold goods to 4 additional customers within the UK during this period:

- (a) AB International Trading ("ABIT")
- (b) NG International Ltd
- (c) Chahal & Sons Ltd
- (d) Outer National Ltd

(9) In the tax period 03/06 Red 12 carried out 26 deals in which it purchased goods from UK suppliers and then exported them abroad, in respect of which it claims an input tax credit of £1,691,828.00.

(10) Red 12 bought goods from 5 suppliers during this period:

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- (a) NTS
 - (b) The Fones Centre Ltd
 - (c) Letting Solutions (UK) Ltd
 - (d) Reya Ltd
 - (e) ABIT

(11) Red 12 exported goods to 9 customers during this period:

- 10
- (a) Bakhit Gharib Trading LLC (Dubai)
 - (b) Al Basha Communication (Dubai)
 - (c) High Level Trading (Switzerland)
 - (d) Conquest Trading FZE (Dubai)
 - 15 (e) Asia Power Sol GmbH (Switzerland)
 - (f) Blue Star Telecom ApS (Denmark)
 - (g) Celtra SA (Switzerland)
 - (h) Al Saqr
 - (i) Imaani International Trading FZE (Dubai)
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(12) Red 12 also sold goods to 4 additional customers within the UK during this period:

- 25
- (a) Fine Art
 - (b) Chahal & Sons Ltd
 - (c) Blue Phone Company
 - (d) Wizard Trading (Europe)

30 (13) All the transactions concerned various models of mobile telephone. A schedule of the transactions is annexed hereto marked "Annex 1", which annex is a copy of the document exhibited to HMRC's Statement of Case marked "C".

35 (14) Red 12 was aware of the identity of its supplier and its customer in each transaction.

40 (15) Red 12 did not purchase the mobile phones in which it traded directly from the manufacturer and was not an authorised distributor of the mobile phones with which it dealt.

(16) None of Red 12's suppliers in relation to the 46 transactions in question were authorised distributors.

45 Contact between Red 12 and the Commissioners

(17) A first visit was made to Red 12 by officers of the Commissioners on 20 April 2004. Mr Singh was not present at that meeting.

(18) During that visit, Red 12 was issued with VAT Notice 726: Joint and Several Liability in the Supply of Specified Goods.

(19) Further visits were made to Red 12 on the following dates and by the following officers of the Commissioners:

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20/04/2004	Steven Jenner, Peter Cameron Watson
19/05/2004	Steven Jenner, Peter Cameron Watson
01/07/2004	Janet Parker, Peter Cameron Watson
04/08/2004	Janet Parker, Peter Cameron Watson
14/09/2004	Janet Parker, Peter Cameron Watson
13/10/2004	Peter Cameron Watson
16/11/2004	Steven Jenner, Janet Parker
22/12/2004	Steven Jenner, Janet Parker
02/02/2005	Steven Jenner, Janet Parker
13/01/2006	Steven Jenner, Peter Cameron Watson
25/01/2006	Steven Jenner, Peter Cameron Watson
01/03/2006	Peter Cameron Watson, Marilyn Balderstone
27/10/2006	Steven Jenner

The Evidence

12. The Commissioners produced 25 box files of witness statements and exhibits, Red 12 produced 7 such files. We heard evidence from the following witnesses on behalf of the Commissioners: Steven Jenner, Lisa Wride, Peter Cameron Watson, Roderick Stone, David Taylor, Gary Taylor, Peter Birchfield. 9 other officers provided witness statements. We heard from Laurence Traynor and Nadhan Singh on behalf of Red 12.

The background facts found by the Tribunal

13. After leaving school Mr Singh had done two business study courses at college for his GNVQ examinations. He worked in the family business in retail for some four to five years after leaving college.

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14. On 27 November 2002 Mr Singh had become a director of a company called Wedding Camera Store, which he had purchased. That company had been registered for VAT on 31 October 2002 as a wholesale supplier of novelty products. Mr Singh claimed to have sold that company in about January 2003 and to have removed himself as a director but at the time of the hearing of this appeal he was still on record as a director of that company. On 5 November 2003 when Red 12 was incorporated its sole director was Deshpal Singh (no relation). On 26 February 2004 Red 12 registered for VAT with a trade class of fancy goods and household goods. On 13 March 2006 the Company House records show the company business as 'Rent Civil Engineering Machinery'.

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15. On 1 April 2004 Mr Singh and Deshpal Singh had visited a trade fair in Birmingham where they met a sales manager of a company called Unique Distribution (“Unique”). Unique was an authorised dealer in mobile telephones unlike all bar one of the companies with whom Red 12 dealt, or, indeed, any of the companies involved in the chains of deals with which we are concerned. Following that meeting Mr Singh became sales manager of Red 12, he claimed in his witness statement that, with Deshpal Singh, he had invested £5,000 in the company. At an initial visit by officers of the Commissioners to Red 12 on 20 April 2004, at which Mr Singh was not present, Deshpal Singh told the officer that there was a nil opening balance in the company accounts with the Royal Bank of Scotland. He had personal savings of £1,000 and was negotiating an overdraft of £5,000. The visit is important because it arose in part out of an attempt by ABIT, a company with which Red 12 had close connections, to clear Red 12’s VAT number with the Commissioners’ centre at Redhill prior to trading with them in mobile telephones. The 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. The officers’ notes described it as a post-registration visit. It was recorded inter alia that Red 12 intended to purchase 100 mobile phones from ABIT at a price of £40 each and sell them to Unique at £42 each i.e. Red 12 planned to act as a buffer trader at that time. It was claimed that Unique would pay Red 12 before Red 12 received the telephones from ABIT. It is curious that it was claimed that Unique would purchase telephones from Red 12, given that it was at the time an authorised dealer. However, Mr Singh’s own records show that Red 12 purchased from Unique and sold on to ABIT but at a loss. The officers were told Red 12 did not intend to be involved in either importing or exporting mobile phones. The officers issued Red 12 with a notice 726 which sets out recommendations of the sort of checks a trader should make (which we set out in paragraphs 36 below).

16. On a further visit by the Commissioners to Red 12 in July of 2004 only transaction invoices were present, but not all the invoices and records that had been requested at the earlier visit. On 21 October 2004 Deshpal Singh resigned from Red 12, and later by a telephone call on 1 March 2005 specifically confirmed to the Commissioners that he had resigned in October, a matter disputed by Mr Singh. On 22 October 2004 Mr Singh travelled to Dubai and on 29 October 2004 he called Redhill with a verification request for a company in Dubai. On that same day he completed his first export deal to a company in Dubai called Blessings Electronics Ltd of a sale of telephones purchased from ABIT. In December 2004 Red 12 started advertising on the IPT website. That website has inter alia on its ‘Trading Board’ lists of various mobile phones for sale and also the details of some advertisers who wish to purchase mobile phones although on the examples we saw taken recently there were considerably fewer people wishing to buy than wanting to sell. Some of the telephones being sold were Nokias and some were being sold by companies with Dubai telephone numbers. There was also a directory of companies in each country which are interested in buying and selling telephones. (The significance of these matters will emerge later.)

17. Towards the end of 2004 Dilraj Singh, Mr Singh's brother, joined Red 12 as Company Secretary, replacing Deshpal Singh's wife who had left the company. There was a further visit to Red 12 by the Commissioners on 22 December 2004, when invoices for VAT period November 2004 were made available to them. On the next
5 visit by the Commissioners on 2 February 2005 the papers relating to the VAT periods ending 31 December 2004 and January 2005, were said not to be available because the accountant, who was new, had removed them for accounting purposes. There having been monthly visits to Red 12 between April 2004 and February 2005, there were no further visits by the Commissioners until 13 January 2006, because of a
10 shortage of staff. Mr Singh believed it was because the Commissioners were satisfied with his business methods.

18. Mr Singh produced to the tribunal spreadsheets of deals done in 2004 and 2005. These show that Red 12 was mainly purchasing from Unique in 2004 but
15 ceased to do so after January 2005. Its only customers between April 2004 and 29 October 2004 were ABIT and Fortune Communications Ltd. After that date it supplied a wider range of customers, including, inter alia, Just Fonez Ltd, Sunico Importers, Letting Solutions (UK) Ltd, Conquest Trading FE, Imaani Trading, Digi Trading GmbH, and Al Saqr. It made increasingly large profits, having initially sold
20 250 Nokia 7210 telephones to ABIT on 22 April 2004 for a loss of £2,750, by January 2006 it was showing a monthly profit of £399,324. Between April 2004 and the end of June 2006 Red 12 had made purchases from its suppliers to the value of £86,344,602.34. It had sold telephones to the value of £81,429,225.40. In relation to various deals other than those we are concerned with in the periods 02/06 and 03/06
25 Red 12 had acted as a "buffer" trader and the Commissioners had paid it the input tax incurred in respect of those deals. It had also been paid its input tax in respect of its trading in all periods prior to 02/06. It therefore was reliant on the recovery of input VAT to make a profit.

30 19. In the relevant periods Red 12 acted as broker in 46 deals. We attach a Schedule setting out the dates and amounts involved in all these deals as Appendix 1. Each of the 46 transaction chains identified has been traced back to a trader that has gone missing or has used a highjacked VAT number or has otherwise defaulted on its VAT liabilities. Each of the defaults in the 46 transaction chains resulted in a tax loss
35 to the Commissioners. It was the Commissioners' case that each of those defaults formed part of a scheme to defraud the revenue. Mr Randolph did not accept that this was the case and did not accept that even where there was clear evidence of a default, that the defaulting trader was the importer, which he maintained was a necessary requirement for the Commissioners to prove where it alleged MTIC fraud. The 12
40 defaulting traders are:

- (i) Steven Phillips T/A First Call
- (ii) Global Dotcom Solutions Ltd ("Global")
- (iii) Puwar Ltd
- 45 (iv) Storm 90 Ltd
- (v) Cosys Services Ltd ("Cosys")
- (vi) NTS

- (vii) Stock Mart Ltd
- (viii) Adworks
- (ix) Samson Traders Ltd
- (x) Fonestyle Ltd
- 5 (xi) Attic Attack UK Ltd (“Attic Attack”)
- (xii) KEP 2004 Ltd (“KEP”)

20. Mr Randolph only accepted that there was evidence of an importation from the European Union in respect of the deal chains which can be traced back to Cosys and Attic Attack. We must therefore carefully analyse the evidence provided by the Commissioners in respect of all the other deal chains. The Commissioners produced deal flow charts grouped by defaulter and these we attach to this decision at Appendix 2.

15 ***Evidence of fraud in the chain***

21. In considering whether or not there is evidence of fraud, we propose initially to identify the defaulter, look for evidence of a tax loss attributable to that defaulter and for evidence of an EU acquisition. Having done that, whenever we are satisfied on the basis of the evidence pertaining to the defaulter that there was, on balance of probabilities, evidence, both that goods were imported from the EU and that they were imported by the defaulter, we will specifically indicate that at this stage, as we will if we find that there is not sufficient evidence. However, in some cases the Commissioners rely on circumstantial evidence, and/or on what may be deemed “similar fact” evidence. In some cases we may accept that evidence, bearing in mind that Mr. Randolph challenges our right to do so. In respect of all the deals there is some such similar fact evidence and we propose to refer to that after setting out the individual defaulters. We accept the evidence of Roderick Stone that third party payments are often a feature of MTIC fraud. They involve a would-be defaulter giving instructions that payment should not be made to it but to a third party, who is usually out of the jurisdiction, so that, instead of receiving the full income including VAT which it would require if it had a genuine intention to discharge its VAT liability, it may only receive a fraction of that money as a ‘commission’ for participating in the fraud. In addition we accept his evidence that there were occasions when it was impossible to identify the original acquirer from Europe because some freight forwarders deliberately omitted the details of the missing trader, or the buffer traders had not maintained sufficient records. To establish the fraud Mr Stone would look first for a third party payment by one of the buffers to an overseas supplier or entity. He would also look for similarities in the transaction chains to those where a debt to the Commissioners has been established, and at the specifications of the telephones, it being reasonable to assume that, where there was a European specification with a 2-pin plug, the goods had been imported into the UK. We consider it appropriate after the initial analysis to regard the evidence globally: that is, not to look at any deal, or any deal chain, in isolation, but also to consider the inter-connectedness of the companies, what they must have known, and the probability in all the circumstances of any of the particular deals being genuine. Having dealt with the evidence in that way, if we are satisfied that there is evidence of

MTIC fraud in all or any of the deals, we will then consider the evidence of Red 12's state of knowledge. The Commissioners prepared charts for us setting out the evidence that they relied on, but we will look at all the relevant evidence, bearing in mind the submissions made by Mr Randolph in respect of each of those deals. We consider that the Commissioners have to satisfy us on the balance of probabilities and on good evidence that in each case there is evidence of MTIC fraud, and that entails inter alia proving that the goods were imported from the EU, and were exported by Red 12 and that there is a missing or a defaulting trader. It is helpful to look at Appendix 2 whilst considering the matters set out below; it lists the parties involved in each chain and sets out the particular make of telephone involved which we will not repeat here.

(i) Steven Phillips t/a as First Call.

Deal 1 (2 February)

It was not disputed by Mr Randolph that there was sufficient evidence of a tax loss, but it was submitted that there was no primary evidence of importation. We are satisfied that the telephones in this deal (1,000 Nokia 8800s) were imported from the EU because First Call's invoice to Mobile Phones (London) Ltd in respect of this deal reads: "Country of origin: EC". This sale was not declared by Stephen Phillips (against whom the Commissioner provided substantial evidence of fraud and other criminal activity) and it is the £82,853.75 undeclared tax on that deal which resulted in the tax loss to the Commissioners. Documents from the freight forwarder (ASR Logistics Ltd) show that the telephones in question were allocated by Zetec SARL, a French company, to Nirvana Trading Ltd, by-passing both Stephen Phillips and Mobile Phones (London) Ltd. First Call is not an authorised dealer, nor is Nirvana Trading Ltd. The freight forwarder documents had been produced to officers of the Commissioners in the course of a visit to them on 9.2.2006. They were exhibited to Mr David Taylor's 4th witness statement dated 15.7.2008 and produced in the course of the hearing, the admissibility of which was subsequently challenged by Mr Randolph. We will deal later with his argument on this point, but we find these documents to be admissible. Red 12 sold the telephones to Asia Power Solutions GmbH in Switzerland. It only did one deal on 2 February 2006. The officer's note reads: "02/02/06: 1000 x N8800 – Zetec Sarl – Nirvana Trading – Fone Centre – Red 12 Trading – Asia Power Sol GmbH – Switzerland." We find sufficient evidence that these telephones were the subject of MTIC fraud.

(ii) Global Dotcom Solutions Ltd. ("Global Dotcom")

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Deals 2-4 (7 February) Deal 6 (9 February) and Deal 11 (15 February)

It is again claimed by Red 12 that there is no evidence of importation. The evidence of tax loss and of fraud is not challenged on behalf of Red 12 and we are satisfied on the basis of the documents we have seen that there was both a default, a tax loss and fraud in respect of all of these deals. 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, which banks in the name of 'Imanse SARL'. We accept that third party payments are evidence of fraud. In deals 4 and 6 there are two handwritten notes providing a reference to sums of money with 'Alfa' written beside those sums. We accept this as evidence of a third party payment to Alfa Tradezone in respect of those deals. In deal 11 the country of manufacture of the phones is given as Germany and a third party payment is made to Alfa Tradezone. 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. We are prepared to draw that inference, particularly in view of the fact that Global Dotcom was a missing trader, which operated for one month only from a domestic flat, the licence to which was terminated for non-payment of rent after only one month. Deals 2, 3 and 4 all took place on the same day, the sales to Phone It (the company to which Global Dotcom apparently sold the telephones) during February 2006 raised a liability in unpaid tax of about £12m. Phone It's total unpaid tax liability was over £25m.

(iii) Puwar Ltd

Deal 5 (9 February)

Mr Randolph contended that there was no evidence of importation nor any evidence of third party payments in respect of this deal. 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.

(iv) Storm 90 Ltd

Deal 7-10 (Deals 7-9 on 10 February, Deal 10 on 13 February) Deals 12-16, (Deals 12-14 on 20 February, Deals 15-16 on 21 February) (Deal 20 on 28 February)

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In respect of deal 7-10 and deal 20, Mr Randolph submitted that there was no evidence of importation. With regard to deals 12-14 he submitted that there was no actual Storm 90 documentation. In respect of deals 12,13 and 14 Mr Randolph disputed the Commissioners' ability to place reliance on a visit report to a freight forwarder, noting that Com 4 U was above Storm 90 in the chain (i.e. that it had sold the goods to Storm 90). In respect of deals 12, 13, 14, 15 and 16 Mr Randolph submitted that there was no primary evidence of a supply to Adworks UK Dotcom Ltd ("Adworks"), the next company in the chain, by Storm 90 and the Commissioners were not able to rely on a trader-produced log.

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In respect of deals 12-16 Adworks deal log for February 2006 shows that it was supplied by Storm 90 in all these deals.

In respect of deals 7-10, 12-14 and 20, these sales were carried out using third party payments to a company called IQ Trading in Denmark. This instruction was given to Adworks by Storm 90. Storm 90 has been deregistered for VAT, and for the quarter ended 03/06 it owes to the Commissioners an undisputed £18,189,098. The Commissioners invited the Tribunal to draw the inference that deals 15 and 16 were funded in the same way as the others, and also that third party payments were made in respect of them because the deal chains are identical up until Red 12's involvement. There was evidence that third payments were also made on behalf of Storm 90 to a company called Sunico in Denmark and to Power Communications in the Netherlands. In respect of deal 20 Red 12's own sales invoice describes the Nokia 6680 telephones which were the subject of this deal as being made in Finland. On 1 March 2006 Storm 90 was made the subject of a worldwide freezing order.

The Commissioners rely generally as evidence of fraud on the part of Storm 90 on: the sharp rise in its turnover (in May 2005 the director of the company told the Commissioners that he had no capital and no trade, in June 2005 the company declared net sales of £44,688.047, in December sales were £52m); lack of due diligence; third party payments and failure to respond to the Commissioners.

During the course of the trial Mr David Taylor had provided a fourth witness statement dated 15 July 2008. To that witness statement he exhibited a copy of a visit report to a freight forwarder called Freight Services Ltd, made on 23 February 2006. We have not heard from the officers who made that visit. The documents, which relate to deals 12, 13 and 14 show a chain from Com4U-Storm 90-Adworks-NTS-Red 12. The records at the freight forwarders show that on the 17.2.2006 Com4U on six occasions imported from Power Com BV, a Dutch company. On all six occasions it sold on the telephones imported to Storm 90. It was submitted that the inference can be drawn that Com4U usually imports from PowerCom (i.e. from the EU). We accept third party payments as evidence of fraud, and we are prepared to admit the evidence

from the freight forwarders. 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. It does not lie in Red 12's mouth to challenge that the goods in Deal 20 were imported, given its own sales invoices.

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(v) Cosys Services Ltd

Deals 17, 19, (28 February) 25 (6 March) and 26 (7 March)

10 Cosys was supplied by Kavico, a Danish company. Cosys owes the Commissioners £25,493,414.97 VAT on sales made to Phone IT. Cosys was deregistered on 16 March 2006. This evidence of fraud was accepted by Mr Randolph, and there is clear evidence of importation from the EU.

15 (vi) NTS Telecom

Deal 18 (28 February)

Mr Randolph submitted that there was no evidence of importation or that NTS ever
20 purchased the goods. NTS owes HMRC a total of £859,292.66. It was deregistered
for VAT in 2007. A sales invoice made out to RED 12 shows that the deal took place
on 28 February 2006. We regard this as significant evidence that NTS claimed to
have purchased the goods; Red 12 did not repudiate the purchase, and its own invoice
25 records the country of manufacture as Finland. We regard that as evidence of
importation from the EU. NTS charged VAT to RED 12 and was paid it. NTS never
declared this transaction and no paperwork in relation to it has ever been provided by
NTS. A Veracis report on NTS dated January 2006 indicates that it was claimed by
NTS that it had no outstanding issues with HMRC, which was untrue. NTS appears
30 in half of all the deal chains. The Commissioners rely on the similarity of all the other
chains involving NTS in which a link to the EU has been clearly demonstrated (see
Deals 7-10, 12-16, 19-24, 27-31 and 33-37). The evidence shows that Rashid, the
director of NTS, informed the Commissioners that he had no capital, but for the
quarter 10/05 he showed sales of £8.3 million and for 01/06 £18 million. There is no
commercial explanation for this and, as the deal chart shows, NTS acted as buffer
35 trader (ie. It made a lower level of profit) not a broker. Rashid also said that he
obtained a "deposit" from his customers to fund his purchases, yet Mr Singh said in
evidence that he did not pay his suppliers until he was paid by his purchaser. NTS not
only supplied Red 12 in respect of this deal, but also was its direct supplier in respect
of 15 other deals which can be traced back further than this one. We also note that in
40 this case the inspection report was faxed to Red 12 on 23 March, almost a month after
the deal was done. We find there is evidence of both fraud and EU importation in
respect of this deal, albeit the evidence is indirect.

(vii) Stock Mart Ltd

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Deals 21, and 23-24, (all were on 3 March), 27 (13 March) –31 (28-31 all were on 17
March)

In respect of all these deals Mr. Randolph submits that there is no primary evidence of importation. In respect of deal 27 he also submits that there is no evidence of third party payments and the Commissioners are not entitled to rely on a deal log allegedly prepared by Adworks to link the trade to Stock Mart. The evidence shows that third party payments were requested by Stock Mart in every deal except deal 27. Stock Mart failed to file a VAT return for 11/05 and refused to tell the Commissioners where it was trading from. An amended assessment of £52,241,252 was raised in August 2006 based on known sales of mobile phones to five known customers. An additional assessment was raised in October 2007 on the basis of information found in sales invoices in the paperwork relating to other traders. Those sales have never been declared and £529,673.89 worth of VAT has never been rendered to the Commissioners on those sales. From February 2006 onwards the Commissioners had mail returned from the alleged Stock Mart address which features on the invoices of trades in chains involving Red 12 in March 2006. Either the Commissioners' mail has been selectively returned or the address on the invoices was false. Every deal chain involving Stock Mart is markedly similar – see the deal chains at Appendix 2. Stock Mart raised sales invoices to Adworks which are included in the deal packs for each deal, but no documentation has been found relating to deal 27; however, Adworks lists the deal in its deal log for March 2006. Stock Mart required third party payments to be made by its customer Adworks principally to its supplier Sunico in Denmark and/or to IQ Trading, as well as to an unconnected entity called Amira Development Inc. With regard to deal 27, the Commissioners rely on the similarity of the chains to draw an inference that the same is true of that deal. In deals 21 and 24 the phones were manufactured in Germany, and in deals 27 and 30 they were made in Finland. 1000 of the 4,000 telephones which were exported by Red 12 as part of deal 30 to Dubai were identified as having come back into Heathrow on 10 April 2006 and were thus part of a carousel trade. In the above circumstances we are satisfied that all the trades were fraudulent and all involved the importation of telephones from the EU.

(viii) Adworksuk.com Ltd

Deals 22 (3 March) and 35 (24 March) (which was a split deal – see Appendix 2)

Mr Randolph submits that here there is no evidence of importation, no evidence of third party payments, and the alleged defaulter was originally said to be NTS not Adworks.

The purchase orders in respect of the above deals indicate that NTS was supplied by Adworks but the VAT payable has never been declared to the Commissioners by Adworks. Adworks made third party payments in its deals with Storm 90, as well as in its deals with Stock Mart. Adworks was involved in 16 out of the 46 deals. In deals 7-10 and 12-16 Adworks purchased from Storm 90 (see 21(iv) above) and sold on to NTS (see 21(vi) above), as it did in deals 21, 23-26 and 27-31 where it purchased from Stock Mart (see 21 (vii) above), and as it did in deals 22 and 35. The Commissioners rely on the similarity of the facts surrounding the chains in which Adworks was involved to support the inference that the transaction chains in respect of deals 22 and 35 were also connected to fraud.

(ix) Samson Traders Ltd (“Samson”)

Deal 32 (23 March)

5 It was submitted on behalf of Red 12 that there was no evidence of importation and the Commissioners reliance on an internal note that Samson sold the goods on to Routers Group was insufficient.

10 The evidence in respect of this trader is very thin. It had failed to submit VAT returns for the relevant period and has deregistered from 21.04.06. It was wound up on 1.11.06 and civil recovery proceedings were begun. A VAT assessment in the sum of £36.7m was issued in respect of the period 1.3.06 to 21.4.06. In each of its transactions third party payment instructions were made by Samson to its customer Routers Group, which appears to be a United Kingdom company. Samson is a
15 defaulting trader. In respect of this deal, whilst we find that there is evidence of a tax loss and from the surrounding circumstances we accept that there is evidence of fraud, there is no direct evidence of an importation from the EU.

(x) Fonestyle Ltd

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Deal 33-37 (all on 28 March) Deal 35 was a split deal (see Appendix 2)

In respect of the above deals Mr Randolph submits that there is no evidence of importation. In respect of deal 33 he objects to the Commissioners’ reliance on recent
25 data from a bank account with the FCIB which fails to make clear which payment is made to which customer in respect of this deal. With regard to deals 34 and 35 he submits that the data from FCIB fails to make good a difference in the figures involved in the trade. In respect of deals 36 and 37 he submits that, according to the recent evidence relied on by the Commissioners, the payments out were to a
30 Rabbobank account in the Netherlands which could not be traced.

The Commissioners raised an assessment in the sum of £2.1m in respect of undeclared sales by Fonestyle. This liability related to the trades which are the subject of deals 33, 34, 36 and 37, in all of which Fonestyle sold to NTS. A further
35 assessment in relation to, inter alia, deal 35 was raised in November 2006. In respect of deals 33 and 34, payments were made by Fonestyle to IQ Trading APS, a Danish company. There are release notes from a German company to Fonestyle dated July 2006. These indicate that Fonestyle was an EU acquirer.

40 A large quantity of the Nokia telephones which were the subject of deal 37 had previously circulated in and out of the United Kingdom on different dates before they were exported by Red 12. They were thus the subject of carousel trading. There was clear evidence that the director of Fonestyle, Mr Irshad, repeatedly lied to the Commissioners, he denied having an FCIB account, and in November denied trading
45 with NTS, a fact which he had previously admitted in May 2006. Whilst the evidence with regard to deals 35-37 is circumstantial, on the balance of probabilities we are satisfied that the telephones in question were imported from the EU, given the clear

evidence in relation to deals 33 and 34, and the fact that there is evidence of a carousel fraud in relation to some of the goods in deal 35. We are satisfied that there is sufficient evidence of fraud and EU importation in respect of all these deals.

5 (xi) Attic Attack UK Ltd

Deals 38-39 (28 March) and 44-45 (29 and 30 March)

10 In respect of all these deals it is not denied by Mr Randolph that there is evidence of fraudulent default by the importer. Attic Attack had been charging VAT to its customers prior to being registered for VAT and it had profited to the sum of £229,606.03 as a result of undeclared VAT. In this case there was evidence of third party payments to EU companies, the goods sold in deals 38,44 and 45 had been bought from Orange and Green trading in Barcelona. Other purchases in which the
15 supplier had been identified were from Ljubljana. There is evidence of carousel trading in respect of deal 44. We are satisfied there is evidence of MTIC fraud in respect of these deals.

20 (xii) KEP 2004 Ltd (“KEP”)

Deals 40-43 (40-41 28 March, 42-43 29 March) and 46 (31 March)

25 In respect of these deals Mr Randolph contends that there is no direct evidence of importation, nor is there any original evidence linking KEP through the trades, and he submits that the Commissioners are not entitled to rely on an undated letter from a Mr Jhaj of Time Corporates Ltd to remedy this.

30 Time Corporates Ltd is the first buffer trader in all the above deals, having purchased telephones from KEP 2004. Purchase orders relating to the deals show that VAT owed to the Commissioners by KEP is £145,787.25. Mr Vasey, the director of KEP, denied to the Commissioners that trade had taken place despite purchase orders from Time Corporates Ltd giving KEP as the supplier. Mr Vasey had signed release notes for £291m worth of goods to Time Corporates which he described as “two lads sitting
35 in a semi-detached house near Heathrow”. Mr Vasey told the Commissioners that he had been contacted by a German supplier called Panmax and he had imported telephones from him. The director of Time Corporates told the Commissioners that KEP had requested third party payments and had asked him to destroy all records of payments by them once payment had been made. The goods in deals 40 and 41 were sold by Red 12 to Blue Star Telecom APS (“Blue Star”) in Denmark. There is
40 evidence that Blue Star sold them on to Zetec SARL in France, there being an invoice, expressed in £GB and the delivery address is to Paul’s Freight in England, which is the freight forwarder from whom they had allegedly gone to Blue Star. This is therefore evidence of a subsequent carousel in respect of these telephones. We are satisfied that all these deals were the subject of MTIC fraud.

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Other matters relied on by the Commissioners to show fraud

22(a). All Red 12's suppliers banked with the First Curaçao International Bank ("FCIB"), an offshore bank in the Dutch Antilles, whose accounts and dealings were frozen in July 2006 owing to its involvement in fraud. Its operation has been taken over jointly by the authorities in the United Kingdom and the Netherlands all bar 3 of its customers also banked there. Red 12 itself held an account with FCIB at the relevant time, having had its account with the Royal Bank of Scotland closed in 2005.

(b) The evidence showed that in the majority of deals, despite the fact that different telephones were being traded, the mark-ups were the same. In all the deal chains in question the mark-ups achieved by each successive trader were consistent in whole pence. The increment in mark-up between each trader is also consistently divisible by £0.05. In a significant number of deals the mark-ups achieved are consistent, despite the fact that each deal involved different stock traded on different dates (see Annex 3). In respect of Deal 25, a split deal which involved 1457 Nokia 8800s, Red 12 put on a mark-up of £33 on its sale to Blue Star in Denmark, but Blue Star put on a mark-up of £1.50 on its onward sale to Imanse SARL, a French company (see reference in paragraph 20(ii) above). There is no sensible commercial reason why these particular telephones should have been imported from Denmark, changed hands in the United Kingdom seven times, been sold back to a different Danish company and then exported to France. In no part of any deal undertaken in these periods did any of the traders make a loss if VAT repayments are taken into account. We attach a schedule of mark-ups as Appendix 3.

Evidence relied on by the Commissioners to show Red 12's state of knowledge

23(1) Red 12 added no value to the mobile telephones that they sold. Spectacular amounts of trade were engendered at a time when Red 12 had no capital.

(2) A large proportion of the stock in which Red 12 traded had two-pin plugs; these telephones must have been manufactured elsewhere because mobile telephones are not manufactured in this country, and so they must have been intended for sale outside the United Kingdom, and yet for no obvious reason they had been imported into the UK, adding to the cost.

(3) Red 12's losses (only 5 in total) between April 2004 and August 2006 amounted to no more than £12,770 only one loss, of £9,000, was of any monetary significance, compared with profits of £4,216,527.30 over the same period.

(4) The timing of the deals. The paperwork did not enable it to be ascertained at any one time in the course of the various deal chains who owned the goods, and who would suffer the loss in the event of an accident or other cause of the loss of the supply. The purchase orders and the invoices did not follow one after another. For example: In deal 3 Red 12 bought 480 Nokia 8800 telephones from the Fones Centre on 7 February. It sold them also on 7 February. However, the documentation from RS 23, the company which sold the telephones to the Fones Centre, shows that sale to

have taken place on 8 February. It made the same mistake in deal 2, and in both cases faxed paperwork through on 27 February. A further invoice was then issued dated 7 February. The release date from RS 23 to the freight forwarder was also dated 8 February. However, Red 12 had already sold these goods on 7 February, therefore it had no title to the goods which it sold to Switzerland. The Fones Centre's purchase order to RS 23 is timed at 7.54pm, giving Red 12 little time to arrange a deal with its customer in Switzerland. In deal 2 10 transactions took place on one day.

(5) The inspection reports relied on by Red 12, which were said by Mr. Singh to involve 100% inspection of the telephones themselves, were often said to have been completed on the day that Red 12 requested them. On occasion the sheer quantity of telephones made this impossible: in one particular case 6,000 telephones were said to have been subject to 100% inspection in the course of one day. Mr. Singh himself had told Customs that it took four freight forwarders three to four days to conclude any inspection. It was contended that Red 12 would not have had access to the goods to inspect them prior to obtaining ownership, and in some cases the inspections took place after the goods had been sold on. In respect of deals 22 and 35 the goods were exported by Red 12 before they had been released to it by its supplier Reya. In respect of deal 35 the goods were purportedly inspected on behalf of Red 12 on 31.3.06, after they had been exported on 27.03.06 and 29.03.06. In respect of deal 37 the inspection report was not faxed to Red 12 until 3.4.06, nine days after the deal was done. The goods were sold and exported by Red 12 before the goods had ever been released to it by Reya.

(6) The Commissioners point to the fact that despite repeated requests from the Commissioners, Red 12 did not provide it with due diligence on its suppliers until July 2007, and then only in respect of two companies: Letting Solutions and RS23. Red 12 discovered that Letting Solutions had a credit reference of just £500, but it was nonetheless prepared to do a large amount of business with it. It had conducted business with Letting Solutions before it carried out any checks. Mr Singh did not ask himself how a company with such a low credit ratings was to engage in trades worth millions, or how it was financing those deals. Red 12 produced a Veracis report in respect of the Phone Centre dated 9 March 2006 which showed that it had a high risk rating for credit, and that it had County Court judgments recorded against it. A Veracis report on the company London Mobile contained documents (dated 2006) which show that London Mobile had a number of negative indicators and was suspected of being engaged in circulating goods. Nonetheless Red 12 did more than £2.7m worth of business with that company between June 2005 and January 2006. The Veracis report itself is dated May 2005, which is odd given that it appended documents dated 2006. The due diligence in respect of supplies other than Letting Solutions and RS23 was only produced for the purpose of this hearing, not beforehand.

(7) No due diligence on its customers was produced by Red 12 until a supplementary disclosure bundle for the purposes of this case. Such documents as Red 12 did produce relating to its customers were deemed by the Commissioners to be inadequate. In particular, some of the documents were either in Arabic or German.

Digi Trading GmbH, a Swiss company to which Red 12 had sold telephones in February 2006, did not have a working telephone number. Digi Trading's VAT registration had in fact been cancelled by the Swiss authorities by 31 December 2005. The company was run by a Belgian who lived in Marbella in Spain; it was suspected of involvement in carousel fraud. We accept that it may not have been possible for Mr Singh to have been aware of these matters. Digi Trading, as was the case with the majority of the people to whom Red 12 sold mobile telephones, and as did all the people from whom it purchased them, banked with the FCIB. Digi Trading first approached Red 12 by a letter faxed on 25 August 2005. It states that its main markets are Europe and South East Asia. In respect of another Swiss company called High Level Trading to whom Red 12 sold a very considerable number of mobile telephones, the only document produced was an almost illegible company registration document in German. There is no evidence that Mr Singh speaks either Arabic or German.

(8) Red 12 provided no evidence of insurance in the relevant period. Whilst it was Red 12's case that the cost of insurance was part of a global price that the freight forwarders charged, no premium was identifiable on those documents.

(9) Red 12 only provided a copy of its terms and conditions for the purposes of this hearing. There was no independent evidence that these were ever given to any of its suppliers and no copy was found at the premises of any of its suppliers. The document itself is deficient in that it is not possible to tell whether or when it refers to Red 12 as supplier or when as purchaser at any particular point.

(10) In 12 deals up to and including deal 21, Red 12 had been purchasing from NTS. In deals 22-23, 27, 30-31, 33-37 a company called Reya Ltd was interposed between NTS and Red 12 as a further buffer trader (see Appendix 2). Reya was founded by a husband and wife team who had been in the jewellery business for twenty-five years. They operated above a jewellery shop which they still owned. They had only started trading in mobile phones in September 2005. Red 12 did obtain a Veracis report on the company, but not until April 2006, having already purchased £5m worth of telephones from them in March 2006. On the due diligence that Red 12 performed on NTS, Reya is given as a trade reference, therefore a connection between NTS and Reya would have been known to Mr Singh. All of the relevant deals took place on the same day, and the deal chains show that Reya purchased the telephones from NTS. Therefore, given that NTS was Red 12's regular supplier, it might have been expected that Mr Singh would have contacted NTS and asked NTS for the relevant telephones, which it evidently had in stock before contacting Reya. The Commissioners calculated that Red 12 lost £87,000 by interposing Reya in the chain in the above deal. Furthermore, there was no evidence of any attempt by Red 12 at any time to source from cheaper suppliers. For example: in deal 17 Red 12 bought from RS 23. In deal 25 it bought from the Fones Centre, who had bought from RS 23, and in deal 32 Red 12 bought from Letting Solutions who had bought from RS 23. In deal 26 Red 12 bought from Letting Solutions who had bought from the Fones Centre.

(11) Evidence (which is set out below) from Gary Taylor, who from 1995 had been employed within the telecommunications industry, and was previously head of strategy at Thus Group Plc. Part of his responsibilities included overseeing a company called Martin Dawes, Scotland's largest Independent Mobile Service Provider to businesses prior to its acquisition by Vodafone UK. He joined KPMG Strategy Group in 2001, where his role is to examine the strategy, operations and general business prospects of telecom businesses for the benefit of prospective investors. He has advised Vodafone UK and T-Mobile UK amongst others. We found Mr Taylor to be very knowledgeable and have no hesitation in relying on his evidence which was, with one exception, backed up by independent evidence; we will return later to his otherwise unsubstantiated claim that Nokia imposes an obligation on their authorised distributors to sell their telephones at a uniform price throughout all geographical markets. It is Red 12's case that it was an arbitrage dealer in mobile telephones, and was selling in the grey market: that is, it was not buying from authorised dealers, and was, for the most part, not selling to the retail trade, although in one case it was claimed by Mr Singh that his customer in Dubai may have had retail outlets. The Commissioners relied on the evidence of Gary Taylor that Red 12 was not, and could not have been, operating legitimately in the grey market. Mr Taylor had read all the papers relating to the case but had had no dealings with it. His evidence was as follows:-

(a) There are two legitimate markets for mobile telephone trading: the white market and the grey market. In the white market telephones are either traded directly between the original equipment manufacturers, for example, Nokia, and the mobile network operators, for example Vodafone, or the telephones are traded directly between the original equipment manufacturers and authorised distributors. Authorised distributors are those who have formal agreements to source handsets directly from the original equipment manufacturer. The grey market arises out of the failure of the white market fully to meet the needs of certain industry participants. Legitimate distributors would participate in the international grey market, and there are four areas of that market: (i) arbitrage, (ii) box breaking, (iii) forecast failure and (iv) dumping. Red 12 did not claim to be operating in any other grey market than the arbitrage market. Gary Taylor was of the view that there were five major contra-indicators to Red 12 operating in the grey market, any one of which would eliminate the possibility that it was operating legitimately:

- (i) arbitraging Nokia stock for which no price differences exist as Nokia sets homogeneous prices across all its territories;
- (ii) Red 12 did not source stock from the original equipment manufacturers or from authorised distributors and would therefore be extremely unlikely to be pursuing profitable arbitrage opportunities due to the small margins available, as having longer supply chains would become unprofitable. Additional suppliers in the chain are inconsistent with the customary trade practice of maximising profit;

(iii) buying handsets from a country with a higher average selling price and selling to a country with a lower average selling price would be unlikely to be exploiting profitable arbitrage opportunities;

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(iv) trading an unreasonable volume of specific handsets that represent an unrealistic market share of the total volume sold through non-original equipment manufacturer sourced distribution channel in Europe;

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(v) generic product descriptions documented on purchase orders and invoices leaves traders at risk of acquiring handsets which are not specified adequately enough to meet customer requirements. The level of products specification contained in a customer order varies depending on the opportunity being pursued, but at a minimum must include information regarding the charger, battery, CD, manual and warranty.

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(b) In addition to the above, a further contra-indicator was that a trader was unlikely to be operating profitable legitimate arbitrage opportunities in circumstances where it is seen never to be holding stock because this would indicate that a 100% of the trade are successful 100% at the time. In Mr Gary Taylor's experience trades do fall through on occasions, leaving a trader with surplus stock. There were only 19 occasions between May 2004 and June 2006 on which Red 12's trade fell through, (this appears from Red 12's own trading figures which show 'cancelled' but no indication is given as to why or by whom) and there is no evidence that it ever held surplus stock despite the fact that some of its deals were for odd amounts. A loss is recorded by Red 12 on only four occasions, other than its initial trade with Unique where it was selling SIM cards, not telephones, and an occasion when some goods were recorded as stolen. Red 12 purchased from suppliers other than the original equipment manufacturers or the authorised distributors in all deals with which we are concerned, despite having sufficient volumes to secure an authorised distributorship.

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(c). In relation to (i) above Mr Randolph challenged Mr Gary Taylor's evidence as to Nokia's price setting across all its markets. In his witness statement Mr Taylor said as follows::

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"Nokia is the only OEM (Original Equipment Manufacturer) which sets identical prices to its wholesale customers in all geographical markets. Nokia's 42% market share of volumes is the highest of all OEMs across western Europe, and its aim is to continue growing its share on a global basis. European competition authorities usually consider companies with an excess of 40% ... to hold significant market power. The potential for scrutiny by the European Competition authorities has led Nokia to consider its position with customers and pricing around the world very carefully. On this basis, Nokia has set homogeneous pricing across all markets for its customers."

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5 Whilst Mr Taylor did not produce any documentary evidence for this opinion, nonetheless his evidence was that it was borne out of discussions he had had with the finance directors and chief executives of the major handset distributors. No independent evidence to the contrary was produced by Red 12. Because of Mr Gary Taylor's knowledge and experience of the market, we accept his evidence as to this point.

10 *Mr Taylor's evidence in respect of the other contra-indicators was as follows:-*

15 (d) With regard to (ii) the evidence as set out in Appendix 2 shows that there were on many occasions very long supply chains in Red 12's dealings. Red 12 must have been aware that it was in a chain with at least three people before it: the manufacturer, the authorised distributor and its own supplier. It also knew that it was not selling into the retail market (other than on two occasions where Mr Singh suggested that his Dubai customer had a retail outlet).

20 (e) With regard to (iii) above, in 26 out of Red 12's 46 deals the telephones were exported either to Dubai or to Denmark. The UK is in the average price band of mobile telephones sold worldwide. Dubai has the lowest average selling price of any of the countries in Europe and abroad. It is the cheapest place on average in which to buy mobile telephones. Denmark is also on average lower than the United Kingdom. Red 12 did export to Switzerland which is the only country to which it exported which has prices higher than those in the United Kingdom. However, Red 12 were buying telephones made in Germany in some cases, and Germany is one of the most expensive places in Europe in which to buy mobile telephones. An analysis of Red 12's figures gives an almost identical profit margin between 7.5 and 7.7% in respect of the three countries to which it exported, namely Switzerland, Denmark and Dubai. Given the differential between the prices in those three countries, Gary Taylor did not accept that such mark-ups were feasible. Such profit margins would only be consistent with a company sourcing direct from an authorised distributor.

35 (f) With regard to (iv) Nokia sells 42% of all mobile telephones sold in Europe. Red 12 sold Nokia telephones in 31 out of the 46 deals. 69% of Red 12's income from sales was derived from the sale of Nokia telephones. Information supplied to Mr Gary Taylor by G S K, a recognised source of industry data, shows that in March 2006 32,000 Nokia 7610 mobile telephones went to Vodafone, and 17,657 were provided to authorised distributors, who would be able to sell those handsets to smaller retailers. Therefore the maximum possible opportunity that existed for Red 12 to purchase that particular handset was out of the 17,657. That month Red 12 actually sold 45 13,600 Nokia 7610, which gives it a 77% market share of all distributed handsets in all of Europe and the United Arab Emirates. This is an extraordinarily high share, and, given the quantities Red 12 were purchasing, it

ought to have been possible for it to have negotiated deals with the manufacturers. There is no evidence that at any stage Red 12 attempted to cut out the middle man, and go either to an authorised distributor, or approach Nokia to become one.

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(g) With regard to (v), there was an absence of sufficient evidence as to details of the particular type of telephone which Red 12 was selling. From the purchase orders and invoices there are, for the most part, completely inadequate specifications. The matters which a purchaser would expect to see, apart from the number of telephones and the type of telephone, are matters of colour, the megahertz wattage, whether they are SIM free, whether a battery is included, whether a charger is included and, if so, whether it is a three-pin or a two-pin charger, (in other words, whether it has a UK specification or a European specification), the language of the instruction manual, whether or not the individual telephones are boxed, whether they include a software CD, the language of the software, whether they include a Europe only warranty or a worldwide warranty. Red 12 was purporting to sell new telephones only, and therefore such matters are likely to be of greater importance than they would be if the telephones were being sold in any other area of the grey market.

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24. We find that the above matters relied on by the Commissioners which were evidenced by documents raised sufficient evidence of fraud in the various deal chains with which Red 12 was concerned to raise a case for it to answer with regard to its state of knowledge, other than deal 32. In some cases we have accepted third party payments as evidence of fraud, and in the case of Adworks (deals 22 and 35) we accept the similar fact evidence and the evidence of third party payments as showing fraud. With regard to deal 32, where the defaulter is Samson, the deal chain (see appendix 2) shows only The Routers Group as a new buffer trader, the others all appear regularly in other deal chains. The inspection report shows the goods to have been manufactured in China, the software to be central European, the manuals to be 'UK and French', and the charger to be 2-pinnnnn. Given that the origin of the goods is China, we cannot be satisfied that there was an EU importation in respect of this deal.

35 **The Appellant's evidence**

25. By December 2004 Red 12 had started advertising on the IPT website and in a journal called the Phone Trader. In his witness statement Mr Singh states "By December I had full control of the business ...". This is relevant to the question of when Deshpal Singh actually left the company (see paragraph 16 above). The IPT website advertises itself as: "This website specialises in helping traders, brokers, re-sellers and distributors of volume mobile phones and mobile phone accessories worldwide, providing an excellent facility for mobile phone traders, brokers, re-sellers and distributors to trade more effectively by putting them in contact with each other and providing added value services to achieve a one-stop shop." Mr Singh relies heavily on the fact that there are many varieties of Nokia telephones advertised on the website, as well as other makes of mobile telephones. We note that in the print-off

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from the website exhibited to his witness statement there are far more would be sellers of mobile telephones than purchasers. However, this was showing the position 2 years on, but it must be accepted that there are Nokia telephones for sale in Dubai as several of the telephone numbers are Dubai telephone numbers. What is not clear
5 from this is whether these telephones have come onto the market as a result of “box breaking”, rather than arbitrage or some other form of grey market dealing (see paragraph 24(a) above). We also were given no idea of the price at which these telephones were being sold.

10 26. It was Mr Singh’s evidence that he was a careful and diligent trader because before entering into a trade he would ring the Commissioners at the Redhill office asking for a verification of the VAT number of those with whom he intended trading. However, he rarely provided more than the company name and the VAT number. It was Mr Singh’s firm impression that the fact that Redhill confirmed the VAT
15 registration number of a trader meant that that particular trader had been visited by the Commissioners and had been cleared for trading, i.e. that they were not involved in MTIC fraud. He made this claim despite the fact that Red 12 had traded before its first visit from the Commissioners and the Redhill document asked for as much evidence as possible other than the VAT registration number, and the officers who
20 visited Red 12 made clear that Redhill checks are not mandatory. The Redhill checks are not an authorisation to trade with a company that has been verified, and the caveat on the certification received from Redhill makes that abundantly clear. Mr Singh would visit some of the people with whom he wished to trade, and he claimed to have visited all his suppliers. However, as referred to above (paragraph 23(10) above), in
25 respect of Reya he does not appear to have been put off by the circumstances of those from whom he purchased or, in the case of Digi Trading, those to whom he sold mobile telephones.

30 27. Mr Singh had visited Dubai, but he had not visited Switzerland. He naively expected the Commissioners to advise him to stop trading with those companies about whom they had the smallest suspicion, something which quite clearly the Commissioners could not do, until or unless they were totally satisfied that the particular companies were in fact trading fraudulently. He had told the officers during their visit on 4 August 2004 that he had visited a company called Sunico in Denmark,
35 to whom he sold goods in December 2004 and July 2006. There is evidence that third party payments were made in respect of Storm 90’s sale to Sunico, as they were by Stock Mart (see paragraph 20(vii) above).

40 28. Red 12 operated from an office where, for the most part, the deals were conducted by Mr Singh. Occasionally a deal was said to have been conducted by Dilraj Singh. All of the deals appeared to have been conducted by telephone, and, it would appear, by mobile telephone or over the internet. No telephone records at all have been provided by Red 12. According to Mr Singh he would receive between
45 100 and 200 telephone calls a day from people wishing to purchase mobile telephones or wishing to sell them. Red 12’s terms and conditions, which were said to have been sent to each and every person who enquired about trade with Red 12, were, according to Mr Singh, sent by e-mail. As stated above, no copies of these terms and conditions

were found by the Commissioners in the records of any of the companies with whom Red 12 traded.

29. No real explanation was given by Mr Singh of how it came about that Red 12
5 made such very large amounts of money in such a very short period with little or no
capital, no assets and with little experience. Indeed, Mr Singh did not regard its
apparent success as abnormal. He appeared not to be well informed about the handsets
he sold or their market, saying in answer to questions about the lack of detail in the
10 invoices: “The customer should know what he is buying ... he should know what
languages and software should be on there, and if he doesn’t he can always check on
the Internet, and I could have done it as well if he had asked me.” From Mr Singh’s
evidence it was clear he did not know what accessories the various telephones came
with, for example, whether the telephone was Bluetooth or not, a matter which,
15 according to Mr Taylor, made a considerable difference to the value of a telephone.
Mr Singh seemed to regard the precise specifications of the telephones he was selling
as being almost irrelevant, despite the fact that he was dealing with brand new
telephones albeit with models some months old.

30. Mr Singh claimed that detailed specifications were not necessary because the
20 specifications were always the same in respect of any particular make of telephone.
We do not accept this evidence because on the documents before us, on the occasions
where there was evidence of the specifications, they would differ even in respect of
the same model of telephone. For example, on the inspection report from Kuehne &
Nagel dated 7 March in respect of deal 25 in which 1457 Nokia 8800s were sold, the
25 software relating to 840 telephones is recorded as being in languages: “D, UK, Lat,
Lit, Est, Russ, Bul, Rom, Ukr”, 1020 of the telephones were said to have been made
in Germany. 437 of the telephones in the same deal were said to have been made in
Korea although Red 12’s sales invoice to Blue Star shows 1457 ... made in Germany.
Some (it is unclear which) had a 3-pin charger (i.e. suitable for the UK), some were
30 said to have US chargers and others a ‘China’ charger. The software in respect of
others of the telephones in this deal was said to be in the languages: “UK, Philipino, 2
Kinesisk Sprog Viet, Tieng, Melayu, Lat, Lit, Est, Russ, Bul Rom, Ukr”. It is not
quite clear in relation to 280 of the telephones whether the software was in all the
above languages, or whether some related to those made in Germany and some to
35 those made in Korea. In any event the telephones were being sold by Red 12 to
Denmark. It might be expected that the telephones would have Danish software, but
none did, and one would not expect there to be 3-pin chargers. The documents show
that a 100% inspection was carried out between 11.25 and 12.10. On this particular
occasion a request for an inspection report which came from The Fones Centre, Red
40 12’s suppliers, was sent to the freight forwarder Hawk Precision Logistics on 6.03.06,
and the inspection report was also faxed back to Red 12 on 6.03.06, the day on which
the deal had actually been done, but, curiously, this inspection report from Hawk
Precision Logistics Ltd is dated 2 March. It describes the chargers as “2-pin (Euro)”,
it refers to there being manuals in UK and Russian, and describes the software as
45 being “central Euro”. There was no explanation as to how the Kuehne & Nagle
inspection report dated 7 March 2006 in respect of the same goods described such
very different products. After being purchased from Red 12 these telephones were

5 sold on in sterling by Blue Star to Imanse SARL (also known as 'Alfa Tradezone'),
which is a French company. With regard to deal 11, which also involves Nokia 8800,
these particular telephones are said to have an Arabic specification, an Arabic keypad,
and were made in Germany; this appears from Red 12's sales invoice to Bluecell SZE
10 in Dubai, yet the invoice from the Fones Centre Ltd to Red 12 shows that it has
bought telephones with Arabic specifications and central European specifications.
There is no reference to the keypad. These facts were apparently never queried by the
customer. These two deals alone show that Nokia 8800s did not come as standard,
quite apart from the lack of interest by Red 12 in the specifications of the particular
15 telephones with which it was dealing. In several cases the specifications both in Red
12's purchase orders and its sales invoices are woefully inadequate, listing no more
than the make and model, the quantity and the price.

20 31. Mr Singh's evidence was that the telephones were not paid for by Red 12 until
the purchaser had paid it, and were always sent ship on hold, so Red 12 took no
commercial risk at all, other than the cost of the inspection reports and freight costs.
It is quite unclear when title passed. Red 12 did not insure the goods in the periods in
question but relied on the freight forwarder's insurance, which was generic and not
specific to any of the deals in question.

25 32. Mr Singh claimed to have no knowledge of any one in the chain other than his
suppliers and those to whom he sold, or even of there being a chain. However the fact
is that he must have known there was a manufacturer involved, and he did know that
the telephones were not manufactured in this country, and also that the majority of his
30 customers were not retailers, and therefore he knew he was part of a chain of at least
five people. Despite claiming not to know the history of the telephones with which he
was dealing, Mr Singh was nonetheless prepared in his terms and conditions to
warrant a level of satisfaction with the integrity of the supply chain. His claim not to
know that the telephones were coming into the United Kingdom from the EU is
35 shown to be untrue on several occasions. For example, in respect of deal 34 the report
from Hawk Logistics, the freight forwarder, states that the telephones are
manufactured in Germany. Despite this, Mr Singh was not prepared to accept that
those telephones came into the United Kingdom from Germany, stating that they
might have been sent, as he said, "to China, for example and come back, I don't
know". Documents in respect of deals 11 and 25 also show that the telephones were
manufactured in Germany. Other invoices refer to telephones coming from Finland.

40 33. Mr Singh was unconcerned to attempt to cut out any of the buffers, even in
those cases where with a little effort he could have made a greater profit by
purchasing higher up the chain, for example in the cases where Reya were interposed
between Red 12 and NTS and see paragraph 23(10) above. Although it is an essential
feature of arbitrage trading, whatever the commodity, that deals must be executed
back to back because of the very nature of the operation, Red 12 seems to have been
able to execute an extraordinary number of back to back deals in the course of a single
45 day. For example, in deal 2, nine transactions had apparently been executed on 7
February 2006. In such circumstances there would be a potential problem with regard
to the passing of legal title, either as a result of failure to buy from one trader before

selling to another, or the failure to import from one country before exporting to another, as happened in the case of deal 45.

34. Mr Singh relied heavily on his claim that Red 12 always obtained 100% inspection reports, before finalising a deal. This was one reason why he claimed that detailed invoices were not deemed necessary. He denied that there were a number of occasions when goods were sold on before the inspection reports were obtained, and his explanation for why some of the reports obtained had dates which do not tie in with the dates of the transactions they cover was that the documents would have been mislaid and copies obtained which showed the later date. In respect of 21 of the 46 deals, the reports were dated more than a day after the deal date. Mr Singh's evidence was that he always requested inspection reports on the date the deals took place, with the exception of deals 30 and 36. In respect of these deals, which were with Reya, there was no live evidence but Mr Randolph suggested that, as Mr Singh was in regular contact with his suppliers and Reya may have already had the goods in stock and, as Mr Singh was aware of this, he requested an inspection report on 23 March for deals which were not concluded until 24 March. We reject this explanation. The documents show that Reya only made arrangements to purchase the goods in both deals on 24 March. Similarly, if Mr Singh was in such regular contact with his suppliers, why was he not aware that NTS (who sold the goods to Reya and was a more regular supplier) had the goods? In the case of deals 40 and 41, the inspection report arrived at Red 12 at 22.42 hours which suggests that it could not possibly influence a contract on which terms were agreed with the Danish customer in the course of that day. In deal 27, which involved 3,000 telephones, allowing 30 seconds to inspect one telephone it would require 25 hours to inspect them all, yet the purchase and sale were all completed on 30 March 2006, and the inspection order, on Red 12's own documentation, could not have been sent to A1 Inspections until after 22.15 hours. It was suggested by Mr Singh that in that case the inspectors would have telephoned him and he would have told them only to do a 25% check, but there is no independent or documentary evidence that this happened. Deals 17 to 20 all took place on 28 February 2006 and totalled some 8,505 telephones, with 100% inspection reports required for all. It does not seem to us possible that these inspections could have been carried out as claimed by Red 12. In respect of deal 25 referred to in paragraphs 22(b) and 30 above, Red 12 received an inspection report from Hawk Logistics dated 2 March 2006, but Red 12 only purchased the telephones on 6 March 2006. This was claimed by Mr Singh to be a typing mistake, but again there was no independent evidence to verify this. It was Mr Singh's view that the use of inspection reports was an acceptable alternative to the keeping of proper invoices and purchase orders. The approximate cost of each inspection report was £120. Despite this cost, Mr Singh had no idea as to the time it took to make an inspection. The only evidence we were given was taken off the Internet on 19 August 2008 from a company called Aberdale Inspections Ltd which claimed to turn around large volumes of goods in a single working day. It is open to question what amount this might be and in any event was not a company used by Red 12 and this advertisement appeared some two years after the events in question. Mr Singh's lack of knowledge is itself evidence of the lack of care which Red 12 took over the goods in which it was trading. Red 12 did not prior to the hearing provide evidence of inspection reports other than one invoice

dated 31 March 2006 from Aberdale Logistics Ltd. Mr Singh claimed the inspection reports were always available to the Commissioners, but were not asked for.

35. The majority of invoices produced by Red 12 are singularly uninformative to
5 such an extent that their commercial usefulness is highly questionable. They expose
Red 12 and the other traders in these chains to considerable commercial and legal
risks. Mr Singh's evidence was that all the deals were done on the telephone and the
paperwork was produced later: "When I get around to it". Some of Red 12's own
10 invoices show anomalies between the dates of purchase orders and sales invoices, for
example, deal 1 shows Red 12's sale invoice to Asia Power as being on 2 February
2006, but the purchase order from Asia Power to Red 12 is dated 6 February 2006.
As with all other examples, Mr Singh's explanation was that his customer might have
put the wrong date on it. In deal 25 the invoice for the sale of a handset to Denmark
15 reveals an inspection report that does not list Danish among the options for the
software languages. Mr Singh's answer to most of these questions was that, because
he was sending the goods "ship on hold", it did not matter if the telephones were not
what the customer expected, because the customer would be able to reject them if he
were not satisfied, and would send them back. There is no example of any customer
20 ever rejecting the telephones Red 12 allegedly sold, a matter which, given the curious
nature of some of the goods as revealed by the inspection reports is in itself a matter
which casts doubts on the legitimacy of the deals. In cross examination, for the first
time Mr Singh claimed that if it were to hand, he would fax a copy of the inspection
report to his customers along with the invoice. With regard to an inspection report
25 provided by ASR Logistics, which was produced by Red 12 supposedly as an
example of a full and helpful report, Gary Taylor described the information contained
in that report as largely "spurious and unhelpful". In particular he criticised the
reference to "MMC" which stands for "a Multi Media Memory Card", and the cost of
which can vary between £10 and £100 and therefore accurate specification is
30 required; "MMC" is a generic technology term that does not describe a product.
Additionally the size of memory is not stated, a matter which has huge commercial
implications. By the time the report was produced the goods had already been
shipped. It is impossible to be certain when any of the deals was actually closed; Mr
Singh believed that the deals were concluded on the telephone on the day of the
35 acceptance by the client, but the question as to who owns the goods up to the point of
the inspection and, in a case where the goods were to be rejected, who would be liable
for the purchase cost is uncertain. There is no sense of commercial reality in the way
Red 12 conducted its affairs, the nature of the trade would require the parties to be
very certain as to where liability lay, which was not certain at any point.

40 36. There is a conflict of evidence between the officers of the Commissioners and
Mr Singh about due diligence. The officers say they repeatedly requested to see Red
12's due diligence, both at meetings and by letter. They received none at the relevant
time, and none until July 2007 when they only received documents in respect of
45 Letting Solutions and RS 23. Mr Singh claims that he was not asked for it and that in
any event he carried out site visits and performed his own due diligence on every
supplier to him involved in all 46 transactions. We do not find the checks made by
Mr Singh satisfactory. VAT Notice 726, which was given to Red 12 prior to the

periods in question, sets out at paragraph 8 checks that a taxpayer can undertake to ensure the integrity of his supply chain, and checks which may be carried out by existing businesses. Neither of the sub-paragraphs is prescriptive, however, it is recommended that sufficient checks be carried out to ensure that a taxpayer is not caught in any fraudulent supply chain. The checks recommended are:

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“1. Undertaking reasonable commercial checks to consider the legitimacy of customers or suppliers. For example:

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- What is the supplier’s history in the trade?
- Are normal commercial arrangements in place for the financing of the goods?
- Are the goods adequately insured?
- What recourse is there if the goods are not as described?

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2. Undertaking reasonable checks to ensure the commercial viability of the transaction. For example:

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- Is there a market for this type of goods – such as superseded or outdated mobile phone models?
- Is it commercially viable for the price of the goods to increase within the short duration of the supply chain?
- Have normal commercial practices been adopted in negotiating prices?
- Is there a commercial reason for any third party payments?

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3. Undertaking reasonable checks to ensure that goods will be as described by your supplier. For example:

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- Do the goods exist?
- Have they been previously supplied to you?
- Are they in good condition and not damaged?”

Paragraph 8.2 of Notice 726 recommends the following checks before dealing with a supplier or customer:

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- “Obtain copies of Certificates of Incorporation and VAT registration certificates;
- Verify VAT registration details with Customs and Excise;
- Obtain letters of introduction on headed paper;
- Obtain some form of trade reference, either written or verbal;
- Obtain credit checks or other background checks from an independent third party
- Insist on personal contact with a senior officer of the prospective supplier, making an initial visit to their premises whenever possible;
- Obtain the prospective supplier’s bank details to check whether:

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- (a) payment would be made to a third party; and
- (b) that in the case of import, the supplier and their bank share the same country of residence

- 5 • Check details provided against other sources, e.g. website, letterheads, BT landline records.

“Paperwork in addition to invoices may be received in relation to the supplies you purchase and sell. We believe that this documentation should be kept as evidence of a transaction’s legitimacy. The following are examples of additional paperwork that some businesses retain:

...”

15 There follows a list of different types of paperwork which should be kept.

37. Insofar as whether the goods had previously been supplied, a matter of which Red 12 claims to have been unaware, Red 12 did not take down any of the IMEI numbers of the telephones in which it was dealing. IMEI numbers are specific to each particular mobile phone. Mr Singh had consulted a Mr Rupert Moyle of SOC VAT Consultants, and on 1 March 2006 he was specifically advised by Mr Moyle that he should take samples of some 10% of the IMEI numbers and retain them. He did not follow this advice. A large quantity of the telephones sold by Red 12 in Deal 37 had previously entered and left the United Kingdom (see above), and had Red 12 noted the IMEI numbers it would have been aware of this. Mr Moyle told Mr Singh that he would not act as an adviser to Red 12 unless the company was doing proper checks. For whatever reason, Mr Moyle ceased to act for Red 12 after the meeting with the officers of the Commissioners at which this remark was made.

38. Mr Singh claims that he complied with that Notice, but did not tell the Commissioners because they did not ask about due diligence until January 2006 when he claims Red 12 gave an officer a due diligence folder on Letting Solutions. He claimed to have checked the same company with Red 12 every two to three months to make sure the VAT number was still valid. Mr Singh also claimed that he required company profiles involving a letter of introduction, a copy of a VAT certificate, copy of certification of incorporation, a sample letterhead, and bank details from every company he dealt with, along with a supplier declaration relating to the supplier’s VAT responsibilities. He claimed that if no such declaration was forthcoming then he would not deal with that company. Whilst copies of due diligence were eventually produced by Mr Singh, as stated above, even where real problems were revealed with companies, typically the case of Letting Solutions and NTS with their lowly credit ratings, nonetheless Red 12 still engaged in very large deals. With regard to the Veracis reports obtained by Red 12, none were produced to the Commissioners before July 2007. The Veracis report on London Mobile Communications dated May 2005 contains no evidence that it was actually prepared for Red 12. There is no invoice to Red 12 for the cost of that report. Mr Singh’s evidence was that he paid Veracis £3,000 at the outset and then in respect of subsequent reports Veracis subtracted the

relevant amount from that sum which they held on account. We find this to be improbable: there are no covering letters from Veracis to support this and no evidence of any payments to them. That particular report is stated to be “Private and confidential. Prepared for the purpose of obtaining legal advice.” Mr Singh claimed to have used Veracis in connection with all his suppliers in the 46 transactions, however there is a letter dated 26 September 2006 from Hassan Khan & Co, who at that time were Red 12’s solicitors, which states: “Red 12 has also recently engaged the services of a company specialising in VAT related matters, Veracis Ltd.” (our underlining). This letter was sent on Red 12’s behalf to the Commissioners. The Commissioners record that Mr Singh told them in January 2006 that he had just started using Veracis, however Mr Singh appears to have ignored those reports which were unfavourable to the people with whom he wished to trade, in particular Letting Solutions Ltd, London Mobile Communications Ltd and Reya. In his evidence Mr Singh said he would have taken no notice of the Veracis report in respect of Reya which in any event arrived after he first dealt with them. Mr Singh was apparently happy to trade on the basis of his own visit to a company trading above a jeweller’s shop, who had only started dealing in mobile telephones some six months previously, without waiting for the report which he had commissioned. He claimed to have stopped trading with Reya prior to receipt of the Veracis report on 6 April, partly because he had paid Reya late on a couple of the deals and partly because he had had a letter from the Commissioners about carousel trading involving Reya. In fact the letter from the Commissioners about carousel fraud only came to Red 12 in May 2006 and therefore cannot have been the cause of Mr Singh’s ceasing trading with Reya. With regard to due diligence in general, Mr Singh’s evidence was that he always had the documents available for the Commissioners to check, but they never asked, and he had done everything that they had asked of him. He dealt only with suppliers that he trusted and carried out his own checks on the suppliers and he had never been asked to carry out due diligence on his customers, but see paragraph 8.2 of Notice 726, set out above in paragraph 36.

39. Red 12’s terms and conditions obtained whether Red 12 was the supplier or the customer. They were never provided to the Commissioners as part of due diligence. In them, Red 12 undertakes and warrants that each of Red 12’s suppliers has conducted all the enquiries and information set out in Schedule 2 (which was not attached to the document and was never produced to the tribunal) and has obtained a warranty from its own supplier. It was Mr Singh’s view that, as he did due diligence on his own supplier, then the terms were met. He did not appear to regard the conditions as important. The terms and conditions do not specify at what stage the goods become the property of Red 12. The document also appears to say that Red 12 is responsible for the payment of insurance, which is contrary to Mr Singh’s own evidence. In cross-examination he was asked how it was to be ascertained who paid for the freight. He said that if Red 12 were exporting, it would pay the freight charged and when asked where this was stated, he replied: “It doesn’t say that. I know that. My supplier would know that. And my customer would know that as well.” Mr Singh was unaware what “CIF” stood for, but accepted that it stood for Costs Insurance Freight. He was shown a letter from Bakhit Gharib Trading dated 7 March 2006, in relation to deal 26, which under heading ‘terms’ said “CIF, through

Work Logistics”. Mr Singh did not appear to understand that this meant that he had agreed to pay the insurance. The terms and conditions also provide that the buyer will not transfer funds to any bank account held off-shore in the seller’s name. Since all the people from whom Red 12 was buying, and Red 12 itself, and all but 3 of Red 12’s customers had accounts with FCIB, Red 12 was in breach of its own terms and conditions on each and every occasion it traded.

40. We have referred previously to the fact that Red 12 on occasion in the period February to March 2006 acted as a buffer trader rather than a broker. In deal 1, acting as a broker on 2.2.2006, Red 12 made a profit of £33.50 per telephone dealing in 1,000 units of Nokia 8800s. Dealing as a broker in the same telephones on 7.2.2006 it made a profit of £31 per unit on 480 telephones, yet dealing as a buffer to a UK company on 14.2.2006 it made a profit of only £1 per telephone on 1,000 units of the same model of telephone. What is curious about this is that the final destination of the goods on that occasion was Bluestar in Denmark, who was already a customer of Red 12. On 15.2.2006, Red 12 sold 500 of the same telephones to Dubai, which suggests that cashflow, one of the suggested reasons by Mr Singh for his acting as a buffer was not a major consideration. Mark-ups appear to remain the same regardless of the unit price of the goods. There is no variation to reflect quantities, the age of the telephones or their desirability. Mr Singh claimed to be unaware of the mark-ups achieved by other traders, and was only aware of his own. He claimed never to have suspected fraud because of the good relationship he had with his suppliers, and because he had not been alerted to it by the Commissioners in relation to his suppliers. On 7 February 2006 Red 12 had bought 2,500 Samsung telephones from the Fones Centre, and sold 500 to ABIT and 2,000 to Asia Power, to whom ABIT also sold on the 500 telephones it had bought. There was no proper explanation given for this split. Mr Singh offered several explanations, in particular that this deal had been done by his brother Dilraj, but he produced no evidence from Dilraj. Another explanation given by Mr Singh was that only 2000 Samsung D600s could be fitted into the secure van which was used to export the telephones to Switzerland. He explained that it was not worth the extra £3,000 to £4,000 in freight to export them altogether. As the 500 telephones were sold for only £1 profit per unit, and those to Asia Power was sold at £13 profit per unit, the additional profit of selling them all to Asia Power would have been £6,000, which would more than have covered the extra freight cost, and also would have made an additional profit for Red 12 of £2,000 to £3,000. In the circumstances, Mr Singh’s explanation does not make commercial sense. At the meeting with the Commissioners on 1 March 2006 Mr Singh was specifically told that he should keep logs of all e-mails and telephone calls for each deal. Mr Singh claimed that this was impossible because he received 100 to 200 e-mails a day. It would have been helpful to have seen even a sample of e-mails and telephone calls, and certainly to have seen his telephone bills. Mr Singh was advised by Mr Moyle that he should have full records for at least a couple of the deals. Mr Singh suggested that because he claimed the cost of his telephone bills in his VAT returns, the Commissioners would have been aware of the number of telephone calls he was making. We found Mr Singh to be an intelligent and resourceful man, however, because of all the inconsistencies in his evidence and the commercial unreality of his trading patterns we do not find him to be a reliable witness.

41. Red 12 called a Mr P Lawrence Traynor to give opinion evidence. Like Mr Gary Taylor, he had had no involvement in Red 12's dealings, but, unlike Mr Taylor, he had not read all the relevant papers, and unlike Mr Taylor he had no experience of working in the mobile telephone industry. He was heavily critical of Mr Taylor's evidence and the majority of his own evidence was directed at attempting to undermine the validity of Mr Taylor's report. His principal criticisms were that Mr Taylor had paid no attention to supply and demand or to foreign exchange fluctuations, and for this reason his evidence should be disregarded.

42. We did not find Mr Traynor's evidence helpful. Whilst his claim that foreign exchange rates impact on all export deals is essentially correct, it was Mr Taylor's uncontested evidence that during the relevant periods the currency markets were flat. Red 12 bought and sold only in sterling, and the original purchase from the manufacturer was so far up the chain that currency fluctuations at that point would not have an impact on Red 12's dealings. Furthermore it would be the purchaser from Red 12 who would be concerned with any such fluctuations. It was not Red 12's own case that foreign exchange played any part in the deals it made. In cross-examination when asked about the Commissioners' evidence that there had been telephones which had been traded by Red 12 which had been on more than one occasion imported to, and exported from, the UK, Mr Traynor replied: "I don't necessarily understand why that would mean that that was an illegitimate deal, if there was a commercial motivation ...". This answer showed that he had not understood the fundamental principles of MTIC fraud, and we place no weight on his opinions.

The Appellant's case

43. In respect of the issue of whether there was sufficient evidence of an MTIC fraud in this case, we have set out Mr Randolph's submissions in brief in relation to each of the defaulters in the earlier part of this decision. We do not accept his submission that the evidence relied on by the Commissioners to show MTIC fraud should be evidence which the Appellant is in a position to refute. In such cases there is always evidence which can only be known to the Commissioners. Mr Randolph relied on earlier descriptions of MTIC fraud in case law for his submission that the defaulter has to be the importer. Neither argument was accepted by Miss Malcolm, and we set out below her reasons for this, with which we concur.

44. We were referred to the case of *Teleos Plc and Others v Commissioners of Customs and Excise* Case C-409/04 which was a reference for a preliminary ruling from the High Court to the ECJ. In that case, which concerned the right of English companies trading in mobile telephones for export to deduct the relevant input tax on certain transactions in respect of which the Commissioners had discovered that some of the export documentation was in fact forged, it was concluded by the Commissioners that the telephones had never left the United Kingdom, and therefore the companies were assessed to value added tax on their supplies, albeit the Commissioners acknowledged that the companies were not involved in the fraud and had no real means of establishing the falsity of the statement, in the documents . It

was held at paragraph 48 by the ECJ that in the case of rules liable to entail financial consequences, the principle of legal certainty must be observed all the more strictly:

5 “in order that those concerned may know precisely the extent of the obligations which such rules impose on them ... Accordingly it would be contrary to the principle of legal certainty if a Member State which has laid down the conditions for the application of the exemption prescribing a list of documents and which documents were presented by the supplier could subsequently require a supplier to account for VAT on that supply where it
10 transpires that, because of the purchaser’s fraud of which the supplier had and could have had no knowledge, the goods concerned did not actually leave the country.”

The court continued at paragraph 58:

15 “Admittedly evasion sometimes justifies the stringent requirements as regards suppliers’ obligations. However, any sharing of the risk between the supplier and the tax authorities following fraud committed by a third party, must be compatible with the principle of proportionality.”

20 The Court added that in cases concerned with fraud, it was not contrary to Community law to require the supplier to take every step which could reasonably be required of him to satisfy himself that the intra-community supply which he is effecting does not lead to his participation in tax evasion.

25 45. We were also referred by Mr Randolph to the case of *Netto Supermarket GmbH v Fianzamt Malchin* Case C-271/06. The facts in that case was similar to those in *Teleos* and the ECJ reiterated its earlier position taken in *Teleos*. The principal conclusion relied on by Mr Randolph was that it followed that a supplier had to be
30 able to rely on the lawfulness of the transaction carried out without risking the loss of the right to exemption from VAT if he was in no position to recognise – even by exercising due commercial care – that the conditions of the exemption were in fact not met, because of the forgery of the document in question.

35 46. From these cases Mr Randolph derived inter alia the following principles: insofar as concerns the principle of legal certainty in particular, in the case of rules liable to entail financial consequences, that principle 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. Each transaction must be regarded on its own
40 merit and the character of a particular transaction in the chain cannot be altered by earlier or subsequent events. The Commissioners are not allowed to take account of the intentions of any trader other than the taxable person concerned. In particular the Commissioners are not allowed to take account of the possible fraudulent nature of prior transactions in the chain in which the taxable person has a position, where the
45 taxable person had no knowledge and no means of knowledge of the fraud. He submitted that it would be clearly disproportionate to hold a taxable person liable for the shortfall in tax caused by fraudulent acts of third parties over which he has no

influence whatsoever; a supplier had to be able to rely on the lawfulness of the transaction carried out without risking the loss of the right to reclaim VAT if he was in no position to recognise, even by exercising due commercial care, that the conditions of the exemption were in fact not met. It should not be made practically impossible or excessively difficult for the taxable person to rebut any presumptions used by the Commissioners with evidence to the contrary. Traders who take every precaution which could reasonably be required of them must be entitled to rely on the legality of their transactions. The concept of “no knowledge and no means of knowledge”, as first described in *Optigen*, is equated by the ECJ in the case of *FTI* with the concept of reasonableness. That position is upheld in *Kittel* at paragraph 45 and in *Teleos* at paragraph 65 and in *Netto* at paragraph 24. A different test is used by the ECJ, that of “knowing or should have known”, where the tax is evaded by the taxable person himself – see *Kittel* at paragraphs 53 and 56 supra. The appropriate test in the present proceedings is one of reasonable commercial care. Insofar as the Commissioners sought to rely on the test of “knowing or should have known”, and insofar as that is a more stringent test to the trader, such action is contrary to EC law.

47. Mr Randolph took issue with the decisions of the tribunal in the cases of *Calltel* and *Mobilx Ltd*, in the latter case, where the chairman was the same as in the former, it was stated:

“... the obligation [on the trader] is to take all proportionate steps available to it to ensure that, on the balance of probabilities, no aspect of the transaction is connected with any other party involved in, or any other transaction involving, fraud on the public revenue through the value added tax system ... and a positive duty to take precautions.”

Mr Randolph reiterated his submission that the test was one of reasonable commercial care but added a gloss to the extent that it followed from the ECJ decisions that in order to make good its case, the Commissioners must demonstrate that the trader had acted unreasonably in the circumstances.

48. We were referred to the case of *Federation Technological Industries (“FTI”)* both for the opinion of the Advocate General in that case and the judgment of the ECJ. That case concerned the imposition of joint and several liability for the payment of VAT. At paragraph 28 the Advocate General said:

“It follows that presumptions for VAT fraud must arise from circumstances, indicative of VAT fraud, of which traders may reasonably be expected to have acquired knowledge. Member States may impose a duty on traders to be vigilant and to inform themselves as to the background of the goods in which they are trading. However, this duty must not place too heavy a burden on traders who take the necessary precautions to ensure that they are trading in good faith.

29. In addition, the presumptions must be rebuttable, without demanding evidence of facts that are excessively difficult for traders to ascertain.

30. If these requirements are not fulfilled, the application of presumptions would effectively undermine the imperative that a person can only be held liable for payment of VAT when he knew or reasonably ought to have known that VAT would go unpaid. That would be tantamount to introducing strict liability through the back door.”

The European Court in following the opinion of the Advocate General and itself concluded at paragraph 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.”

49. Mr Randolph derived from various tribunal cases that the requisite time for knowledge of fraud is at the time of the transaction – therefore at the time of the trade in question it must be shown that the trader knew or had the means of knowing that the defaulter had already formed a fixed intention to evade his VAT liabilities. Furthermore, mere failure to account for VAT will not be sufficient, there must be no other rationale to the chain but the perpetration of fraud. There was no positive obligation on a trader to take every precaution that could reasonably have been required and appeals in such cases do not depend on traders failing to take precautions, but rather on where the traders should have acted differently on the information before it. It was further submitted that the mere fact that there was fraud would not be sufficient, there must be some reason which might lead the tribunal to conclude that the trader had the requisite knowledge. It was accepted that standard of proof was the balance of probabilities, nonetheless the quality and cogency of the evidence necessary to establish the allegation of fraud must be commensurate with the gravity of that allegation. It was also Red 12’s case that if its right to repayment of input tax is to be overruled, then evidence in that regard needs to be compelling, and it was not open to the Commissioners to rely on presumptions, which in this case were neither compelling nor sufficiently compelling. Insofar as the Commissioners’ case was based on matters outside Red 12’s control and/or knowledge (deemed or actual) then such matters cannot be taken into account when deciding to refuse Red 12’s request for repayment of its input tax. Mr Randolph sought a declaration to the effect that Red 12 was entitled at least to that part of its input tax claim which corresponds to the tax actually paid by the buffer traders in the 46 transactions, in order to avoid multiple recovery. In this regard Mr Randolph relied on the analysis by the tribunal in the case of *Honeyfone*, where full argument was heard on the point.

50. With regard to the factual matters, Mr Randolph pointed to the fact that during the periods February and March 2006 Red 12 acting as a buffer trader carried out some 15 deals that were not covered by the decision in this case. He concluded that it could not be said that Red 12 was uniformly acting in a way characterised by the Commissioners as unlawful. This is a proposition which we cannot accept. It has for

some time now not been the Commissioners' practice to take action against the buffer traders. The remainder of the factual matters disputed by Red 12 are referred to in the part of the decision dealing with the evidence.

5 51. Mr Randolph pointed to flaws and discrepancies in the evidence given by the various witnesses for the Commissioners. He submitted that the extent that there were discrepancies in the evidence given, then the evidence of the officers on the ground should be preferred to that of the main witness, David Taylor, who had no direct experience of Red 12 or its trading.

10 52. For his submission that the defaulter has to be the importer, Mr Randolph relied on the description of MTIC fraud set out in a number of previous decisions, both in the ECJ and in the Tribunal. He was unable to point to any case where it was said that the defaulter had to be the importer. It was, however, the case that the
15 defaulter was the importer in all the cases to which we were referred. Mr Randolph pointed to the evidence of Mr Stone in his witness statement where he said:

20 "A transaction chain in an MTIC fraud involves a 'missing' trader, a 'hijacked' trader or a 'defaulting' trader, who acquires (imports) goods from another EU Member State, a number of intermediary or 'buffer' trader and a 'broker' trader."

We have referred to Mr Stone's evidence to the Tribunal on this point at paragraph 20 above, and his reference to reliance on indirect evidence of fraud and importation
25 from the EU. There being no decided case on the issue of whether or not the fraud can be constituted where there is not proof of the identity of the fraudulent importer, Mr Randolph invited the Tribunal to make a preliminary reference to the ECJ. In the event that the Tribunal is not convinced by Red 12's primary argument that direct evidence of importation is required, and is not prepared to refer the matter, then he
30 submitted that the Tribunal is obliged to deal with the evidence on a deal by deal basis, which we in fact have done, without conceding that it is incumbent upon us as a matter of law to have done so.

35 53. Mr Randolph objected to the further evidence produced by the Commissioners in the form both of further witness statements and further documents. He relied on the case of *Brayfal Ltd*, a case heard in the High Court before Lewison J. In that case the Commissioners wished to introduce further documentation to correct evidence that a witness had already given in her evidence in chief. At paragraph 54 Lewison J said:

40 "She has corrected her evidence, in that she has now said that the evidence that she has now said that the evidence that she gave to the tribunal in chief was wrong. To deploy a new case based on a different assessment goes further than merely correcting evidence, it advances a new positive case based on a new chain of transactions. Mrs Clifford's evidence, to the extent that
45 HMRC wish to rely on it, has been fully deployed before the tribunal. The tribunal were, in my judgment, entitled to find that allowing evidence in during the course of cross-examination would prejudice *Brayfal* in the

presentation of its case. HMRC seek to draw a distinction between documents that support the case that it advances and documents that alter that case. These documents do alter the evidential nature of HMRC's case. Instead of relying on the £59m assessment, which relates to one chain of transactions, in order to prove the fraudulent tax losses, HMRC now wish to rely on the £23m assessment which relates to a different chain of transactions. In my judgment, Brayfal were entitled to take their stand on the basis of the documents as presented after HMRC had had five chances to present their documents and had assured the tribunal that their case would be complete on the final extension."

The Court upheld the tribunal's decision not to allow the Commissioners to introduce those documents. In our judgment the present situation is very different from that in *Brayfal*. The initial evidence by way of an additional witness statement sought to be introduced by the Commissioners was served on Red 12 on the Friday prior to the giving of any evidence in this case which was opened on the Tuesday, the exhibits were served on Red 12 on the Monday. There had been no history of repeated directions about disclosure, Mr David Taylor's third witness statement, which was made in response to matters raised by Red 12 in a further witness statement. His fourth witness statement was made in response to questions arising during the hearing. It was dated 15 July, and was served on that date. On that date, when the Commissioners raised the issue of any objection there might be to either the third or fourth witness statements, Mr Randolph indicated without qualification that he had no objection to the admissibility of either witness statement. For the avoidance of doubt, we would have over-ruled any objection Mr Randolph might have made given we found no prejudice to Red 12 in the circumstances.

54. The Commissioners sought to introduce two further witnesses, Peter Birchfield and Andrew Letherby, whose witness statements were dated respectively 17 and 18 July 2008. In relation to Mr Birchfield, Mr Randolph made no objection to his evidence on the basis that he was available for cross-examination, and Mr Letherby's statement was not objected to. We find it curious that Mr Randolph, having set aside his initial objection to the introduction of David Taylor's third and fourth witness statements, and not having objected at all to the inclusion of Mr Birchfield's and Mr Letherby's evidence, nonetheless made the above submissions and in closing invited the Tribunal to set aside the late evidence of David Taylor insofar as it changed the case and the Commissioners had not made an application to amend the statement of case. It is unquestionably the case that the late evidence changed the identity of some of the alleged defaulters. Some of the documents related to evidence found at the freight forwarders. We find that there was no prejudice to Red 12 by the late admission of these documents. Red 12, on the basis of its own case, namely that it knew none of the identities of those higher up the chain, was never in a position to challenge the Commissioners' evidence with regard to the importation of the goods from the EU, or the fact that some of the traders higher up in the chain had defaulted.

55. It was not accepted on behalf of Red 12 that third party payments were evidence of importation from the EU, and we were referred to the evidence of Mr Stone when he admitted that third party payments do not indicate the particular party who imported the goods. However it was his clear evidence, which we accept, that
5 third party payments are evidence of fraud. It was submitted that it was not possible to conclude from the fact that third party payments are being made that the goods are being supplied by the party to whom third party payments are made, and such evidence could not be relied on because it was not possible for an Appellant to rebut such evidence and the inferences from it. It was argued that in an MTIC case it is the
10 defaulter's loss that is relevant, and there was a duty on the Respondents to show that there was an acquisition, and the defaulter was the acquirer. Furthermore, the evidence of importation must be direct, it was not open to the Commissioners to rely on indirect evidence because an Appellant must always be in a position to rebut a presumption or inference (see paragraph 42 above).

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56. Finally with regard to delay, the Tribunal was referred to the case of *Sosnowska*. In that case the ECJ was concerned with the question of whether it was permissible to extend from 60 to 180 days from the date of submission of a taxable person's VAT return, the period available to the national tax office for repayment of
20 excess VAT to taxable persons unless they lodged a security. The Court, having referred to the right in Article 17 of the Sixth Directive of taxable persons to deduct VAT they have already paid on goods purchased as input from the VAT they are liable to pay, stated that the right to deduct is an integral part of the VAT system, which "as a general rule may not be limited". The Court continued "In particular that
25 right is exercisable immediately in respect of all the taxes charged on transactions relating to input ...". The Court then continued to consider the issue of making a refund, it referred to the Member State having a certain freedom of manoeuvre, but held that those conditions could not undermine the principle of the neutrality of the VAT tax system by making the taxable person bear the burden of VAT in whole or in
30 part. The Court then stated: "This implies that the refund is made within a reasonable period of time ...". It held that in that particular case, extending to 180 days the period for extended verification of a taxable person's tax return was incompatible with European law by virtue of the fact that it breached the principle of proportionality. It was submitted by Mr Randolph that this case was relevant because the
35 Commissioners had targeted traders of mobile telephones: Notice 726 only applying to traders of telephones, CTUs and other such commodities. In *Sosnowska* the Polish government had sought to justify its approach on the ground that new companies were more likely to commit fraud than established companies. In the present case the Commissioners sought to justify differential treatment of traders of mobile telephones
40 and computer units from other traders on the grounds that they were more likely to commit fraud. The Tribunal indicated to Mr Randolph that the Tribunal was unable to provide any remedy for delay, and had no jurisdiction where the policy of the Commissioners was in issue. We were invited to refer the matter to the ECJ, however this is an argument which is proper for the High Court and not the Tribunal. In any
45 event, Mr Randolph pointed to no particular time in respect of which he was pleading delay. In case he takes this matter further, we find that there has been no unreasonable delay on the part of the Commissioners at any stage in this case.

The Respondents' case

57. As set out at paragraph 8(i) above, Miss Malcolm accepted that the
5 Commissioners had, with regard to knowledge or means of knowledge to raise an
initial case requiring an answer from Red 12, and it was only once that case was
raised that the burden of proof shifted to Red 12. It was not disputed that the
Commissioners had to show a relevant tax loss to the revenue, and that that tax loss
10 was caused by fraud. It also 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.
It was the Commissioners' case that Red 12 fell foul of all the different tests of
knowledge as propounded in the various authorities and had in fact actual knowledge
of fraud in all the deal chains.

58. The Commissioners took issue with Mr Randolph on the matter of whether
15 there had to be direct proof of importation by a defaulting trader to allege MTIC
fraud, which raised two separate points. First there was the question of whether the
defaulter has to be the acquirer, i.e. the actual EU importer, and second, whether the
means of proof to establish that has to be direct proof or whether circumstantial
20 evidence or inference, will suffice. It was not the Commissioners' case that the trader
has to take every single possible precaution, but that he must take reasonable and
proportionate precautions to avoid fraud within the context of an industry riddled with
fraud, taking account of the time, effort and expense to the trader of taking every
single precaution.

59. Miss Malcolm distinguished the present case from that of *Optigen* in part on
the basis that there were transactions in which the particular appellants were
engaged which were not linked to fraud, whereas in the present case the
Commissioners averred that every single trade in which Red 12 was involved in
30 February and March 2006 had been traced back to a fraudulent tax loss. Therefore
when the Advocate General in his opinion in *Optigen* set out: "Each transaction must
be regarded on its own merits and the character of a particular transaction in the chain
cannot be altered by earlier or subsequent events", he was saying no more than that if
the trader had no knowledge and no means of knowledge, then he did not bear the
35 consequences of the default or fraud or the dishonest intent of anybody further up or
down the chain. This was to be distinguished from the question of whether you are
allowed to look up and down the chain in order to reach a decision about a taxpayer's
knowledge or means of knowledge. Where in his written submissions Mr Randolph
had submitted that the ECJ authorities made plain that the right to the repayment of
40 input tax could only be removed when it was shown that the person seeking
repayment had the requisite knowledge that the relevant fraud was being committed,
he was in error because none of the authorities say that the trader has to know about
the actual detail of the fraud. We were referred to paragraphs 51 and 52 of *Optigen*
where the ECJ states:

45 "51. It follows that transactions such as those at issue in the main
proceedings which are not themselves vitiated by VAT fraud constitute

supplies of goods or services effected by a taxable person acting as such and an economic activity within the meanings of Articles 2(1), 4 and 5(1) of the Sixth Directive, where they fulfil the objective criteria on which the definition 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 subsequently carried out by the taxable person of which the taxable person had no knowledge and no means of knowledge.

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“52. Nor can the right to deduct input 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.”

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60. It was accepted on behalf of the Commissioners that the time at which the knowledge of the trader is to be tested is the time when the transaction takes place, his transaction cannot be affected adversely by something he learned later. The Tribunal was referred to the tribunal decision of *Calltell Telecom Ltd*, paragraphs 50 and 51 read:

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“50. ... it is clear from what was said by the Court of Justice in *Kittel* that the knowledge of the trader whose claim for credit has been refused is to be tested at the time the transaction took place. That time may not be a moment, but might be a period extending over a few days, or even longer ... he cannot, consistently with the tenses used in paragraph 61 of the judgment and as a matter of logic, be affected by knowledge which came into his possession, or which could have come into his possession, only after the transaction had been completed. It follows therefore that, if he is to be deprived of the right to deduct, the trader must be shown to have known, or to have had the means of knowing, that the defaulter had already formed the fixed intention of evading his VAT liabilities. The task facing the Commissioners is, therefore, formidable.

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“51. We are not persuaded, however, that it is essential for the Commissioners, if they are to succeed, to show that a trader in the appellant’s position knew, or had the means of knowing, the defaulter’s identity. Such a requirement cannot be derived from what the Court of Justice said in *Kittel*, and we see no reason why a trader, knowing that a default was to occur but ignorant of and indifferent to the identity of the intending defaulter, should not suffer the consequences of entering into a transaction which he knew or should have known was merely a vehicle for fraud.”

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The Commissioners rely on paragraph 51. We would note that that case was dealing with a case of contra-trading, which is not the case here. In the present case the Commissioners submit that it was sufficient to show that Red 12 had the knowledge that it was part of a fraudulent chain, it did not have to know the details of that chain

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or even the relevant fraud. In *Kittel* it was said that an appellant did not even need to know that it was a value added tax fraud, but simply fraud in any form.

5 61. The case of *FTI* was the first case where the ECJ set out a requirement on a taxpayer to take every precaution that could “reasonably” be required of it. This was a case concerned with deciding whether s.77A of the VAT Act 1994 was in conformity or conflict with European law. Included in the legislation is the word ‘presumption’, Miss Malcolm submitted that Mr Randolph had confused circumstantial evidence and similar fact evidence with presumption, which was an error of law. Both circumstantial evidence and similar fact evidence refer to factual evidence which is not to be rebutted, but challenged. A presumption arises out of proven facts from which the presumption is made, that presumption may be rebutted. In *FTI* the Advocate General was saying that whilst you can presume knowledge by a trader, you cannot presume it in such a way as to lead to strict liability, he was not saying more.

62. Miss Malcolm referred us to paragraph 43 of the judgment in *Kittel*:

20 “43. A fortiori requiring the tax authorities to determine whether a given transaction constitutes a supply by a taxable person acting as such and an economic activity, to take account of the intention of the trader other than a taxable person concerned involved in the same chain of supply and/or the possible nature of another transaction in the chain prior or subsequent to the transaction carried out by the taxable person of which the taxable person had no knowledge and no means of knowledge would be contrary to those objectives.”

30 She submitted that the “objectives” here referred to legal certainty. This passage was relied on by Miss Malcolm as showing that what was being considered was the objective way in which it was necessary to look at the chain, the ECJ did not say that you cannot look at the chain to determine whether there is knowledge or means of knowledge. It was submitted that there was no requirement set out in *Kittel* that the transaction should be the subject of VAT fraud, still less that it should specifically be the subject of MTIC fraud. Any fraud known to the taxable person or of which he had the means of knowledge vitiated his right to a repayment.

40 63. Miss Malcolm submitted that the case of *Sosnowska* was not authority for the proposition that Mr Randolph put forward, namely that 180 days was too long a period in which to make a repayment, but was authority for the proposition that there was no reason to discriminate against new traders as a group, least of all where there was no evidence that they were, in fact, evaders or fraudsters. We were referred to the case of *Megantic Services Ltd v HMRC*, a High Court decision before Charles J in which there is reference to relevant trading activities being many and complicated and thus the relevant investigations being complicated and lengthy. In that case Charles J also said that at times full cooperation was not provided to Customs in carrying out their investigations, as was the case here. At paragraph 10 the Judge said:

5 “There are aspects of the trading in 2006 of Megantic relating to the product that is said to be traded and the way in which the trade is conducted, which excited the justifiable suspicion of Customs and may later demonstrate, by way of inference and proof, that a carousel fraud is being carried out in that case.”

This was relied on for the proposition that the Court is entitled to use inference to establish fraud.

10 64. With regard to Mr Randolph’s submission that the Tribunal should not admit the late evidence of David Taylor, we were referred to the case of *Mobile Export 365 Ltd*, a High Court decision. In that case Lightman J gave directions and guidance to the tribunal which were, in part, as follows:

15 “20. ... In the current and all future appeals the tribunal should determine once and for all whether to accede to applications to admit or exclude evidence ... the presumption must be that all relevant evidence should be admitted unless there is a compelling reason to the contrary. As I have already said, problems of complying with any previous timetable for trial are no
20 longer relevant. ...”

Earlier in that case the Judge had said:

25 “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 taxpayer’s 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.”

30 65. The Commissioners’ case was that it was possible to prove fraud by circumstantial, evidence, and no question of presumption or of rebuttal by an Appellant arose at the early stage. With regard to admitting new evidence, it was not the case that the Tribunal was only able to look at evidence available to the
35 Commissioners at the time of their decision. It would create enormous cost to the public purse and unfairness to the Commissioners if that were the case. Similarly it would cause unfairness to traders in that they too would not be able to ask the Tribunal to have regard to fresh evidence not available at the time the decision was made. It was pointed out that the majority of Red 12’s evidence relating to due
40 diligence was produced after the Commissioners’ decision.

66. Steps which could have been taken by Red 12 were as follows:

45 1. It could have checked that the first supplier in a particular chain was legitimate by asking the freight forwarders for the name of the importer.

2. It could have checked where the telephones had been imported from, or even if they had been imported.

3. It could have checked how long the telephones had been in the country and how many buffers there were between it and the importer, given that all the goods remained with the freight forwarder. In respect of Reya, Red 12 knew that it had lied in its marketing documentation about how long it had been involved in the trade, yet it traded with Reya regardless.

67. In cases where there was no direct evidence of EU acquisition, it would be a perfectly permissible and logical inference that where there is fraud in the chain, the fraud operates to create a benefit to the fraudsters arising out of the fact that at an earlier stage there has been an EU acquisition, and it is perfectly appropriate therefore to infer EU acquisition. We adopt this reasoning by Miss Malcolm.

Reasons for decision

68. We have set out as Appendices the deal chains and also the mark-ups made by the various participants. This is to make clear the sheer improbability of these trades being genuine. In particular we take account of the following:

- (i) the exponential increase in Red 12's turnover despite no capital and no assets;
- (ii) by February 2006 Mr Singh, who had some previous commercial experience, had been operating in the field for long enough to know of the considerable risk of fraud and yet his checks on his suppliers were inadequate;
- (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 (see paragraph 22(b));
- (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.

69. It makes no sense that, as for example in deal 2, one thousand mobile telephones should have been brought into this country, not by an authorised dealer, and therefore already at one remove from the manufacturer, and they should pass through the hands of seven different traders before they even come to Red 12. There can be no commercial rationale behind these extensive chains, or indeed behind the imposition of Reya between NTS Telecom and Red 12 in several subsequent deals. Mr Singh claimed not to know about the previous traders, but NTS had been a regular supplier beforehand, and just one telephone call to NTS would have confirmed that they had the telephones available to supply to Red 12.

70. In the case of *Megantic Services Ltd* Charles J at paragraph 9 said:

5 “It is also clear from those authorities [*R (Deluni Mobile Ltd) v Customs and Excise Commissioners*, *R (UK Tradecorp Ltd) v HMRC* and *R (Mobile Export 365 Ltd) v HMRC*], in particular, for example, the decision of Moses J, that in this industry or in trading of this type (here essentially in mobile phones) those who take part in it are, or certainly should be aware that they are at risk of being the subject of an investigation by Customs. Standing back from chains of transactions that can, in some cases, be demonstrated that what is being
10 shared out is the 17½ % of tax amongst a number of people, and the only real purpose of the chain of transactions is to enable that money to be extracted unlawfully from the Revenue for the benefit of those involved in the chain.”

15 Whilst it might be possible to regard one or two of these chains as being legitimate, when one considers the sheer volume of telephones being traded, the trading patterns and the inter-connectedness of all the different companies involved, it is apparent that there can be no explanation other than that fraud is being perpetrated.

20 71. As did the Tribunal in the case of *Calltell Telecom Ltd*, we accept that there is a genuine grey wholesale market in mobile phones, but we consider it an inescapable conclusion from the evidence we have heard and read that Red 12 was not engaged in it. We were left in no doubt that all the transactions in which Red 12 engaged in deals 1-46 were wholly artificial.

25 72. We were given no explanation for the volume of the trade, other than that Mr Singh claimed to trust his suppliers, and be on good terms with them. He was unable to give an explanation as to why such large quantities were available, why he was able to source the precise number of telephones required by his would be purchasers, why he never had surplus phones on his hands, why he had not attempted to become an
30 authorised distributor, or why on occasion he was buying telephones which originated in countries where phones were more expensive than they were in this country and selling them on to places where they were as a rule less expensive. We have set out in detail at paragraph 30 above the extraordinary descriptions on the invoices in relation to deal 25, and we have referred to Red 12’s terms and conditions which are totally
35 inconsistent with those which might be expected of a trader who was concerned to trade legitimately. We will not repeat here those matters which we have already set out above. Mr Singh was completely unconcerned as to the fact that he might not be supplying what his customer wanted, pointing only to the fact that none of his trades had ever been rejected. This fact alone we found extraordinary given the inadequacy
40 of the invoices. Additionally Mr Singh was prepared to deal with companies of which on the face of it he had scant knowledge, and even where the knowledge that he had indicated that such a trader was very unlikely to be legitimate, for example Reya, he nonetheless proceeded to trade with that person. Mr Singh’s actions were not those of a man who was concerned that he was operating in an area which he knew to be rife
45 with fraud, the very best that could be said of his behaviour was that he closed his eyes to those aspects which were unwelcome to him. We echo the words of the tribunal in the case of *Calltell* where it was said that a trader in a legitimate market

trading in goods worth millions of pounds would not deal with others without first satisfying himself that his suppliers could supply what they contracted to supply, and that his purchasers could pay for what they had agreed to purchase. It is not enough to state that goods would not be paid for until they had been inspected, nor be delivered until paid for. In a genuine market traders who are dependent, as Red 12 was, on payment by their purchasers in order that they could themselves pay their suppliers would not commit themselves to a purchase without having certainty that the purchaser would pay, and would not commit themselves to a sale without being certain that their own supplier was in a position to deliver. That delivery should be of precisely those items which the purchaser wished for. Red 12 was in all these deals exposed to the risk that it would be left with goods for which its purchasers could not pay, and the risk that it would be unable to fulfil orders from its customers. Furthermore it was also exposed to the risk that, were the goods to be damaged in transit, or should they be stolen or anything else befall them, there was no insurance to cover those contingencies. The only conclusion we can properly draw from Red 12's approach is that it was unconcerned whether the checks were properly carried out by the inspectors, and that the contract terms were of no concern because they were irrelevant: Red 12 was well aware that its suppliers and customers would not let it down because the transactions had all been pre-arranged. We conclude that Mr Singh 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. It is not insignificant that the only profit made by Red 12 was an amount equivalent to the repayment of the value added tax. We have set out at paragraph 23(1)-(10) above the evidence relied on by the Commissioners to show Red 12's state of knowledge. We accept all those matters, as we also accept paragraph 23(11)(a)-(g), the evidence of Gary Taylor as to the improbability that RED 12 is dealing in a legitimate market and is indeed trading in the way it claimed. None of the matters relied on by Red 12 undermines the case raised by the Commissioners. We consider that such evidence more than meets the high standard of proof which is required where fraud is alleged.

73. Turning to those submissions of law made by Mr Randolph which we have not already dealt with, we reject his submission that Red 12 has to be in a position to rebut the evidence of fraud. In these cases it is of their nature that there is evidence which is only known to the Commissioners and cannot be known to an appellant. We follow the reasoning of the tribunal in the case of *Calltell* at paragraphs 50 and 51 which we have cited above. What is required is that the Commissioners must show that at the time when Red 12 entered into these various deals, it either knew or had the means of knowing that the trades were fraudulent. We accept Miss Malcolm's argument on this point as set out above in paragraph 63, with reference to the cases of *Kittel* and *FTI*, and also her submissions on the distinction between presumptions which may be rebutted, and similar fact or circumstantial evidence, which may be challenged. We accept that the Commissioners are entitled to rely on both similar fact and circumstantial evidence surrounding the various deals in the chains to show fraud. Mr Randolph did not in fact challenge such evidence beyond contending that it was not admissible as Red 12 was not in a position to rebut it.

74. Whilst it is usual in MTIC fraud cases 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 deal chain had conspired to defraud the revenue, for example by means of third party payments to a trader outside the United Kingdom, this would be no less a case of MTIC fraud. The earlier 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. However we have set out above in respect of each of these deal chains the evidence which we find supports the contention by the commissioners that there was an MTIC fraud, and so if we are wrong in relation to any of those deals, our findings in relation to others where there is a clearer evidence will not be compromised.

75. We were urged to apply the test of whether or not Red 12 had taken due commercial care with regard to its various transactions, and without hesitation, for all the reasons which we have set out above in relation to its method of trading, we find that in effect little or no commercial care was taken by Red 12. It is not sufficient for it to rely on the very inadequate details which it gave to the Commissioners at Redhill in relation to its suppliers, or on its so-called due diligence. Again we have set out above our reasons for not finding such precautions adequate. Miss Malcolm has referred to basic precautions which were not taken by Red 12, such as checking with the freight forwarders where the telephones had come from. Mr Singh claimed that commercial confidentiality would prevent the freight forwarders from giving him the information as to who were the previous traders involved in any particular batch of telephones, however commercial confidentiality would not prevent them from giving information as to how many previous traders had handled them or as to the origin of the telephones. In any event, in some cases it was known to Red 12 that the telephones had come in from abroad, and yet the fact that the telephone chargers had plugs unsuitable for use in the United Kingdom did not cause Red 12 to make any further checks. It apparently deliberately closed its eyes to the possibility of fraud. 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. It chose not to, other than making the barest minimum of checks. We do not suggest that it is incumbent on a trader to undertake checks on all the traders up and down the deal chains, indeed it would not be possible for it to do so. But, in Red 12's case, where it did carry out checks on its immediate suppliers, and where it did receive information which ought to have given it pause for thought, it did not pause. It did not record any of the IMEI numbers which it had been advised to record by Mr Moyle, at least in respect of 10% of the telephones in any particular deal. Mr Singh was aware of the banks used by his suppliers and his customers, it apparently never occurred to him to query that his own terms and conditions refer to not trading with companies with overseas bank accounts (it being unclear whether he is talking as a purchaser or supplier in this case), but in any event as Red 12 itself used an overseas bank, such a consideration was irrelevant. 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 724, 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. It was submitted by Mr Randolph that the Commissioners had to demonstrate that a trader had acted unreasonably in the circumstances, whilst we make no finding as to whether that is or is not correct as a proposition of law, in the circumstances of this case we find that the Commissioners have demonstrated that Red 12 acted unreasonably in the circumstances.

76. With regard to the question of whether or not Red 12 is entitled to recover that part of its input tax claim which relates to the tax actually paid by the buffer traders in the 46 transactions, we were referred to the case of *Honeyfone*. In that case the tribunal concluded that, to avoid multiple recovery which would be regarded as a penalty, the tax actually paid by the buffer traders should not be denied as input tax to Honeyfone. The tribunal there was concerned with double recovery from a buffer in between the defaulter and the broker, which it concluded was impermissible. In the present case we find that there was an orchestration of the chain in order to separate the exporter from the importer, or the defaulter where they are not one and the same. In *Kittel* the court did not indicate that the right to deduct is only lost to the extent of the tax lost, nor that it might be regained to the extent that the tax authority is able to recover the tax lost by assessing another trader who is able to, and does, pay. It may be inferred from *Kittel* that a trader with the requisite knowledge who enters into a transaction of the kind under consideration forfeits the entire right to deduct regardless of the measure of the tax lost, a desirable outcome as a means of discouraging fraud. We adopt the reasoning of the tribunal in *Calltell* at paragraph 60 as to why this does not result in a penalty. The tribunal said:

“If the Commissioners are right ... the objective of the fraud is to extract from the Commissioners the very input tax which is the subject of the appeal ... It cannot be said that preventing the participants from achieving that objective is tantamount to the imposition ... of a penalty.”

We find that Red 12 is not entitled to recover that part of its input tax which relates to the tax paid by the buffer traders, which, in any event, is not a matter of which there was any evidence before us.

77. We have already indicated our finding that the Commissioners were entitled to introduce the further evidence of David Taylor, Peter Birchfield and Andrew Letherby. We have also set out our findings with regards to the issue of delay. We are satisfied that in this case it is open to us to infer fraudulent behaviour in those deals where there is insufficient evidence of fraud by itself from those other deals where there is sufficient evidence, given the similarity of the parties, and also to infer importation from the EU on the basis of similar fact. We do not consider any of the matters raised should be referred to the ECJ by this Tribunal. We have found evidence of fraud in respect of all the deals as above at paragraph 20 , and it is only in respect of one deal that we have not been satisfied that there was sufficient evidence to establish that the goods had been imported from the European Union, as is required for the Commissioners to establish MTIC fraud. As this case was pleaded on the basis of it being an MTIC fraud and not fraud simpliciter, we allow the appeal in

respect of that deal, deal 32. Whether, given our finding that that deal was tainted by fraud, albeit not by MTIC fraud, the Commissioners choose not to repay the input tax to Red 12, is a matter for them.. In respect of all the other 45 deals the subject of this appeal, the appeal is dismissed and we direct that the Appellant pay the
5 Commissioners' costs of the appeal, such costs to be the subject of an assessment on the standard basis by a costs judge of the High Court in the absence of agreement between the parties.

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**MISS J C GORT
CHAIRMAN**

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