TC01967

Appeal number: LON/2006/0982 & LON/2007/400

VAT – MTIC – fraud in deal chains admitted – whether connection – whether knowledge or means of knowledge – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX

HARWICH GSM LIMITED **Appellant**

- and -

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

TRIBUNAL: Mrs B Mosedale(Tribunal Judge)
Mr H Adams (Tribunal Member)

Sitting in public at Field House, London WC1 on 18, 19, 20, 21, 22 25 & 26 July 2011 and in Bedford Square London on 7 September 2011 with written submissions in closing from Appellant on 28 September 2011 and reply from HMRC on 7 October 2011

Mr I Bridge, Counsel, instructed by Chinnery & Co, for the Appellant

Mr C Kerr, Counsel, and Mr J Walsh, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against the decision of HMRC to refuse repayment of input tax credits claimed by the Appellant ("Harwich") amounting in total to £11,762,634.80 arising in respect of 74 purchases made by Harwich in the periods 03/06, 04/06 and 05/06. The claims were refused by HMRC on the grounds that the purchases were connected with the fraudulent evasion of VAT and that the Appellant knew this or ought to have known this.

2. Before considering the law applicable to and the facts of this appeal, we deal first with some procedural matters.

Late application for disclosure

3. At both counsels' requests, it was agreed that closing would not follow immediately after the end of the evidence and we reconvened for closing in September 2011. At the hearing of closing submissions, Mr Bridge asked for and was given leave to make further written submissions in response to HMRC's written closing submissions produced at the hearing. We received those further written in late September but find they go well beyond responding to points made by HMRC in its written closing. Nevertheless, we have considered them because HMRC was given the opportunity to respond to them and did respond to them in October.

4. In those further written submissions, Mr Bridge applied for disclosure of "relevant policy material" in relation, we understand, to his allegation that HMRC had a policy "to deny the input tax of everyone in the industry".

5. Applications for disclosure should be made as early as possible in proceedings so that the material disclosed is well known to both parties in time for the hearing. An application made *after* the hearing has taken place would only be likely to succeed in exceptional circumstances where both there was an extremely good reason why the application was not made earlier and a very real likelihood of the material sought to be disclosed affecting the outcome of the proceedings. Applications allowed in any other situation would be likely to unfairly derail and disrupt the resolution of the proceedings.

6. We find that no reason was given by Mr Bridge why this application was only made *after* the hearing of the appeal and not even foreshadowed in his submissions at the hearing or at closing. There is no reason apparent to us why it should have been made so late.

7. Further, it is not explained why the information sought is thought by the appellant to exist. It is merely an allegation of the appellant's that HMRC had such a policy. Even if we were to read the application as an application for disclosure of HMRC's policy on extended verifications, whatever that policy was, it is not explained to us nor apparent to us why it is relevant or could have any affect on the outcome of proceedings in this Tribunal. The reason for this is as explained in paragraphs 119-129 below.

8. For these reasons, we refuse this application.

Allegation of non-compliance with directions

9. At the hearing the appellant's director, Dr Okposin, made a number of allegations that in 2005 and 2006 he had handed material to Mr Smallbone, the appellant's HMRC visiting officer, which had then not been disclosed to the appellant in the course of these proceedings.

10. Again in his written closing after the oral hearing for closing submissions, Mr Bridge alleged that HMRC failed to comply with an order of the tribunal given on 27 October 2009 to produce the trial bundles and evidence in relation to the First Curacao International Bank ("FCIB"). We assume that the allegation relates to the allegations made by Dr Okposin at the hearing.

11. It was agreed by the parties at the hearing that HMRC would immediately conduct a check of all documents held at Chelmsford (where Mr Smallbone worked at the time of the denial letter and where the papers were still held) to see if any of the documents held there had not been disclosed to the appellant. This resulted in the production of a new bundle F11 at the hearing.

12. However, it became apparent after this that many of the documents in F11 were actually already in the voluminous trial bundle and we find that the only things in F11 which were not already in the trial bundles were a few letters written by Mr Smallbone. One of these, for instance, was a standard form letter written in mid-2006 about HMRC's new record keeping requirements. None of the omitted documents were of any significance to our findings and we conclude that their omission was inadvertent.

13. The appellant was asked to be specific about what documents it alleged were missing. It did not produce a list. Nevertheless, at various times during the hearing Dr Okposin had claimed that there was an earlier version of a document, such as an earlier copy of the appellant's loan agreement with the Rev Field (see paragraph 156). For reasons explained below in paragraphs 316-317, we did not accept that any such documents existed and therefore we find that the only documents missing from the trial bundles were those few documents mentioned in the previous paragraph and which were of little relevance to the proceedings.

14. So far as the FCIB evidence is concerned, this was also served by HMRC. Apart from the FCIB statements disclosed with the witness evidence of Mr Mercer and Mr Loureiro, we are aware that some further disclosure was provided on CDs. We were not referred to the content of these CDs by either counsel but they were given to us at the start of the hearing as part of HMRC's disclosure. We are therefore not satisfied that HMRC failed to disclose the FCIB evidence. Nor do we see any reason why, if Mr Bridge was concerned that there had not been full disclosure of FCIB material, he waited until after the hearing was over to draw this to our attention.

15. He failed to make this allegation at the proper time and offered no explanation why it was made late. By making it so late it deprived HMRC of the chance to respond or the Tribunal to properly consider the matter. For these reasons we dismiss the allegations.

16. In parallel with HMRC's double checking its own disclosure, the appellant was requested to perfect its list of documents. This has never been done. As discussed below in paragraphs 176-192, we do not accept that the appellant had lost its business records in any event, so its failure to perfect its list is a serious matter. However, HMRC did not ask for any sanction in respect of this failure so we consider it no further.

17. In so far as Mr Bridge is alleging that there was deliberate non-compliance by HMRC, we dismiss it as we see no evidence of this. We do find there was some inadvertent and immaterial non-compliance by HMRC. As no harm was done, and because of the appellant's own failure to perfect its list of documents, we do not consider that any sanction is required by this Tribunal. So in so far as Mr Bridge is applying for a sanction (he does not make this clear) we dismiss the application.

18. We now turn to the law as it applies in this appeal.

Terms and expressions and description of MTIC fraud

19. This case is one of many in which HMRC allege that the transactions were connected to MTIC fraud. Many previous tribunals and higher Courts have given a description of MTIC fraud. We rely on the descriptions given by Burton J in *R (Just Fabulous (UK) Ltd) v HMRC* [2007] EWHC 521 at paragraphs 5-7; by Lewison J in *HMRC v Livewire Telecom Ltd* [2009] EWHC 15 (Ch) at paragraph 1 and by Floyd J in *Mobilx Ltd (In Administration) v HMRC* [2009] EWHC 133 at paragraphs 2-3.

20. The simple missing trader fraud is described by Lewison J in *Livewire* at paragraph 1:

> "[1.] VAT fraud is a serious problem for national taxing authorities throughout the European Union. VAT fraud can take a number of forms. The particular form of fraud with which these appeals is concerned is known generically as missing trader intra-community fraud or MTIC fraud. This is a description coined by HMRC, but is generally used by those who specialise in this area. Even this generic type of fraud can itself take different forms:
>
> i) In its simplest form it is known as an acquisition fraud. A trader imports goods from another Member State. No VAT is payable on the import. He then sells on those goods to a domestic buyer and charges VAT. He dishonestly fails to account for the VAT to HMRC and disappears. The importer is labelled a "missing trader" or "defaulter".

21. Although this is the simplest form of the fraud it depends on the defaulter having a genuine buyer willing to purchase the goods. There is a more sophisticated version of missing trader fraud where the fraudster does not have a genuine market into which he

can sell goods at the volume and price necessary to achieve the sorts of illegal profits he wants to make by failing to account for the VAT due. Lewison J describes this in his next paragraph:

> "ii) The next level of sophistication involves both an import and an export. A trader once again imports goods from another Member State. No VAT is payable on the import. Typically the goods are high value low volume goods, such as computer chips or mobile phones. He then sells on those goods to a domestic buyer and charges VAT. He dishonestly fails to account for the VAT to HMRC and disappears. The domestic buyer sells on to an exporter at a price which includes VAT. The exporter exports the goods to another Member State. The export is zero-rated. So the exporter is, in theory, entitled to deduct the VAT that he paid from what would otherwise be his liability to account to HMRC for VAT on his turnover. If he has no output tax to offset against his entitlement to deduct, he is, in theory, entitled to a payment from HMRC. Thus HMRC directly parts with money. Sometimes the exported goods are re-imported and the process begins again. In this variant the fraud is known as a carousel fraud. There may be many intermediaries between the original importer and the ultimate exporter. These intermediaries are known as "buffers". The ultimate exporter is labelled a "broker". A chain of transactions in which one or more of the transactions is dishonest has conveniently been labelled a "dirty chain". Where HMRC investigate and find a dirty chain they refuse to repay the amount reclaimed by the ultimate exporter."

22. A simple missing trader fraud relies on a genuine sale of goods into an open market. To commit the kind of sophisticated, organised missing trader fraud described above, however, the fraudster has to establish an artificial market. In this artificial market, the goods are bought and sold but there is no real market for the goods. For this type of fraud it is not even necessary for the goods to actually exist.

23. It is possible but not essential for this fraud to work for the goods (if they exist) physically to go round in a circle (which gives the fraud its name of carousel fraud) as it is obviously more efficient and makes more money if the defaulter re-uses the goods in artificial chains as often as possible. In reality, where the fraudster sets up a complex web of buffers and brokers, he may well use the same goods many times to commit the fraud but those goods do not necessarily pass through the hands of the same buffers and brokers more than once.

24. To create the necessary artificial market, the fraudster must organise a buyer at every step of the way: there is no genuine market. Third parties will not enter into the chain if they do not see a profit in it, so the fraudster must organise a sale at a profit for everyone who is to be a buyer in the chain. Logically it follows that the defaulter must ensure that the buffers and brokers do realise their profit: they will act as rational people and if they make a loss, they will not participate again. So if the fraudster wants to commit the fraud a second time with the same people, he must continue to organise every step of the transaction because there is no genuine market. As organising an artificial market must take effort, it is likely (but not essential) that the fraudster would use the same brokers and buffers again and again.

25. It will be important to the fraudster (even where the broker is entirely independent of the fraudster) that the broker recovers its input tax (or at least believes that he will) because otherwise the broker will not buy the goods. A method of protecting the broker's input tax reclaim introduced yet a further level of sophistication. This is also described by Lewison J:

> "iii) In order to disguise the existence of a dirty chain, fraudsters have become more sophisticated. They have conducted what HMRC call "contra-trading". The trader who would have been the exporter or broker at the end of a dirty chain, with a claim to repayment of input tax, himself imports goods (which may be different kinds of goods) from another Member State. Because this is an import he acquires the goods without having to pay VAT. This is the contra-trade. He sells on the newly acquired goods, charging VAT but this output tax is offset against his input tax, resulting in no payment (or only a small payment) to HMRC. The buyer of the newly acquired goods exports them and reclaims his own input tax from HMRC. Again there may be intermediaries or buffers between the contra-trader and the ultimate exporter. The fraudsters' hope is that if HMRC investigate the chain of transactions culminating in the export, they will find that all VAT has been properly accounted for. This chain of transactions has conveniently been called the "clean chain". Thus the theory is that an investigation of the clean chain will not find out about the dirty chain, with the result that HMRC will pay the reclaim of VAT on the export of the goods which have progressed through the clean chain. I should add that HMRC do not agree with the label "clean chain" because they say that both chains are part of an overall fraudulent scheme."

26. It is not essential for organised MTIC fraud, with or without contra-trading, that the buffers and brokers necessarily understand that they are not operating in a genuine market. Indeed it is the appellant's case that even if the transactions at issue in this appeal were connected to orchestrated fraud, its director was nevertheless at the time convinced its transactions were taking place on a genuine "grey" or secondary market for mobile phones.

27. HMRC allege that the transactions in this appeal are the organised sophisticated MTIC fraud.

Law

28. The European Court of Justice ("ECJ") ruled in *Axel Kittel v Etat Belge* (C-439/04) and *Etat Belge v Recolta Recyling SPRL* (C-440/04) in July 2006 that (paragraph 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 fraudulent evasion of VAT, it is for the national court to refuse that taxable person entitlement to the right to deduct."

29. The Court of Appeal considered this in *Mobilx Ltd (In Administration)* [2010] EWCA Civ 517. At paragraph 47 Moses LJ (giving the leading judgment) said:

> "…. the objective criteria which form the basis of concepts used in the Sixth Directive form the basis of the concepts which limit the scope of VAT and the right to deduct under ss. 1, 4 and 24 of the 1994 Act. Applying the principle in *Kittel*, the objective criteria are not met where a taxable person knew or should have known that by his purchase he was participating in a transaction connected with fraudulent evasion of VAT.

30. It was not in dispute that to succeed in their case, HMRC have to prove that, in respect of the all the deals at issue in this appeal:

- There was a tax loss;
- The tax loss resulted from fraudulent evasion;
- The deal was connected to that fraudulent tax loss; and
- The Appellant knew or ought to have known this.

Means of knowledge

31. What did the CJEU mean when it said in *Kittel* at paragraphs 56 & 59 that it is clear that a taxpayer who "should have known" his purchase was connected with the fraudulent evasion of VAT "must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud" and in these circumstances lose his right to deduct his input tax on that purchase?

32. Mr Bridge's submission was that "having any means of knowledge" means that Dr Okposin had to be able to ascertain that the goods in any specific transaction were connected to fraud. It is not sufficient to say that Dr Okposin should have suspected fraud: he had to have the means of knowing the suspicions were justified. Mr Bridge suggests that any trader in the mobile phone market in 2006 must have known it was likely that the goods it sold and purchased had been subject to a VAT default: but that was not enough.

33. Moses LJ in *Mobilx* said at paragraph 60:

> "The true principle to be derived from Kittel does not extend to circumstances in which a taxable person should have known that by his purchase it was more likely than not that his transaction was connected with fraudulent evasion. But a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion."

34. He also said at paragraph 52 that a:

> "taxpayer [who] has the means at his disposal of knowing that by his purchase he is participating in a transaction connected with fraudulent evasion of VAT he loses his right to deduct…"

and also that:

> "A trader who fails to deploy means of knowledge available to him does not satisfy the objective criteria which must be met before his right to deduct arises".

35. At paragraph 61 Moses LJ said:

> "If he [the taxable person] has the means of knowledge available and chooses not to deploy it he knows that, if found out he will not be entitled to deduct. If he chooses to ignore obvious inferences from the facts and circumstances in which he has been trading, he will not be entitled to deduct."

36. So we agree with Mr Bridge that it is not enough for HMRC to show that the appellant knew or ought to have known that its transactions were *probably* connected to VAT fraud: HMRC has to show that it knew or ought to have known its transactions *were* connected to VAT fraud. Mr Bridge accepts that a trader would have means of knowledge if he knew that the only reasonable explanation for the transaction in which he was involved was that it was connected to fraud.

Standard of proof

37. Mr Bridge accepts that the standard of proof is the civil standard of proof. We agree. In any event nothing turns on this. Our findings on knowledge and means of knowledge set out at the end of this decision notice are to both the civil and criminal standard.

38. We move on to consider the facts.

Were the transactions connected to fraudulent tax loss?

Admitted that all deal chains started with a defaulter

39. Before considering what the appellant knew or ought to have known, we consider whether HMRC has made out its case that the transactions were in fact connected to fraudulent VAT loss.

40. Mr Bridge accepted, and we find, that the supply chains as alleged by HMRC were accurate. We do not set out the 74 deal chains, but refer to them below when we consider the evidence for the allegation that the chains did not arise on the open market but were orchestrated for fraud.

41. Mr Bridge also accepted on behalf of the Appellant that all of its 74 purchases on which it claimed input tax traced back to a fraudulent default of VAT by a supplier earlier in these supply chains.

42. But Mr Bridge did not in opening accept that this meant that the Appellant's deals were *connected* to fraudulent tax loss as alleged by HMRC. We deal with this submission below but first comment briefly on the fraudulent tax loss. Each chain traced back to one of three companies who failed to pay VAT on the invoice on which they supplied the goods at the start of the chain: C&E Enterprises, Worldwide Enterprises and Computec.

43. We were presented with evidence in the form of unchallenged witness statements with exhibits from various HMRC officers. Officer Cole was employed in one of HMRC's MTIC teams and gave evidence about Computec. Officer Reardon was also employed in an MTIC team and gave evidence C&E Enterprises and Computec. Officer Gordon Smith was employed in carrying out extended verifications. He gave evidence about Worldwide Enterprises Ltd. Officer Robert Barallon was employed in one of HMRC's MTIC teams. He gave evidence about Computec. We accept this evidence and find as follows.

44. Although it initially filled 3 nil VAT returns, C& E Enterprises issued invoices charging VAT but did not return any of its sales, with an overall VAT liability of about £72million, on a VAT return and did not pay the VAT. While not every VAT default is deliberate, it is difficult to think of any reason other than fraud why a trader, making VAT free acquisitions from Europe as C&E Enterprises did, would register for VAT, issue VAT invoices and then fail to both return and pay its resultant VAT liability. Apart from the appellant's admission, we are satisfied that the default by C&E Enterprises was fraudulent.

45. Although it initially declared a very small turnover in 2005 on a VAT return, and made a small input tax reclaim in August 2005, thereafter Worldwide Enterprises, trading from an accommodation address, issued invoices charging VAT but did not make any VAT returns. Nevertheless, it issued VAT invoices on its sales and between 12 and 20 April 2006 generated an overall VAT liability of about £36 million on sales. It neither declared it nor paid it. From the evidence of release notes it acted as an acquirer and so was acquiring the goods VAT–free from suppliers elsewhere in the European Union. We are satisfied its VAT default was fraudulent: in these circumstances we can see no reason other than fraud why a trader would issue VAT invoices in respect of such financially large transactions yet fail to both declare and pay its resulting VAT liability.

46. Computec traded from an accommodation address. It only ever submitted nil VAT returns. Nevertheless it issued invoices on 16 days between 3 April and 9 May 2006 with a VAT liability of over £100 million. From the evidence of release notes it acted as an acquirer and so was acquiring the goods VAT–free from suppliers elsewhere in the European Union. We are satisfied its VAT default was fraudulent: in these circumstances we can see no reason other than fraud why a trader would issue VAT invoices in respect of such financially large transactions yet fail to both declare and pay them.

47. In conclusion, it was accepted and we find that the 74 chains of sales and purchases were as alleged by HMRC and that in each of them there was a fraudulent VAT default.

Meaning of "connection" to fraud?

48. As explained above, although he accepts fraud and the deal chains are proved, Mr Bridge asserts that a mere link to a fraudulent default on VAT through a deal chain is not "connected" to a fraud in the sense intended by the CJEU in *Kittel*. The example he gave to the Tribunal was that where the UK Customs authorities seize goods because they are part of carousel fraud and then sells them on the open market. He says a purchaser of those goods in no way is connected to the fraud although is dealing in the goods which were used for fraud. This is a bad example: so far as this Tribunal is aware HMRC does not, and does not have power to, seize goods which are suspected of being a part of carousel fraud let alone sell them on the open market.

49. Another point Mr Bridge made repeatedly was that in his view the wholesale market in mobile phones in 2006 was awash with phones on which VAT had been defaulted and innocent traders trying to trade in a genuine grey market could not avoid purchasing phones which had previously been the subject of a default. He pointed to Mr Stone's unchallenged evidence on behalf of HMRC that after the introduction of extended verification from mid-2006 the trade in mobile phones collapsed and did not revive on the introduction of the reverse charge. This indicates that perhaps as much as 95% of the previous "trade" had been driven by fraud. Mr Bridge points out that the three defaulters in the appellant's chain between them traded in phones worth over £1billion. He says the market was awash with phones on which VAT had been defaulted.

50. This is really the same point. Mr Bridge is saying there is no connection between the appellant's purchases and the earlier VAT defaults. The market was simply awash with phones which had been used for fraud and a genuine trader trading on a genuine grey market could not help but deal in them.

51. Mr Bridge's case is that there is no evidence that what the appellant did was any different to what anyone else did in the wholesale market for mobile phones in 2006. He says that the appellant had a very successful trading model based on low profit margin on high turnover which only failed because of HMRC's intervention.

52. Both these two points are really the same as Mr Bridge's point on connection. Mr Bridge is saying that it was chance that the appellant bought phones on which VAT had been defaulted: this does not (in his opinion) make the appellant's purchase connected to the default.

53. As we have already said there is a very real difference between an acquisition (or simple missing trader) fraud and one which is orchestrated (often referred to as carousel fraud although strictly the goods do not need to move in a circle for the fraud to work as explained above in paragraph 23). The difference is, as explained above at length in paragraphs 21-26, a simple missing trade fraudster sells the goods into the

open market whereas the defaulter in a organised MTIC fraud sells the goods into a organised chain and not the open market. It is essential for carousel fraud to work that there is a broker in that chain who will sell the goods zero rated. The profit for the fraudster comes from the fact that the broker will buy the goods at a higher gross price than he will sell them for: the difference is the VAT. The fraudster's take is therefore the VAT (less the profit margin each participant makes). The broker, innocent or knowing, will only enter into the transaction for a profit: it can only make a profit if the VAT it pays its supplier is recovered from HMRC. At root, therefore, although complicated, carousel fraud is a fraud on HMRC as it depends on VAT being repaid in circumstances where the transactions were orchestrated for the purpose of generating that VAT refund.

54. So is Mr Bridge right to say that the appellant's purchases, albeit in a deal chain which commenced with a default, were not thereby connected to fraud? That depends on two things:

(a) Firstly, is Mr Bridge right that as a *matter of law* that the appellant's transactions will only be "connected" to a fraud committed earlier in the deal chain (but not by its immediate supplier) if it is organised MTIC fraud and not merely acquisition fraud? and

(b) Secondly, as a *matter of fact* was this organised MTIC fraud as alleged by HMRC or only simple acquisition fraud?

What did the CJEU mean by "connected"?

55. So is Mr Bridge right on the meaning of "connected"? What did the CJEU mean when they said:

> "[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 fraudulent evasion of VAT, it is for the national court to refuse that taxable person entitlement to the right to deduct." (our emphasis)?

56. The two cases referred to the Court when it gave this answer (*Kittel* and *Recolta)* both involved organised MTIC fraud, and the question which the CJEU rephrased and asked itself was:

> "[27] By its questions, which must be considered together, the referring court asks essentially whether, where a recipient of a supply of goods is a taxable person who did not and could not know that the transaction concerned was part of a fraud committed by the seller, Article 17 of the Sixth Directive must be interpreted as meaning that it precludes a rule of national law under which ….that taxable person to lose his right to deduct that tax."

57. Here it is quite clear that the CJEU is contemplating an organised fraud where the appellant's transaction was organised by a fraudster and was therefore a part of the fraud. This is because the CJEU uses the phrase "the transaction concerned was part of a fraud" clearly referring to the taxpayer's transaction. And although the

conclusion itself at paragraph [61] does not make it explicitly clear that the CJEU intended to limit its comments to organised fraud of which the transaction at issue forms a part, nevertheless in its earlier explanation for its conclusion the Court said:

> "[56] In the same way, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.
>
> [57] That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice."

58. As this was at least part of the reasoning for the CJEU's conclusion, it seems they had in mind an organised fraud where the transaction on which input tax was refused was a part of the organised fraud because why else refer to "participant" and aiding the perpetrators? The broker's purchase and sale only aids the fraudsters if it is part of an organised fraud: it would be irrelevant to a person committing acquisition fraud higher in the chain.

59. Our conclusion is that although not all of the Court's comments were expressly limited to organised MTIC fraud, such fraud was the context of the case, and at least a part of the reasoning for their conclusion was based on the fact the transaction at issue facilitated the fraud. Therefore, we think the Court's use of "connection" was intended to reflect the idea that the appellant's transaction in some way facilitated the fraud.

60. However, reverting back to our second question above, it would only be essential for this Tribunal to take a definitive view on the actual meaning of "connection" as used by the CJEU if anything turned on it in this appeal. It is clear that where a transaction actually facilitates fraud in the sense that it is part of an overall orchestrated fraud, then it is connected to that fraud. It is intrinsically a part of it.

61. We therefore need to determine whether the fraud to which Mr Bridge has admitted a link through the deal chains was orchestrated and therefore clearly connected to the fraud. If, however we find that the fraud at issue in this case was a simple acquisition fraud, we would have to consider whether to refer the question on the meaning of "connection" to the CJEU.

62. So we move on to consider whether the fraud committed was simple acquisition fraud or organised missing trader fraud.

Were the deal chains orchestrated?

63. The appellant's position is that that it admits that on the basis of the banking evidence some of the 74 deal chains were orchestrated, but it does not specify which ones and does not in any event admit that all are. So we consider the facts in relation to all 74 of the deal chains to decide if they were orchestrated for the purpose of fraud.

64. It is also the appellant's case that even if any or all or the deals were orchestrated, the appellant did not and could not have known this and was itself the victim of the fraud. At this point in the decision, we are not considering knowledge or means of knowledge: this we consider in a separate section below starting at paragraph 117.

The witnesses

65. We had evidence from the appellant's visiting officer Mr Smallbone in the form of the deal chains that he discovered as part of his extended verification. We accept his evidence: this part of his evidence was not challenged. We also had unchallenged evidence from HMRC Officer Juan Loureiro and Officer Mercer

66. Officer Loureiro gave unchallenged evidence about money transactions he found on the Paris server of the FCIB at which all traders in these deal chains had accounts. Officer Loureiro only analysed 15 out of the 74 transactions. Officer Mercer also gave unchallenged evidence about money transactions he found on the Paris server of the FCIB. Officer Mercer only analysed 6 out of the 15 transactions analysed by Officer Loureiro.

67. Looking at the evidence, we found that it was not always easy to be sure of which of the money movements were related to other ones as the parties to the transactions had a tendency to split and combine sums of money. Nevertheless, even where it was difficult to be certain of which money movement related to another, we found that the same companies were involved and that this occasional uncertainty about the chain of money movements in no way detracted from our overall conclusion that the money moved in a circular fashion, starting and ending with the same company. For instance, the banking evidence in relation to deal 26 shows that there are payments by a company called Fluid to both Celcom and Freshnet and that both Celcom and Freshnet made payments at the same time to Harwich. We found that the actual route of the money in deal 26 was Fluid to Freshnet to Harwich. This is because Freshnet was Harwich's customer in Deal 26. The payment Fluid to Celcom to Harwich was much more likely to be in respect of another deal, such as deal 27, which took place on the same day but in which Celcom was Harwich's customer. Another example was deal 38. There seemed to be two possible routes for the money but either route involved payments from SL Computer to Fluid and from Fluid to Harwich's customer. Whichever route is right, both are circular.

68. In conclusion we accept the unchallenged evidence of both officers and consider their flow charts to be largely correct, but we have drawn our own conclusions. We have set this out below.

Circulation of funds

69. The money routes we found proved in these 15 deal chains are the ones given below. We found that the money chains in all 15 deals for which banking evidence was produced showed exactly the same circular pattern of payments with merely a few minor variations. The normal pattern was this:

Harwich is paid by its customer and…
Harwich paid its supplier and payments go back up the invoice chain to…
The defaulter who pays…
SL Computer who pays…
Fluid who pays…
Harwich's customer

70. Of the 15 chains for which we were presented with evidence, this chain of payments was shown in over half of the chains (deals 8, 9, 12, 25, 26, 32, 38, 40 and 45). Deals 29, 43, 65 and 67 show the same pattern except a Mr Alagu Muthusamy stood in the shoes of the defaulter. In other words the Line 1 buffer paid A Muthusamy rather than its supplier, and Mr Muthusamy paid SL Computer and the chain of payments continued as before. Deal 68 shows the same pattern as the normal pattern except that a company called Excelsius stood in the shoes of Fluid (it was paid by SL Computer and paid Harwich's customer). Lastly, deal 2 followed the same pattern except that a company called Europe Communication was interposed between SL Computer and Fluid. We refer to Europe Communication again below in paragraph 89 in a different context but one which shows it was connected with the supply of the goods.

71. Apart from all 15 chains showing virtually the same circular pattern of money movements, we also found that in some cases the money did not in fact flow up the invoice chain. This was the case in deals 29, 43, 65 and 67 because Mr Muthusamy was paid in place of the defaulter (in some cases Worldwide Enterprise and in others Computec). In addition, in deal chains 9 and 38, Xytel (alleged line 2 buffer) paid Stylez instead of Anderson Consulting (both alleged line 1 buffers) which was the company which made the supply to Xytel according to the invoices. In deal 40 the "wrong" defaulter, C&E Enterprise, was paid by Trade Eazy. Trade Eazy should have paid Worldwide Enterprise which was the company which, according to the invoice, had made the supply to it.

72. We therefore find as a matter of fact that in all 15 of the analysed money chains, the money moved in a circle. Not only that but beyond the invoice chain the same companies were involved in the same order. The appellant offered no explanation for this: indeed Mr Bridge accepted that it was suggestive of orchestrated MTIC fraud. We find that it is proof that all 15 of these transactions were orchestrated for the purpose of MTIC fraud as we can think of no other explanation why the money would move in such repetitive circles.

73. We had no evidence of the chain of payments in the remaining 59 deal chains. However, on the basis that they involved the same traders in the invoice chains we

consider it considerably more likely than not that they would also demonstrate the same circularity of payments involving the same mysterious entities, SL Computer, Fluid and Mr Muthusamy.

74. In conclusion, we find that there were circular flows of money in all 74 chains. This would not happen in a normal trading situation: one company would not be constantly buying back goods it had only just sold. On the other hand, if this is organised MTIC fraud as described above in paragraphs, the circular movements of money make perfect sense. We find that all 74 deal chains were part of an organised fraud. As they all involve the same group of companies, we also find they were all part of the same organised fraud.

75. We go onto to consider whether any of the other evidence supports or detracts from this conclusion. We find as follows.

Limited number of defaulters

76. In March 2006 Harwich conducted 28 deals all of which traced back to the defaulter C&E Enterprises. In April 2006, Harwich conducted 35 deals, the first 17 of which traced back to the defaulter Worldwide Enterprises. Harwich's next 29 deals (in April and May 2006) traced back to the defaulter Computec.

77. Mr Bridge's case is that this was a genuine market awash with phones on which fraudsters had earlier failed to pay VAT. If he was right, it would be a remarkable coincidence that Harwich bought phones in blocks that happened to originate with the same fraudster because in a genuine market no one would be exercising any kind of overall control over who bought and sold the phones. The fact that this clear pattern of successive purchases tracing back to the same defaulter suggests someone was directing the chain of transactions and that there was not in fact a genuine market.

78. Not only that, we find that the defaulters succeeded each other when the previous defaulter was deregistered: C & E was deregistered on 1 April 2006; Worldwide was deregistered on 19 April. So far from appearing to be chance, it seems that there was a guiding hand which substituted into the supply chains a new defaulter as soon as the previous one was deregistered.

Patterns in chains

79. We also found patterns in the invoice chains which we find demonstrate that the chains did not arise by chance. All 74 invoice chains were in the pattern indicated below:

Defaulter	C & E Enterprises then Worldwide Enterprise then Computec.	who sold to….
Line 1 buffer	Anderson or Stylez or Trade Eazy or Hexamon or First Associates or	who sold to …

	Global Access	
Line 2 buffer	Global or Euro Asia or Xytel or MP3	who sold to …
[line 3 buffer – 14 deals]	Cell Express or TM Global or Zain	[who sold to ….]
UK dispatcher	Harwich GSM	who sold to….
EU customer	Cellcom or Freshnet or MS Enterprises	

80. While we accept that it is part of normal commerce for supply chains to become established, such as a manufacturer supplying approved distributors, who in their turn supply wholesalers who in their turn supply retailers, this is clearly not what happened here. No one had a role other than to buy and sell: no one bulk purchased stock, stock was not split but sold rapidly down the chain with a slightly increased price at each level. No one was a manufacturer or authorised distributor. On the contrary it was the appellant's case that it was trading in a commodity on an open, grey market. In such a market trading should have been more random.

81. So we do not consider that this pattern arose by chance or through normal commercial relationships.

Mark-up of alleged buffers

82. We find that the mark up on the goods by the intermediate traders were in round units of 10, 20, 25, 30, 35 or 50p per unit irrespective of the price or quantity of goods being sold. Over 83% of the mark-ups were either 20 or 25p per unit; in over 50 of the 74 deals the mark up for the first buffer was 20p per unit, and 25p per unit for the second buffer.

83. We find such repetitious but low mark ups suggestive of organisation because we think it extremely unlikely that it could arise by chance. And where the profit margin is very low in a genuine market we would expect to see the occasional loss: the lack of any losses suggests organisation. The repetitious low profits are also suggestive of fraud because it makes little sense for traders to deal in such very valuable commodity for such little return unless they truly were taking absolutely no risk and everything was prearranged.

Back to back trading

84. In all but one of the 74 deals the same stock in the same quantity was sold down at speed through the supply chain. All the invoices were raised on the same day. The stock always remained at the same freight forwarders through the deal chain up until it was despatched by the appellant. No one in the supply chain broke bulk, added any

value to the goods or took the risk of being left with stock. But they were always able to make a steady low profit for doing little more than issuing the paperwork.

85. We consider that the likelihood of this happening regularly or at all in a real market seems vanishingly small. It strongly indicates to us that none of the transactions in the supply chains were on the open market.

Consistent prices

86. The prices paid by the Appellant were very consistent. The same mobile phone handset was sold to the Appellant for the same price by *different* suppliers on *different* days. Yet the open market, if it existed, was a grey market outside control of the manufacturer, trading on the margins around the edge of the 'authorised' market. Prices should have shown some volatility.

87. The appellant's case is that the volatility was ironed out because everyone traded on the IPT website and prices were known to all. But this makes no sense either: it fails to explain why the prices increased along the chain (eg a line 2 buffer always paid more than a line 1 buffer) and it fails to explain why a trader near the end of the chain did not try to cut out the middle men and buy direct from the traders earlier in the chain as it would have been able to identify them from the IPT website.

88. We find the consistent prices paid at the same level of the deal chain, combined with the variously lower prices paid by buffers earlier in the chain, is strongly indicative that this was not trading on the open market.

Irrational trading model

89. We find the defaulters acquired the goods from the European Union (normally Europe Communication OU in Estonia). We make this finding based on the evidence of the release notes. In any event it follows that there must have been a VAT-free acquisition else the VAT default would not have been worthwhile. The goods were then traded rapidly – normally within 24 hours – down a chain of alleged buffers to the appellant. The appellant despatched the phones to one of three customers in the European Union.

90. It follows that if all these transactions were taking place on a genuine market, the appellant's customer could have sourced the phones much more cheaply on the continent. By buying them from the appellant it was buying phones at prices which included not only the buffers' small profits, the larger profits of the appellant, and the appellant's and the defaulter's freight charges over to the UK and back to the continent. This is irrational. And whereas goods might follow a commercially irrational route on an occasional basis, it is stretching coincidence that it should do so 74 times and in every single one of the Appellant's deals at issue in this appeal, which were in fact every single deal conducted by the Appellant in that period.

91. The trading model was also irrational in the sense that there were simply many more intermediate traders than would be expected in a commercial deal chain. None

of the traders in the chain were manufacturers, authorised distributors, network operators or mobile phone retailers: the claim of the Appellant is that they were commodities dealers in a grey market. Yet a grey market operates rationally and traders would seek out the best deal. The appellant agreed that all traders were registered on the IPT website: rational traders would have registered on this and sought out the traders at the start of the chains. Instead the chains comprised many dealers who, as we have already commented, bought and sold back to back with no risk yet making a profit. Market forces would have meant, on the contrary, very short chains. Indeed, market forces (were it a genuine market) would have cut out all the UK traders. The fact that the long chains were a constant feature of the Appellant's 74 deals is strongly indicative that they were not driven by market forces.

92. Mr Bridge suggests it was rational for the alleged buffer traders to ignore the possibility of more lucrative sales to Europe: it was he says much easier to sell in UK and avoided transport and insurance costs. We do not agree. Firstly, this looks only at whether the buffers were acting rationally and does not look at the overall picture that it was irrational for the alleged buffers to be offered the goods at all. Why should the goods come into the UK? Secondly, even looking at the buffers' position by itself, were this a genuine market they would not be acting rationally. Based on the appellant's freight and other costs, these were were not enough high enough to make a broker prefer a profit of 50 per phone rather than a profit closer to £5 per phone. The only reason we can see for the buffers acting in this manner was that this was not a genuine market and they were inserted by a guiding hand to play a small part in the fraud.

93. We find it was also irrational for the defaulter to import the goods into the UK: acting rationally it would not have incurred unnecessary freight charges. Yet these goods clearly were not suitable for sale on the UK market as they had 2 pin chargers. And while the appellant points out that chargers could be changed, it is nevertheless a fact that none of the phones were in fact sold in the UK but re-exported to the continent. Whether with modifications they could have been sold here, clearly they were not intended to be sold here. We find the importation into the UK was irrational and therefore strongly suggests that the motive for the importation was not commerce but fraud.

Location of goods

94. The goods were always stored at Pauls Freight in the UK and always shipped to same freight forwarders on the Continent irrespective of location or identity of the buyer. Mr Bridge says that by itself this is not evidence of fraud: the appellant merely carried out its buyers' instructions. Our finding is that it is stretching coincidence that the appellants' customers, two in France and one in the Netherlands would, if truly independent of each other, choose to use the same warehouse near Paris; and stretching coincidence that no matter which of the appellant's seven suppliers supplied the goods they had always been imported into the same warehouse in the UK.

95. While not by itself determinative of overall fraud, it strongly suggests that all the traders in these various deal chains were not acting independently of each other and on a genuine open market but were acting in concert and controlled by a guiding hand.

Inadequate deal documentation

96. We find that the deal documentation was not as we would expect to be entered into by companies who considered themselves to be acting in a genuine commercial market and at risk if things went wrong. For instance, most the invoices do not have detailed specifications of the phones: most do not record if the phones have a warranty, what type of charger and battery was included, the language of handset, the script of keypad, the language of manuals, the colour of handset, and whether the phone is new or used. Some do not even specify whether the phone is SIM free (in other words, whether it is tied to a particular network). Except in a very few cases there are no contracts dealing with vitally important issues such as the passing of title, liability for risk, terms of payment and return of faulty goods.

97. Mr Bridge's submission is that the Tribunal is unable to take a view on whether such contractual terms are unusual or indicative of trading not being on a commercial basis unless we have expert evidence of what the norm is in the grey market for mobile phones.

98. We do not agree. It is for the Tribunal to determine whether the matter on which it is being asked to make a decision is a specialist one on which it would require expert evidence. We are entitled to take judicial notice of matters which do not require specialist knowledge. Tribunals do not exist in some kind of vacuum without the common knowledge of ordinary persons.

99. We take judicial notice of the fact that people do not ordinarily act against their own interests and that in matters of trade people dealing on the open market deal at arm's length. Whereas some of the specifications of a mobile phone might not affect its value but only its marketability (eg the type of charger) other matters do affect the value of the phone (eg whether SIM-free, whether there is a warranty). A failure to specify such vital matters in the written contract suggests therefore that the deal was not at arms' length.

100. It is the appellants' case that its transactions were on the open market: yet from the evidence from contractual terms of the deals chains is we find that the deals made by other persons in the chains were not at arms length and were therefore not ordinary trading on the grey market. The only explanation for these long deal chains without the normal specification of goods that would be expected in invoices for deals negotiated at arms' length transactions is that they were organised by a guiding hand committing VAT fraud. Whether the appellant knew or should have known of this is something we deal with in the later part of this decision notice.

Buffers no longer exist

101. All the buffers have since been deregistered for VAT. In most cases the de-registration was shortly after the deals in this appeal took place. While in business suppliers come and go, HMRC's case is that it is unlikely in a real market that all suppliers would find business unprofitable at the same time.

102. We note that it is well known that input repayments to many brokers were withheld by HMRC at about the time of the deals in this appeal and therefore that brokers ceased to buy: this is a likely explanation of why the buffers de-registered. There was no more business. However, accepting that as an explanation means accepting that the buffers' business depended on sales to brokers: that means accepting (at the least) that there was no UK market for the goods. If this was the case, why were the goods sold to and from so many buffers within the UK before being sold to a broker? It makes no commercial sense.

103. Either there was a real market for the goods within the UK in which case it is surprising that all the UK buffers chose to cease operating at about the same time: or there was no such market, in which case why were there so many UK to UK sales? If the real market was on the continent one would expect to see sales direct to the continent and not through 4 or 5 buffers each taking a slice of the profit to be had.

Few trading days

104. Although of less significance, it would be unexpected were this a genuine market for the trading to be concentrated as it was in this case on a few days. For instance, in March 2006 all the deals took place on only 3 days, all near the end of the month.

105. Dr Okposin's explanation for why Harwich only traded near the end of the month was that it could only afford to do so once it had received its VAT repayment. Nevertheless this is no explanation of why all the trading in this appeal took place on only 7 unconsecutive days.

Profit margins should total 17.5%

106. In written closing after the hearing of oral submissions, Mr Bridge submitted that HMRC would be unable to demonstrate that there were MTIC fraud unless the profit margins earned by the buffers and brokers totalled 17.5% of the price of the goods. We reject this. Contrary to Mr Bridge's submissions, the reverse is more likely to be true.

107. Except in circumstances where the broker is funded by the fraudster, the "profit" to the fraudster from the fraud will be the 17.5% VAT defaulted on by the defaulter. However, this profit is reduced by the profit made by any buffer or broker because it reduces what the defaulter gets back as the price of the goods bearing in mind the object of the fraud is to get the broker to pay more for the goods than it receives.

108. So in a case where the broker is a third party to the fraudster, if the combined profit of the buffers and brokers exceeded the 17.5% VAT defaulted on by the

defaulter, this might indicate (a) there was no fraud (b) or there was collusion between any or all of the broker and buffers and the fraudster. In this case, the profit of the alleged buffers and brokers in total did not amount to a sum even close to 17.5% of the VAT defaulted upon. Therefore, there is no reason to doubt our finding based on all the other evidence that the deal chains were indeed part of an orchestrated MTIC fraud.

Conclusion

109.The FCIB evidence alone, proving as it does circularity of funds, we find proves that the transactions did not take place on the open market but were part of an organised MTIC fraud.

110.The rest of the evidence to which we have referred above also proves the same. There is no other explanation for the long, irrational deal chains through the UK for goods originating and ending on the Continent; no other explanation for the repetitive patterns in the chains and the small consistent and repetitive profit margins for the alleged buffers, the lack of specification on the invoices, the back to back trading at no risk and the short time in which the many transactions took place. On this evidence alone, irrespective of the FCIB evidence, we would find all 74 deals chains were predetermined to facilitate fraud and did not take place on the open market.

111.Both the evidence of the invoice chains themselves, and separately the evidence of the money movements lead to exactly the same conclusion. There can be absolutely no doubt whatsoever that all these chains were orchestrated for the purpose of a VAT fraud on the UK Government.

112.As we have found as a matter of fact that all the purchases and sales at issue in this appeal made by the appellant were part of an orchestrated MTIC fraud, we do not need to refer to the CJEU a question on whether "connected" would include a connection to a mere acquisition fraud. This was not acquisition fraud; and it is clear from *Kittel* that "connected" includes connection to organised MTIC fraud.

113.We do not know whose was the guiding hand which organised this fraud: the various companies which make a repeated appearance in the money chains, such as SL Computers, were no doubt controlled by the fraudsters. But we are not asked to identify the fraudster. The question for this Tribunal is whether the appellant knew or ought to have known that his purchases and sales were connected to fraud.

Were Harwich's other 13 deals part of the same fraud?

114.It was also alleged by HMRC that the 13 buffer deals undertaken by the Appellant in June 2006 were part of the same fraud. These deals form no part of this appeal: the input tax was repaid by HMRC in the sense that the appellant offset it against its output tax and HMRC has not assessed to reclaim it. Nevertheless, HMRC do allege that these deals were part of the overall orchestrated fraud. They rely on the following evidence in making this allegation:

- In all 13 deals the Appellant sold to a broker who sold the goods abroad. In 11 of these 13 sales, the broker made a margin of 2%. The Appellant's margin in the 74 deals which are at issue in this appeal was also 2%. HMRC thinks it would be stretching coincidence too far for this to have happened by chance.

- In 6 of the chains the supplier is Fluid Trading, who is also features frequently in the banking evidence in the 15 chains that were sampled of the 74 chains at issue in this appeal;

- In 9 of the chains the EU customer is either M S Enterprises or Freshnet, which are two of the Appellant's customers in the 74 deals which are at issue;

- In all 13 of the supply chains the broker used the same bank, same freight forwarder and sent the goods to the same address in France. It is stretching coincidence, says HMRC, that this could all have happened by chance.

- Lastly but not least all 13 of these deals, say HMRC, were in fact connected to fraud in that they all trace back to a countra-trader.

115.We agree with HMRC for the reasons given above that these 13 deals were also connected to MTIC fraud. This has only minor significance for this appeal which we revert to in paragraph 311.

116.Having found that all 74 purchases on which the appellant reclaims its input tax were connected to fraudulent evasion of VAT, we move on to the question whether the Appellant knew that its transactions were connected to fraud or whether the Appellant ought to have known this.

Appellant's knowledge or means of knowledge

HMRC's conduct

117.The appellant's case, in part, is that HMRC's conduct is to blame and that this impacts on the application of *Kittel* to this case. In summary, HMRC is criticised for the following reasons:

- It is alleged HMRC acted unlawfully by seeking to disrupt the wholesale market in mobile phones;

- HMRC had an unlawful change of policy in 2006 which put the appellant out of business.

- HMRC acted unlawfully because they targeted the brokers and not the buffers;

- HMRC knew of the extent of the fraud in 2006 and failed to alert the appellant to the full risk;

- HMRC's decision to refuse to repay the appellant's input tax was flawed;

- HMRC knew of the extent of the fraud in 2006 and failed to put an end to the fraud.

- HMRC is using the appellant as a scapegoat.

118. We deal with each allegation in term.

Disruption of mobile phone trade

119. The appellant suggested that HMRC had acted unlawfully to disrupt the mobile phone trade. Apart from refusing to repay the appellant its input tax claims, it was not disputed that Mr Smallbone had verbally advised the appellant in January 2006 "not to enter into these deals" and in a letter written on 28 February the appellant had been advised that if the appellant continued to enter into these deals HMRC would consider it to have knowledge its transactions were likely to be connected to fraud.

120. We have found that all the deals at issue in this appeal were orchestrated for the purposes of fraud and were not genuine deals on a genuine market: therefore, the advice given by Mr Smallbone was entirely accurate. The only way the appellant could have avoided the fraud was not to have entered into the deals which it did. Mr Smallbone cannot be criticised for such advice: the question is whether the appellant should be criticised for not taking it. We deal with this below when we consider knowledge and means of knowledge.

121. In conclusion, by refusing the appellant's input tax repayment, HMRC clearly did prevent the appellant continuing to enter into the sort of deals it had been participating in: but that did not disrupt mobile phone trade as these deals were artificially generated. There is no evidence, therefore, that HMRC unlawfully disrupted any genuine trade. In any event, we are not undertaking a judicial review of HMRC's conduct. If the appellant considers that HMRC have acted unlawfully it should have taken its complaint to the High Court.

122. Whether it was correct for the HMRC to refuse the repayment, however, depends not merely on the trade being fraudulent, but whether the appellant knew or ought to have known it was fraudulent. We consider this from paragraph 148 onwards.

(a) Unlawful change of policy in 2006

123. It is well known and certainly something of which we take judicial notice that HMRC did change its policy in early 2006 such that it would no longer make repayments to alleged brokers before it had carried out extended verification. We see nothing in this policy that was unlawful.

124. The appellant's allegation, made in its written closing is that HMRC had a policy to refuse input tax repayments to all traders in the wholesale mobile phone market after extended verification irrespective of whether HMRC considered that the trader knew or ought to have known of a connection to fraud. Had HMRC done this it may well have been unlawful.

125.However, there is no evidence in front of us on which we could reach a conclusion that this allegation was justified. Mr Bridge's case is that Mr Smallbone's advice to Harwich, recorded in his notebook, see paragraph 216, that Harwich should stop trading, is evidence of this unlawful policy. We cannot agree. Mr Smallbone's advice was that the Appellant should stop entering into the sort of deals it did. As we have found that all of Harwich's deals were orchestrated for the purpose of fraud and did not take place on an open market, Mr Smallbone was proved to have given entirely correct advice. Giving that advice is not evidence of unlawful policy.

126.On the contrary, Mr Smallbone, when he denied the Appellant's repayment of input tax, did so in a detailed letter setting out why he considered the appellant knew or ought to have known of the connection to fraud. Whether that was the right decision is the one that this Tribunal is called on to decide for itself.

127.In any event, as we said above, we are not undertaking a judicial review of HMRC's conduct. If the appellant considers that HMRC have acted unlawfully it should have taken its complaint to the High Court. It makes no difference to the question this Tribunal has to answer which is whether the appellant knew when it entered into its transactions to buy and sell mobile phones that it was entering into transactions connected with fraud.

128.If it is our finding that the appellant did not know and should not have known that its transactions were connected to fraud, then it would follow that HMRC were wrong to withhold the input tax at issue in this appeal. The appellant would be entitled to repayment of the input tax with interest. It might also be able to seek damages from HMRC, although it might be difficult for the appellant to show that HMRC's actions in withholding the input tax put it out of business given our finding above that its "business" was artificially generated by a fraudster for the purpose of MTIC fraud.

129.But if our finding is that either or both the appellant did know or should have known that its transactions were connected to fraud, then it follows that HMRC were right to withhold the input tax and the appellant cannot complain that by doing so HMRC effectively prevented it from trading.

(b) Targetting brokers and not buffers

130.As we said above, we are not undertaking a judicial review of HMRC's conduct. If the appellant considers that HMRC have acted unlawfully it should have taken its complaint to the High Court. Whether HMRC targeted brokers in preference to buffers makes no difference to the question this Tribunal has to answer which is whether the appellant knew when it entered into its transactions to buy and sell mobile phones that it was entering into transactions connected with fraud.

131. In any event, it seems obvious to the Tribunal that HMRC as a public body must act in the interests of the taxpaying public as a whole. Where it has good reason to suspect that the input tax is not repayable, it should not repay it. This is not to say that in respect of the same deal chain, it should also pursue the alleged buffers for repayment of input tax already repaid by offset with output tax. Apart from questions

of whether the buffers have the right to offset their output tax liability, it seems likely that the buffers were men of straw inserted into the deal chain by the fraudsters and it must be unlikely they could pay any assessment. Pursuing them would likely cost considerably more than would be gained.

132.The appellant says that although it received joint and several letters, the alleged buffers in the same deal chain did not receive them. We do not find that the appellant, were it relevant, had made out its case on this. Mr Smallbone's evidence was that he had informed the officers responsible for the traders in the same chain that he had issued a joint and several letter to the appellant: the only evidence that these other officers had not taken similar action was Dr Okposin's hearsay evidence that his suppliers told him that they had not received such a letter.

133.We do not accept this evidence. Firstly, as explained below, we found Dr Okposin to be an unreliable witness and in any event he claimed this was said to him at meetings we have found did not take place (see paragraph 226). Secondly, even assuming Dr Okposin accurately reported his suppliers' denials, we have no reason to suppose that they would have been truthful with Dr Okposin. Whether or not the suppliers knew they were participating in an artificial transaction chain generated for fraud, they may not have been keen to admit to a customer that HMRC considered their supply chain flawed. Thirdly, it was for the appellant to call witnesses on whose evidence it relied, and it chose not to call its suppliers.

134.Our conclusion is that the appellant has not made out its claim that its suppliers did not receive joint and several liability letters in respect of the same deal chains as it did. It has therefore not made out its case, were it relevant, that it was treated differently to its suppliers. In any event, as we have said, we are not conducting a judicial review of a public body and this is not relevant to the question we are called to decide.

(c) HMRC should have warned the appellant

135.It is an allegation of the appellant's that HMRC knew the scale of the fraud in early 2006 and failed to warn the appellant of it. We discuss the extent to which the appellant was warned below in paragraph 213-243. In summary the appellant was told that ceasing to carry on the sort out of deals it did was the only way to avoid the fraud and it received many letters telling it that its previous trading had been traced back to fraud; and it was told no future repayments would be made without extended verification. We find it cannot claim that it was not warned of the full extent of the fraud.

136.In any event, even if such an allegation was made out, it would have no relevance to the question of whether the appellant *knew* it was participating in transactions connected to fraud: if it knew it was participating in transactions connected to fraud it cannot be heard to complain that HMRC did not warn it of what it already knew.

(d) HMRC's decision to refuse to repay appellant was flawed

137. Whether HMRC's decision to refuse to repay the appellant was right is the question we are called on to decide. We will find HMRC's decision to be wrong unless HMRC can satisfy us that the appellant knew or ought to have known that its transactions were connected to fraud.

138. The appellant considers that Mr Smallbone's decision to refuse input tax repayment was flawed. Mr Bridge says, for instance, that Mr Smallbone failed to consider the appellant's response to the joint & several letters (see paragraph 217-227 for more details on this), and suggests Mr Smallbone might have reached a different decision had he taken this into account.

139. Whether or not Mr Smallbone took everything into account which he should have done, or whether he might have reached a different decision had he done so, is entirely irrelevant to this Tribunal. We are not conducting a judicial review of Mr Smallbone's decision. We are deciding afresh whether it was the right decision, taking into account all that is known at the time of the hearing and irrespective of the state of Mr Smallbone's knowledge at the time of the denial letter.

(e) HMRC should have put an end to the fraud

140. It is an allegation of the appellant's that HMRC knew the scale of the fraud in early 2006 and failed to put an end to it. As we have said, this Tribunal is not undertaking a judicial review of HMRC's conduct. If the appellant considers that HMRC have failed to act properly, it should have taken its complaint to the High Court. It makes no difference to the question this Tribunal has to answer which is whether the appellant knew when it entered into its transactions to buy and sell mobile phones that it was entering into transactions connected with fraud.

141. In any event, we were not presented with evidence from which we could conclude that HMRC knew at the time the scale of the fraud in 2006 and/or acted improperly in response to its knowledge. We were not told by what means the appellant considered that HMRC failed to use powers that it had to bring trading to an end other than it should have got an injunction on unspecified grounds: Mr Bridge describes HMRC in his written closing as "the market regulator" but of course HMRC is not. It is a tax collecting body. Were we called to reach a conclusion on this (which we are not), we would conclude that the appellant had not made out its case.

(f) Market awash with phones

142. Mr Bridge suggests that the appellant cannot be blamed for buying phones on which VAT had been defaulted as the market was awash with them and the only real way it could have avoided the fraud was by ceasing to trade. The implication of what Mr Bridge says is that neither HMRC nor this Tribunal could consider the appellant to have acted improperly because it did not cease to trade.

143. We disagree. If the appellant knew or should have known that the deal it intended to enter into was connected to fraud, it should not have gone ahead. It is no

defence to say that such a decision would mean it had no business. If its entire business in the months at issue in this appeal was part of an orchestrated fraud (which we have found it was) then, if it knew this, the appellant should have ceased to trade.

(g) HMRC is using appellant as a scapegoat

144.Mr Bridge's case is that HMRC failed to stop the fraud, failed to identify and recover the money from the defaulting traders and is using the broker as a scapegoat.

145. Although Mr Bridge does not specify his complaint more exactly, it seems to be a complaint that the appellant has been discriminated against because HMRC has chosen to refuse to make its repayment but has chosen not to pursue the defaulters.

146.As we have said, such a complaint is for judicial review and not one that we have jurisdiction to entertain. In any event we consider that as a matter of public law, if HMRC consider that they have prima facie evidence that the appellant knew or should have know of the connection of its transactions to fraud, then it must refuse to repay the tax to the appellant. However, at the same time, if the defaulting companies were empty shells, without money and inserted into the chain by fraudsters to commit fraud, as seems likely, doing anything other than what HMRC has done (de-register and assess them) would be a waste of time and resources and not something HMRC would be required to do under public law. Mr Bridge presented no evidence that the defaulters were anything other than without assets, so even if we were able to entertain this complaint (which we are not), it is not made out.

Conclusion

147.Our conclusion on the appellant's allegations about HMRC's conduct is that they are not made out and irrelevant to the question in front of this Tribunal. The one exception to this is that we will of course consider whether the appellant was misled by HMRC as this is relevant to the appellant's means of knowledge and we consider this in paragraph 238-243 below.

148.We move on to consider the appellant's knowledge and means of knowledge of the connection of its transactions to fraud. First, we consider the witnesses who gave evidence on this issue.

The witnesses

Officer Michael Wright

149.Mr Wright was the visiting officer for the appellant between February and July 2005. His evidence was not challenged.

Officer James Smallbone

150.Mr Smallbone was an HMRC officer. When he joined an MTIC team in mid-2005 responsibility for checking the Appellant's repayment claims was allocated to him.

151.His evidence was largely the documents exhibited to his witness statement the accuracy of which was not challenged. One question for the Tribunal, however, was whether his notebook entry of a telephone conversation with Dr Okposin on in February 2006 was accurate. We decide that it was accurate in our paragraph 228-232 below.

152.Although it was not put to Mr Smallbone, in his final written closing after oral submissions, Mr Bridge alleges that Mr Smallbone was biased against Dr Okposin because Dr Okposin had made an official complaint against Mr Smallbone although that complaint had not been upheld. Such allegations should be put to a witness so that they can respond to them. The Tribunal should not consider allegations of untruthfulness or bias if the witness is not given a chance to comment.

153.So we do not consider that this allegation was made; in any event we saw nothing to substantiate it in our observation of Mr Smallbone. We considered that his answers overall were careful and considered, despite a careless error in his witness statement which we mention in paragraph 229 below. We preferred his evidence to that of Dr Okposin for the reasons explained below in relation to Dr Okposin.

154.Mr Bridge challenged Mr Smallbone's evidence that at first in 2005 when he started checking Harwich's claims he was principally looking at export . Mr Bridge put it to him that he was actually principally looking for connection to defaults. Mr Smallbone denied this and explained that at that time HMRC had 30 days to verify a claim so they just looked at export documentation and purchase invoice and payment evidence. Verification of the chain was done after repayment. The evidence backs Mr Smallbone up on this. It was clear repayments were made before verifications in 2005.

Reverend Jeremy Field

155.Mr Field is a curate in the Church of England. He met Dr Okposin when they both worked together at the British Commonwealth Council and they became friends. They kept in touch and Mr Field visited Dr Okposin at the appellant's premises. He said he knew that the business was going very well and offered to loan money to Dr Okposin.

156.In total he loaned £155,000. He loaned the money in three tranches: we find that the first two loans were made before the date of the written loan agreement in evidence before us. Dr Okposin said that there was an earlier loan agreement. This contradicts Mr Field's evidence. As we found Dr Okposin to be an unreliable witness (see below), and as no such agreement was produced, and for the reasons explained in paragraph 176-192 we do not consider that Dr Okposin did lose access to the

appellant's papers, we prefer Mr Field's evidence on this. So in conclusion we find Mr Field's first two loans were made without a written agreement.

157.Mr Field's evidence was that in his opinion Dr Okposin was entirely honest. Indeed, we are sure that Mr Field trusted Dr Okposin as presumably he would not otherwise have loaned the money without even a written loan agreement.

158.It was not in dispute that when the loan was made in 2005 the rate of interest on it offered and paid by Dr Okposin was 10% a month. This reduced to 6% per month in 2006. In total, in a few months Mr Field received *in interest* an amount which was only about £30,000 short of the amount of his loan. Thereafter, as HMRC refused to refund the appellant's input tax claims, no payments of interest or repayment of capital have been made by the appellant. Mr Field's evidence was not clear on what he expected to receive if the appellant succeeded in its claim before this tribunal: at 6% per month over some 5+ years he appeared to be owed a very considerable sum indeed.

159.He agrees that the rate of interest he was offered and initially paid was remarkable and even surprising but says that he was not worried by it as he thought Dr Okposin was honest.

Lynne Barker

160.Mrs Barker knew Dr Okposin from attending the same church. She was employed by Harwich from early 2005. Within a short time of coming to work for the appellant, she borrowed money on her credit card in order to make a loan to the business. The rate of return was 10% per month (down to 6% in 2006) plus all credit card charges. She loaned the money before the written agreement was signed. She agreed the rate of interest was surprising but considered it explained because the company was doing very well.

161.She says considered Dr Okposin to be honest and that she was happy to invest despite knowledge of fraud in the industry as she says she thought Harwich did everything possible to ensure it was not caught up in fraudulent trading.

162.We find her job was to carry out the due diligence and to keep ringing people on IPT and make up the trading board. She had no prior experience in mobile phone trading nor in carrying out due diligence. So far as due diligence was concerned she considered that her job was to check the companies were validly VAT registered and registered as companies. Her role was not to evaluate the due diligence: as she said she took the companies at face value.

163.She said she did not witness any negotiation or trading herself, but thought it was "preposterous" to suggest that the deals were contrived.

Dr Okposin

164.Dr Okposin was the director of the appellant and in control of its affairs. The appellant had a second director, a Mr Amoo-Peters, who did not give evidence. Mr Amoo-Peters loaned the appellant money but we find took no part in the day to day running of the company. The legal position is that the appellant company will be fixed with the knowledge of its director and therefore this tribunal is concerned with the knowledge or means of knowledge of Dr Okposin.

165.Mr Bridge's case was that Dr Okposin was an honest man who through no fault of his own found himself in a business that turned out to be riddled with fraud and has ended up financially ruined by the experience, has lost his home, is divorced from his wife and owes money to his friends.

Dr Okposin's background

166.Dr Okposin has a PHD in economics. He has written numerous books included *The changing faces of Malaysian Economy*, *The Economic Crisis in Asia*, and *Singapore Investment*. The royalties from these books were sufficient for him to buy his own home. He spent five years in Asia as an economic consultant. He returned to the UK in about 2001 and was taken on by the Commonwealth Business Council as an investment manager. His role was to encourage businesses to invest in commonwealth countries. When his two year contract with the Council expired, he decided to go into business by himself.

167.He set up a company in September 2003 called Harwich Kidz Limited whose business model was to buy children's clothes wholesale from Asia (then Brazil) and import them into the UK to sell to retailers. Suppliers offered his company 180 days credit but only with a bank guarantee. His bank initially offered a bank guarantee with his house as security but then withdrew this offer before he had traded. So this business venture came to nothing.

168.Dr Okposin then heard that mobile phones were a good market and he decided to break into the mobile phone wholesale market and contacted the International Phone Traders ("IPT") website. He paid the joining fee and was therefore able to see which companies had stock. His contact at IPT put him in touch with Team Global. He bought 83 phones from Team and sold them to persons in Nigeria. He changed the name of company to Harwich GSM in May 2005 and he started to buy mobile phones and sell them in small quantities to persons in Nigeria but in very large quantities to persons in Dubai. He re-mortgaged his home to provide the start up capital for this business.

Dr Okposin's evidence

169.We found him to be a defensive and evasive witness. He kept asking to be taken to the original documents rather than trust in the accuracy of HMRC's counsel's schedules of information: in one exchange he admitted that his customer often paid the appellant before the goods were shipped (and gave an explanation for why this happened) but he then disputed whether HMRC's schedule of timings which showed

that this had happened was accurate. While a desire to see the underlying documents is understandable if Dr Okposin had forgotten that his customers sometimes paid in advance, we found it indicated a defensive and uncooperative attitude where the witness had just accepted that it did happen.

170.We found him to be a reluctant witness, slow to answer some questions, avoiding answering some other questions and occasionally simply refusing to answer questions. An example of his evasiveness was when it was put to him that he knew that the information from the IMEI numbers could protect the appellant from being involved in a fraud". His answer was "…I knew that the IMEI numbers did not add any commercial value to me." This was not an answer to the question.

171.He was not a cooperative witness: his response to being asked whether he had paid the second instalment due on the appellant's insurance policy was to say that he couldn't be expected to remember what he had eaten for dinner on any particular day in 2006.

172.By far the most significant factor, though, is that we did not find his evidence to be reliable.

173.One small example of this (we refer to many others below) was in respect of entries in the appellant's bank statements. He initially said an entry in the appellant's statement referring to "St Johns Colchester" was a reference to a donation to St Johns Ambulance by the appellant. When pointed out that the entry was a receipt, he said it referred to an inter-company transfer from the appellant's parent company which had an account held in the St Johns Colchester branch of a bank. Bearing in mind that this question had been asked of him in correspondence back in 2006, he cannot have been taken by surprise by it. We do not accept either answer as correct: the first was clearly wrong and the second was also shown to be wrong as other entries show that this was not an inter-company group transfer which had a different designation. So we do not know from where this money came. If Dr Okposin did not know, he should have said so. Instead neither explanation he gave was reliable.

174.Dr Okposin, as mentioned above in paragraph 9 claimed that HMRC had not fully disclosed to the appellant all the documents that it held and that the appellant itself no longer had access to any of its documents. He also claimed that a schedule of due diligence that he produced to the tribunal was accurate.

175.We consider the reliability of these claims before going on to consider what the appellant knew or ought to have known in 2006.

Did Harwich have access to its own documents?

176.Dr Okposin's explanation for the loss of its documents was that the appellant had lost its business premises in Colchester in December 2006 because it had been unable to pay its rent after having several months' of VAT reclaims withheld. Dr Okposin knew he had to retain the records and had therefore moved them to his home. But at roughly the same time he had decided to go to Bible College in the North of England

and had left his home. He was unable to afford to keep up the mortgage repayments and the building society had repossessed his home. He said all his belongings together with the appellant's business records had been lost.

177.Dr Okposin said he did not know about the impending repossession because he not receive the letters from the building society warning him about it because he did not pay Royal Mail to redirect his (personal) post. We find this at odds with his behaviour in relation to the *appellant's* post, as we find he arranged for friends with office premises to act as a postbox for mail received for the appellant. They would scan the mail for Harwich and email it to Dr Okposin at Bible College. This arrangement was succeeded by an arrangement for the appellant's post to go to its accountant's address.

178.In any event, we find Dr Okposin's claimed failure to receive letters from his building society was irrelevant as Dr Okposin then accepted that he did know that it was likely a building society would repossess if mortgage payments were not kept up. Indeed, contrary to saying he had not known about the repossession, he then gave evidence that he had rung up the building society sometime in early 2007 and had been told that repossession proceedings were in progress and it was too late to stop them. He said that although he knew his property was about to be repossessed, he nevertheless made no attempt to rescue the appellant's papers because he had no money to travel back to Harwich. Although it was put to him, he did not provide any satisfactory evidence of why, being short of money and unable to pay his mortgage, and expecting to be away in College, he had made no attempt to rent out his home.

179. He said on his return to Harwich when he found his house on the market the estate agent would not allow him access to the house and his possessions. He said the telephoned the building society to find out about his possessions but the lady said she would ring back but she has never done so. He did not explain why in the intervening *four years* between returning to Harwich and this hearing he made no further attempt to contact the building society over the whereabouts of his possessions and the business records.

180.Is this a reliable account? There are inconsistencies in it and this claimed failure to preserve the appellant's records was all the more strange when by December 2006 Dr Okposin already knew that the appellant's input tax had been withheld and that he had instructed solicitors on behalf of the appellant to conduct the litigation which culminated in the hearing before this Tribunal. It would be difficult to have prosecuted the claim without the documents.

181.It was Dr Okposin's evidence that prior to leaving the records behind in December 2006 he had already drafted his witness statement and a schedule of the due diligence which he had carried out. He claimed that the witness statement survived because he had given it to his solicitors; the schedule survived on his memory stick. He did not explain why other electronically held information was not preserved although it was clear that some of it (such as Mrs Barker's trading board) was held electronically.

182. Was Dr Okposin's story reliable? We take into consideration :

(a) The appellant produced at the hearing documents annexed to his new schedule. It was the appellant's case that Dr Okposin could not say for certain whether all the documents were included in the trial bundle. Therefore it is clear that the source of them was not the trial bundle. We excluded these documents because in so far as they were duplicates of documents in the bundle they were unnecessary and in so far as they were not duplicates they should have been disclosed by the appellant long in advance of the hearing. But their mere production means that the appellant was able to produce documents without relying in the trial bundles;

(b) the appellant admits to behaviour which was irrational yet he was clearly capable of rational behaviour, so we ask ourselves whether he behaved as irrationally as he claims;

(c) there were inconsistencies in his account;

(d) most importantly, we do not accept his account that his witness statement and his due diligence schedule were produced in 2006. We explain this below. The point is that he needed access to the documents to produce both (especially the due diligence schedule) yet we find they were produced after the date he says he last had access to the Harwich documents but (at least in the case of the witness statement) before the trial bundles were produced.

183.In conclusion, we did not find his account credible. Our conclusion is that we do not accept as truthful the appellant's accounts of the claimed loss of the appellant's records.

The reliability of Dr Okposin's schedule of due diligence

184.As our finding that Dr Okposin's story of the loss of the records was not reliable depends in part on our finding that his due diligence schedule was not produced in 2006, we need to explain why we have found this to be the case.

185.As already mentioned, the appellant produced at the hearing a folder containing a previously undisclosed schedule of due diligence carried out by the appellant in respect of the traders it dealt with in the deals at issue in this case. It was supported by exhibits which we excluded for reasons given above. It was Dr Okposin's case that he had not made his counsel aware of this document until two weeks before the hearing and then he expanded on it to put in the stock. HMRC raised no objection to it being used as a working document to refresh Dr Okposin's memory but doubted its authenticity.

186. As mentioned it was the appellant's case that Dr Okposin had prepared this due diligence schedule in late 2006 when he and the company's solicitors had started to prepare to litigate HMRC's denial letter. Was this reliable evidence?

187.Dr Okposin served five witness statements. His third witness statement deals with due diligence and does not refer to this schedule. Dr Okposin said that this was because the witness statement was prepared *before* the due diligence schedule. However, the witness statement was dated August 2007, almost a year *after* when Dr Okposin said he prepared the schedule. His explanation for this is that the witness statement was prepared before he went to Bible College in December 2006 and held back by his solicitors pending receipt of the Statement of Case from HMRC.

188.If this explanation were true it does not explain why:

- it was not served until August 2007 when the Statement of Case was received in early December 2006;

- why its service was preceded by two other witness statements by Dr Okposin. These earlier witness statements were dated early in 2007 and were very general denials of the allegations made by HMRC and contained virtually no information. We find it is clear that these two were in response to the statement of case.

189.We find Dr Okposin's third witness statement was written in response to the service of HMRC's evidence which was served in early July 2007. We find this because Dr Okposin not only states in it that "I will do my best to address the issues raised by HMRC in their evidence" but actually contains specific responses to specific allegations made in Mr Smallbone's witness statement. An example is the allegation by Mr Smallbone that Dr Okposin had told him on 17th February 2006 that the appellant would carry on trading regardless of warnings from HMRC.

190.We are therefore unable to accept as credible Dr Okposin's account that his third witness statement was written in late 2006 and before he lost access to the appellant's records. We find it was written in or around August 2007 which when it was dated. The schedule must have been written *after* this date as, firstly, Dr Okposin says it was written after the witness statement, and secondly because there is no reference to the schedule in any of Dr Okposin's five witness statements.

191.We conclude that the schedule was not prepared in 2006 as claimed by Dr Okposin but was prepared much later and after his five witness statements. His story of how it came into being was not credible. He denied he had made up the contents of the schedule to improve his case. But we do not accept the denial. We do not consider that, except where it can be verified by reference to documents, that the schedule is an accurate summary of due diligence. This is because it was not prepared contemporaneously, and it was prepared by Dr Okposin whose evidence in respect of it we have found to be unreliable. We also refer below to the question of what action Dr Okposin took after receiving a letter from HMRC dated 15th February and find that he did not take the action claimed in his schedule: see paragraph 219-227 below for our reasons for this finding. In conclusion, we did not find the schedule reliable.

192.In practice, the greatest significance of the schedule was the insight it gave us into the unreliability of Dr Okposin's evidence. Bearing in mind that we found his

story of how he lost the appellant's documents to be unlikely, and bearing in mind that we have found him to have been quite unreliable on when he prepared his schedule and witness statements, we do not accept that he did lose the Harwich papers as he said he did. He must have had access to the papers to prepare his August 2007 witness statement. His evidence was quite unreliable.

The appellant's knowledge

193. It was not in dispute that Dr Okposin was the controlling mind of the appellant company and the Dr Okposin's knowledge must be imputed to the company. We therefore consider it is Dr Okposin's knowledge and/or means of knowledge (if any) that will determine the appellant's appeal. So we go on to consider what Dr Okposin actually knew or ought to have known.

The Appellant's role in the fraud

194. It is HMRC's submission that the role of the broker is the lynchpin in the fraud and it makes no sense for a fraudster to involve a innocent dupe. It would risk the innocent and honest dupe asking awkward questions.

195. Mr Bridge's case is that there are obvious reasons why the fraudster would prefer a third party as exporter. It would give that third party the risk of non-repayment of the VAT by HMRC.

196. We think the position is best explained by understanding that there are two ways of committing orchestrated MTIC fraud as described by us in paragraph 22-26. One is to use a third party as broker: the money which the broker introduces into the chain is his own (or borrowed from friends and family) and has not originated with the fraudster. The broker takes the risk of non-repayment of the VAT by HMRC and the reward is the profit margin on net VAT prices. It is a win-win situation for both fraudster and broker as long as HMRC repay the VAT. The second is for the broker to be funded by the fraudster.

197. We do not agree with HMRC that the mere fact that it is orchestrated fraud means that the alleged broker must necessarily have actual knowledge: he may see that there is a profit to be made without understanding how it is generated. Nor do we agree with Mr Bridge that the fact that the broker is a third party means that he is necessarily innocent either. He might be quite happy to knowingly take the risk of non-repayment of VAT by HMRC because of the profit margin he is offered. A putative broker in the know might consider it a risk worth taking particularly before the time before it was known HMRC had changed its policy and would carry out extended verifications before making a repayment.

198. So Harwich's role as the broker in an orchestrated MTIC fraud does not by itself tell this Tribunal whether it actually knew that it was participating in fraud. To consider this we look to the evidence discussed below.

Funded by fraudsters?

199.For the sake of completeness, before moving on, we mentioned above that the second method of committing orchestrated MTIC fraud is for the fraudster to actually give the broker the funds to enter into the transactions. The fraudster here is taking the direct risk of non-repayment of the VAT by HMRC. HMRC allege in this case that Harwich had funds the source of which was unexplained. This is only relevant if the allegation is that the fraudster funded Harwich: it seems unlikely a person could be funded by a fraudster for the purpose of committing fraud and not know it.

200.It was not in dispute that Dr Okposin set up sister companies to Harwich. HMRC's case was that he did so in order to disguise money movements and in particular the source of funding of the appellant. They point out that that these companies had bank accounts yet were not trading.

201.Dr Okposin's case is that the purpose of the companies was to look for new lines of business in which the appellant could invest. He points out that the companies had employees, although we find that the only evidence of work done by these employees (a Mr Gammons and a Mr White) was work done on behalf of the appellant.

202.Nevertheless, although we have not found Dr Okposin's explanation of the source of some deposits convincing (see paragraph 173 above), at the same time HMRC have not satisfied us that Harwich had more money at its disposal than could be accounted for on the basis of (a) the loans from friends (b) Dr Okposin's own money from the re-mortgage and (c) most significantly the large profits from earlier trading.

203.So we do not consider that HMRC has made out a case that Harwich had funds for which it could not account. Harwich was therefore just a third party broker in the MTIC transactions in the sense that it traded with its own money. By itself this tells us nothing about what the appellant knew in 2006. As the question is whether it did know that its transactions were connected to a fraud or it should have known this, we go on to consider what it did know.

Dr Okposin's character

204.It is Mr Bridge's contention that Dr Okposin's charater itself is an indicator that he would not have been knowingly involved in the fraud. He refers to Dr Okposin's attendance at Bible College, his religious beliefs, the donations the appellant made to charity at the instignation of Dr Okposin, and that Dr Okposin has never been convicted even of a driving offence. He points out that Dr Okposin holds a doctorate and is the author of respected books on economics. None of these matters were in dispute.

205.In a criminal case where the previous good character of the appellant is not disputed, the appellant would be entitled to a good character direction being given to the jury. This is a civil case, and we will take previous and subsequent good character into account. See paragraph 401 below.

206.Two witnesses for the appellant, Mr Field and Mrs Barker, state their opinion that Dr Okposin is honest. This may not be admissible in a criminal case (it is evidence of opinion rather than evidence of fact about reputation): the Tribunal has the power to admit evidence whether or not admissible in civil courts. HMRC did not suggest it should not be admitted nor did they challenge it. So we accept Mr Field's and Mrs Barker's evidence that they considered Dr Okposin to be honest. Our conclusion on what weight to attach to this evidence is set out in paragraph 397.

Dr Okposin's location and background

207.It was HMRC's case that there were many connections, such as location and even age between the directors of the appellant's trading partners and that these coincidences between supposedly unconnected parties should have put Dr Okposin on notice that they were not in fact unconnected. We revert to this below. However, in response to this it was Mr Bridge's case the fact that Dr Okposin has a different ethnic background and geographic location from the directors of his trading partners is by itself an indicator that he was not involved in the fraud.

208.We do not accept Mr Bridge's case that it follows that persons of different backgrounds or geographic locations would not trade with each other unlawfully. If a person is prepared to trade lawfully with another person despite differences in location or background, there is no reason to suppose that location or background would prevent that person trading with them *un*lawfully (there might well be other reasons – such as honesty – why it would not do so). Here the appellant clearly had a trading relationship with companies with directors of a different background and location to his own: the question is simply whether he knew or should have known that those deals were connected to fraudulent VAT loss.

209. We move from generalities to the specifics of what Dr Okposin actually knew at the time of the transactions in question.

Dr Okposin's general knowledge about MTIC fraud

210.Mr Bridge's case is that Dr Okposin was aware of MTIC fraud but did not understand how extensive it was, and in particular did not know that virtually all transactions in wholesale mobile phones were fraudulent.

211.We find that Dr Okposin was well aware of fraud in the mobile phone market. He accepted he had been issued with Notice 742, he indicated many times in the hearing that he asked for HMRC's advice on due diligence and indicated that he considered HMRC's view of it important. He would not have done this if he had not understood due diligence was undertaken in order to prevent his company participating in fraudulent supply chains. He was also visited many times by HMRC officers in connection with verification of his input tax claims.

212.We find he was well aware of fraud in the wholesale mobile phone trade. We move on to consider how much he knew about fraud in his own supply chains.

Dr Okposin's knowledge about fraud in own supply chain

213.The appellant's input tax claim for August 2005 was withheld pending extended verification. The appellant took legal advice and threatened HMRC with judicial review. HMRC paid the claim on 15 December 2005 on a without prejudice basis even thought HMRC had found and notified to the appellant that the chains commenced with tax losses. At the same time the appellant's refund claims for November and December 2005 were also paid so the total received by the appellant was some £1 million.

214. About the same time that the appellant was informed that its high value deals for the period June 2005 had been traced to a hijacked VAT number and substantial VAT losses, it nevertheless received repayments of input tax from HMRC as the appellant's claims for repayment in respect of its January and February 2006 deals were repaid by HMRC.

215.However, in January and February 2006, immediately before the deals at issue in this appeal, the appellant was also the recipient of numerous letters from Mr Smallbone informing it of VAT losses traced to defaulting traders in various of its 2005 deals. These letters contained a warning that HMRC would hold the appellant jointly and severally liable if it knew or had reasonable grounds to suspect that the VAT would go unpaid. The appellant's solicitor responded to these letters. Mr Smallbone's letter in reply was (in paraphrase) that HMRC's purpose in sending these letters was to inform the appellant that its due diligence was ineffective to prevent it from taking part in fraudulent deal chains.

216.As already mentioned, in January 2006 Mr Smallbone had advised the appellant that the only way to avoid fraud would be not to enter into these sorts of deals. It did not take this advice.

217. The appellant's case is that it responded to these letters by improving its due diligence. In particular, it started to commission Veracis reports and pay for credit checks on its suppliers. We consider this below in paragraph 353-358.

218.In the meantime, we find that at this time the appellant rapidly increased its trading. Previously its turnover per month was about £2.5million. In 01/06 its turnover went to over £10million; in February to over £13million and in March to over £22million, and in April to over £34million. There was a difference in that previously its customer had been in Dubai: now its customers were in the EU.

219.In reaction to 3 joint and several warning letters from Mr Smallbone dated 15 February 2006 in relation to trades in 2005 where the appellant had bought from Zain, Team Mobile and Cell Express, Dr Okposin's evidence was that he phoned his solicitor (Mr Robert Holland of Dass Solicitors) who advised him to enquire of his suppliers whether their due diligence was satisfactory. Dr Okposin's evidence is that he took this advice and immediately contacted his suppliers. He said his suppliers agreed with Dr Okposin that they would in future source the stock from different suppliers. Dr Okposin told us he thought it important his suppliers changed their suppliers. He said the appellant itself started to trade with new suppliers although it

was the case it still dealt with Zain, Team and Cell Express, who were the three in respect of transactions with whom it had received the warning letters.

220.We consider the reliability of this evidence.

Cell Express

221.We find that with regards Cell Express, Dr Okposin's schedule claims that on receipt of the first joint & several letter from HMRC on 7 February 2006 he wrote to Cell Express. Then on 9 February, Dr Okposin visited Cell Express with the result Cell Express agreed to change its suppliers. Then on 15 February 2006 Dr Okposin received a further joint & several warning letter from HMRC in relation to other deals with that company. Dr Okposin wrote to Cell Express in respect of this second letter on 16 February.

222.The two letters written by the appellant are virtually identical: but in neither of them did the appellant ask Cell Express to change its suppliers. The letters merely asked Cell Express to specify the due diligence it had carried out on its suppliers, what due diligence Cell Express expected its suppliers to carry out on their suppliers, and lastly to confirm that Cell Express' checks would be in accordance with Notice 726.

223.The appellant's second letter refers to the first letter. It makes no reference to any visit occurring in between. It makes no mention of an agreement that Cell Express would change suppliers. Cell Express replied to the appellant's second letter on 19 February and in its reply refers only to the letters from the appellant and makes no reference to a meeting; it makes no reference to changing its suppliers; indeed its comment that it will ask its suppliers about the due diligence they carried out is suggestive that they are not changing suppliers because otherwise the information would be pointless.

Zain and Team Mobile:

224.There are similar inconsistencies with the evidence on Zain. The appellant wrote to Zain on 16 February a letter in the same form as the letter to Cell Express. Dr Okposin claims he met with Zain the next day and Zain agreed to change suppliers. But Zain's reply on 24 February to the appellant's letter of 16 February makes no mention of a meeting on 17 February nor of an agreement to change suppliers. The third supplier in respect of which Dr Okposin orally claimed they had an agreement to change suppliers was Team Mobile: his schedule merely claims a visit took place on 8 February. Yet again the letter from Team dated 9 February makes no mention of a visit nor of changing suppliers.

conclusion

225.We take into account these inconsistencies. We take into account the unreliability of Dr Okposin's evidence on other matters. We take into account that we do not accept the schedule was a reliable or contemporaneous account of events.

226.We find that, contrary to his oral evidence to us, Dr Okposin did not visit Cell, Zain or Team mobile nor ask his suppliers to change suppliers. We find in reaction to the various joint and several warning letters in respect of supplies made by these three particular suppliers, he merely asked these suppliers to confirm their due diligence procedures. His evidence was that he took a "commercial decision" to continue to trade with Cell Express, Zain and Team Mobile. We find his next deal with Cell Express was on 17 February and *before* that company had replied to his letter. We find therefore was that his response amounted to no more than sending letters: he was prepared to trade without even receiving a response.

227. Not only do we consider his response inadequate, clearly Dr Okposin thought so too. This is because he told us that he had done more than he actually had: he told us he agreed that his suppliers would change *their* suppliers, but we have found he agreed no such thing. We note that in any event, even if we had accepted his evidence, we would not have considered it an adequate response to the risk. Clearly an agreement with a supplier to change its supplier gave the appellant no guarantee that (a) the supplier would do what it said, or (b) the new supplier to the appellant's supplier would deal only in honest chains, or (c) that the appellant's supplier himself was acting honestly.

The telephone call on 17 February

228.Mr Smallbone phoned Dr Okposin on 17 February 2006 to ask for some documents which Dr Okposin said he was happy to supply. Mr Smallbone then asked if Dr Okposin had received his letters of the 15 February. Dr Okposin's reply is recorded as "He said he had. He then went on to explain that regardless of these warning letters, he was going to trade with the suppliers involved. I explained that was his decision but had has been made fully aware of the possible consequences."

229.Mr Smallbone refers to this conversation in his witness statement. He incorrectly states that he received a phone call from Dr Okposin. It is clear from his notebook that rather it was Mr Smallbone who had phoned Dr Okposin.

230.Dr Okposin denies that in this phone call he said that he would carry on trading regardless of the warning letters. We have to decide whose evidence to accept.

231.We note that Mr Smallbone's witness statement was incorrect on who made the phone call, but the question is whether his contemporaneous notebook was incorrect. The error in his witness statement was careless but we do not think it affects Mr Smallbone's overall credibility as it was a small point in the context of a long witness statement and it was not really relevant who initiated the phone call.

232.On the other hand, we have found Dr Okposin to give unreliable evidence on other matters. Further, bearing in mind that the notebook was a contemporaneous note it seems unlikely Mr Smallbone would falsely impute a statement about future conduct to Dr Okposin when on 17 February he cannot have known that Dr Okposin would carry on trading despite the warning letters. Bearing in mind these factors, we conclude that Mr Smallbone did correctly record the conversation in his notebook.

Dr Okposin did state on 17 February that he would carry on trading regardless of the warning letters from HMRC.

Later warnings

233.On 28 February 2006, and just before the deals at issue in this appeal, the appellant received a further joint and several warning letter in relation to its remaining high value transactions in period 10/05 as they had been traced back to a defaulting trader.

234.On the same date Mr Smallbone wrote to the appellant saying that HMRC would deem the appellant to know that VAT was likely to go missing if they carried on trading in this manner. Dr Okposin's evidence was that his response was to consult a solicitor and improve the appellant's due diligence. We find he started to obtain Veracis reports and credit checks on trading partners. We consider below in paragraph 380 whether this improved his due diligence.

Conclusion

235.Our conclusion is that certainly no later than February 2006 Dr Okposin knew that HMRC considered that a great number of the deals which the appellant had entered into in 2005 had been traced to a fraudulent VAT default. He knew that despite this, HMRC had ultimately repaid all of the appellant's VAT (albeit in one case on a without prejudice basis). He knew in addition that HMRC were threatening to hold the appellant jointly and severally with the defaulters liable for the missing VAT.

236.We find that he was very well aware of the very high risk of his trades being connected to fraud.

237.We also find that his response to this risk was to rapidly increase the value of his trading; to trade with new suppliers but continue to trade with three of his previous suppliers and 2 of his customers in respect of which he had been notified that chains involving them had been traced to fraudulent VAT loss. We find he did start to obtain new Veracis reports and credit checks on some trading partners, but that was the extent of his increase in due diligence as we found unreliable his evidence that he asked his suppliers to source their goods from different suppliers. We also find his told Mr Smallbone that he would carry on trading regardless of the warning letters.

Mixed message from HMRC?

238.As mentioned above, at the same time as the appellant was receiving notification that most of its previous deals had been traced back to a fraudulent default, and receiving warnings that HMRC might hold it liable for the missing VAT, it nevertheless continued to receive its VAT repayments for deals in 2005, and January and February 2006.

239.Mr Bridge put the case that it was therefore not surprising if the appellant thought that HMRC approved its trading model.

240.We do not agree. The question is not whether the appellant had reason to think that HMRC would continue to repay its input tax: the question is whether it knew or ought to have known that its transactions were connected to fraud. And it had been told that all its transactions on which extended verification had been successfully carried out had been traced back to fraud. This was not a mixed message on connection to fraud.

241.We accept that by continuing to make repayments despite the proved connection to fraud *might* indicate to a trader that HMRC were happy that the trader was doing all it could to protect itself from fraud and was therefore not to blame that despite its precautions its transactions in fact did trace back to fraud.

242.But this is of no help to the appellant if we find that it did *know* of the connection to fraud. It is relevant to the question of means of knowledge but we find that as the repayments were made in some cases after delay and without prejudice and in particular having received the various oral and written warnings from Mr Smallbone in January and February 2006, no person in the position of the appellant on 1 March 2006 could genuinely or reasonably think that the repayments were unqualified approval of its due diligence processes and trading model.

243.Having looked at how very well aware we find the appellant was of the risk of MTIC fraud in general and how frequently it had been told that it had in the past traded in MTIC fraud chains, we now move on to consider what Dr Okposin knew about the transactions at issue in this appeal.

Unrealistically benign trading environment?

244.It is HMRC's case that the trading environment was too good to be true and that the Appellant knew this. Therefore, runs HMRC's argument, he knew that the trading opportunities did not arise in a genuine market and therefore it follows that he knew that they were orchestrated for the purpose of fraud.

Tribunal to take judicial notice?

245.Mr Bridge's view was that HMRC had produced no evidence of what were normal trading conditions in the wholesale mobile phone market in 2006 and that therefore they were unable to advance a case that the appellant knew it was an unrealistically benign trading environment. The appellant's evidence was that at the time he did not think odd any of the many matters which HMRC suggested to him were odd: we are bound to find they were not odd says Mr Bridge.

246.We do not agree.

247.Firstly, we have already said in paragraph 97-98 above, that the Tribunal is entitled to take judicial notice of matters of common knowledge on which it does not

require expert evidence. We take judicial notice of matters such that it is unusual for persons to act against their own interest in a commercial arms length transaction unless there is a good reason. We find it is odd, for instance, for person trading at arm's length to offer credit of £100,000s or millions of pounds to another trader who offers no security and has few assets and no credit rating, and a short trading history.

248.We note that, at least impliedly, in *Mobilx* the Court of Appeal took a similar view. In a number of places it indicated that the Tribunal should look at the surrounding circumstances and whether or not they were normal. It did not suggest that a Tribunal could not take a view on what was commercially normal without expert evidence. See for example the following extracts from *Mobilx:*

> "[75] ….The Tribunal might have concluded that Mr Peters should have known that the transactions into which he entered were connected with fraud, by reference to the unconventional nature of those circumstances…."
>
> "[84]….the trader has chosen to ignore the obvious explanation as to why he was presented with the opportunity to reap a large and predictable reward over a short space of time."

249.Secondly, we have already found that all the deals entered into by the appellant were engineered for the purpose of fraud: those deals themselves cannot therefore be any kind of an indication of what is normal in arms length commercial trading.

250.We consider whether there was an abnormal trading environment and whether the appellant knew this.

Able to make a lot of money

251.We find it was very easy for the Appellant to make a lot of money. The Appellant started to trade in mobile phones in 2004. Its owner and director, Dr Okposin, had no previous business experience in that sector. Nevertheless, it achieved a turnover of £13.4 million in 2005 and a turnover of over £100million for the six months of 2006 in which it traded. This was phenomenal success achieved in an incredibly short space of time.

252.It was put to Dr Okposin that at the earliest he had started dealing in handsets in February 2004 although not in substantial quantities to Dubai until November 2004, yet on 7 days of dealing over 3 months in early 2006 he made gross profit of £1.3 million with a turnover of £36 million. He said he did not think it was odd. He said he worked hard, 12 hours a day driving round and meeting suppliers. It was put to him it was too good to be true. He denied this and said it came from hard work.

253. We do not believe that he actually thought that everyone who worked hard for two years would make profits pro rate of £4m a year which is what his evidence amounted to saying. We think it is very unusual to be so successful in business no matter how hard a person works, and where a person is that successful there is a rational explanation for it. Dr Okposin did not offer us a rational explanation of why he thought working 12 hours a day driving round and meeting his suppliers would

generate profits at a rate of approximately £4million per year. And we do not accept that he genuinely thought that the explanation was hard work.

Finding the deal

254.Dr Okposin's evidence is that Lynne Barker would use IPT to identify possible sources of stock. And that when stock was located they would then find a customer. But then he says that it was often the case that the customer would want morestock than offered so the appellant would have to approach different suppliers to fulfil demand. He also said that his three customers were well known on the IPT for taking any quantities of stock.

255.We note that none of the deals at this appeal appeared on Lynn Barker's trading board and her evidence was that she had never witnessed a deal being negotiated.

256.Mr Bridge suggests the fact that the appellant might buy in one day from more than one seller goods sold to a single buyer was "powerful evidence of innocence and honesty". We cannot agree. Bearing in mind that Dr Okposin's initial evidence was that the appellant first approached suppliers, it makes little sense that he should then suggest his role was to fulfil demand from customers by locating suppliers with stock.

257.We find Dr Okposin was unable to give us a rational explanation for his company's role in this market: from his evidence all it seems he had to do was locate stock and sell it on to one of 3 customers who had huge demand.

Holding stock

258.We find the appellant was always able to sell exactly what he bought and never held stock. He said this was because he had no storage facilities and said he did not think it odd that he was able to do this.

Trusting customers

259.HMRC's case was that in 14 of the 74 deals the customer paid the appellant before the appellant had shipped the goods. Although Dr Okposin accepted in cross examination that this happened, and gave an explanation for it (see paragraph below) by closing submissions it was the appellant's position that HMRC's schedule was wrong. We find on the contrary that the schedule was accurate. In 14 out of 74 deals the appellant was paid before the goods were shipped. So in some 14 cases the appellant's customers paid for the goods before they had arrived in the country of destination and before they had been inspected.

260.Dr Okposin's evidence was that there was nothing odd with the customer paying for the extremely valuable goods early because the customers relied on the appellant's freight forwarder's inspection report and on the fact that the appellant was reliable.

261.We do not accept this explanation. We find Harwich's customers did not rely on the inspection report in 13 out of the 14 cases because we find it was sent after the

payment was made. We also note that Harwich had not had a particularly long relationship with any of the three customers, two of which had only been incorporated within the last 12 months. We note that Freshnet routinely paid in advance despite having a term in their purchase order that payment was dependant on their inspection of the goods.

262.We find that the Appellant had customers who acted in an uncommercially trusting manner towards it.

263.Nor do we accept as reliable Dr Okposin's evidence that he did not find this trusting attitude by his buyers odd. He suggested that it was usual for people to pay in advance when ordering over the internet: Dr Okposin is an economist and ought to know better (and we find he does know better) than to compare a small retail purchase over the internet with wholesale trading of very valuable commodities.

Easy trade credit

264.All of its suppliers granted credit to Harwich. In at least 60 of the 74 deals the goods were released to the appellant before it had paid. In slightly over half the deals the goods were shipped by Harwich before it paid for them.

265.We find the appellant was given substantial credit by companies with whom it had no previous trading history or only a short trading history. For example, the appellant started to trade with MP3 on 28 April 2006. It made two purchases worth in total over £4million. MP3 released the goods to the appellant on 28 April and were not paid until 2 May. By this point the goods had already been shipped by the appellant out of the country. Dr Okposin said he did not think this was odd as he had met the director in February and had provided trade references.

266.The appellant only had written credit agreements with 3 of its 7 suppliers. These were with Xytel, Euro Asia and Global Roaming. The agreements are all dated March 2006 and grant the Appellant 30 days credit. None of them required interest or security. We find that Dr Okposin drafted the agreements: they are all on the Appellant's headed notepaper and all in identical terms. It seems the Appellant was in so powerful a trading position it could dictate its own very favourable trading terms with its suppliers.

267.Dr Okposin claimed that the appellant had oral credit agreements with its other suppliers, and indeed this seems to be right as the appellant routinely did not pay on time, despite in some cases (eg Zain) invoice terms requiring payment before the dates the appellant actually paid.

268.In particular, TM Global was paid very late for supplies made in March and April. The Appellant contended they were paid in June 2006 but produced no evidence of this; we find they were paid in August 2006. Either way the payment was at least three months late. Although TM Global chased payment they did not initiate legal action. Their invoices required "TT on inspection" yet Harwich routinely did

not pay on time. TM Global's letters, in contrast refer to a 30-day credit, period yet the appellant did not even meet this.

269.The appellant was given very substantial credit at the time a credit check on the appellant would have revealed it had no credit rating. It had not even produced draft accounts (those for 2005 were signed in April 2006). Dr Okposin claimed he gave a cashflow forecast to his creditors but this was not provided to us and in view of the fact we consider his evidence unreliable, we do not accept this.

270.Dr Okposin's evidence was that he did not consider it odd to be given trade credit by a company with whom the appellant had no previous relationship; but later he said with regards TM Global that he was not surprised they gave the appellant credit as they had a one year trading history with each other. We find that Dr Okposin's evidence was that he did not think it odd to be given credit for such very large sums whether or not the appellant had any previous trading history.

271.Dr Okposin agreed that the appellant could not have traded without this credit. We find that he was given credit for long periods of time which enabled him to trade by ensuring that he did not have to pay until he was paid. In a genuine market we would find it very odd that traders, whether or not they had traded with the appellant before, were prepared to routinely allow the appellant, with no credit rating or significant assets or security, and without upfront deposits being paid, to buy and sell on to third parties the very valuable goods the subject of these deals. We also find it very odd that there was no interest charged on the generous credit terms or security requested.

272. Dr Okposin was an economist and had had a previous experience with his children's clothing business that credit was not easy to obtain for a business without a trading history. We find he did know that it was very out of the ordinary that Harwich should be offered such generous terms but he chose to deny this.

273.Dr Okposin could not give us any rational explanation of why he though the market operated like this: We find Dr Okposin failed to give any reasonable explanation of why he thought that this was not odd.

Knowledge of irrational market

274.We find (it was not in dispute) that all the traders in this market were registered with and traded on the IPT website. Mr Bridge's submission is the fact that all trading partners used IPT to trade indicates that Dr Okposin was not involved in the fraud.

275.On the contrary, we agree with HMRC that trading on an open website would give honest traders ample opportunity to cut out unnecessary steps in transaction chains. As noted above the goods typically passed through the hands of 4 or 5 UK registered companies in the space of a day, with a profit at each step of the way. Putting aside the issue of why the goods would pass through the UK at all, commercial self-interest would suggest that traders would seek the lowest price, and

the lowest price was offered by the traders near the start of the chain. Yet despite this open website these long chains were the rule in every single of the appellant's deals at issue in this appeal.

276.It was put to Dr Okposin that he must have wondered why his buyers didn't bypass him and his sellers didn't bypass him. We find Dr Okposin avoided giving a straight answer to this question. So he failed to provide us with an explanation for this. Elsewhere he described the IPT website as a stock exchange and could not explain why companies were not cut of the long chains. Yet he was clearly aware that where markets are transparent this is what would ordinary happen as he said elsewhere in evidence that to reveal your suppliers would be to kill your business. Yet we find the IPT website did reveal all suppliers, and 'business' flourished. Dr Okposin knew this.

277.He also said he did not question why his suppliers didn't seek to make the much greater margins that appeared to be available by selling to customers on the continent but were instead satisfied with the very small profits to be made on UK to UK trades.

278. So we find that the identify of suppliers was very easily discovered but no one utilised this information and Dr Okposin knew this and offered no explanation, and certainly no rational explanation, of this phenomenon. Nor did the appellant itself attempt to cut out the middlemen and go to the source.

279.We also find that Dr Okposin was aware of another odd lack of competitiveness in the market. The appellant's main contact at Zain was a gentleman called Rafiq Ahmed. Dr Okposin first knew Mr Ahmed when Mr Ahmed was employed by TM Global. Mr Ahmed left TM Global to form his own company Zain. Dr Okposin asked TM Global if it was okay for him to deal with Zain and they said this was no problem, said they bought from Zain themselves and gave Zain a trade reference. Yet we find Zain and TM Global would have been (if this was a real market) in competition with each other.

280.Dr Okposin gave no explanation for this uncommercial behaviour by his suppliers although he was aware of it. We find that Dr Okposin was an economist and did understand that this would have been odd behaviour by TM Global if the market were genuine. He was prepared to trade with both Zain and TM Global despite this knowledge.

Knowledge of origin of goods

281.We find Dr Okposin gave inconsistent evidence on what he knew of the origin of the goods.

282.He said he thought some of his immediate suppliers imported the goods yet all his Veracis reports state all his suppliers sourced goods within the UK. He did agree that he knew his suppliers were not manufacturers and not authorised distributors. He appeared to suggest that he did not know the goods were imported but he agreed he did know that they were not manufactured in this country and therefore had to be

manufactured abroad: he said that he thought they were imported direct from the manufacturers. He did know that the phones had a central European specification and two pin plugs.

283.He did know that his three buyers were located on the continent. We find that he did therefore know that goods originating outside of the UK were being imported into the UK and sold through at least two UK companies before being sold to customers on the Continent. He said of his customers that he knew they bought in "huge quantities", that he did not know what they did with the goods and that he did not think it odd all 3 customers (two French and one Dutch) wanted the goods delivered to the same warehouse near Paris.

284.He did not accept that it was odd that goods would come into the UK only to leave again. He said it was normal business practice as we're all part of the EU and it was lawful for goods to move between countries. This was not a sensible answer to the question; while goods can come in and out of the UK, there would normally be a rational reason for this. The market ought to operate to cut out unduly expensive supply routes such as goods coming in and out of the UK when they originate and end abroad. We find that Dr Okposin, as a doctor of economics, was well aware of how genuine markets operate and his somewhat silly answer was given because he did not chose to acknowledge to the Tribunal the obvious irrationality in the deal chain that was apparent to him at the time of the deal.

Easy credit

285.It was also HMRC's case that the Appellant secured funding on terms inconsistent with rational commerce. The Appellant produced nine loan agreements evidencing loans in total in the region of £300,000 between March and October 2005. The terms of the loans are in near identical form and were drafted by Dr Okposin. The loans were unsecured and include a clause that (whatever its actual legal effect) suggests that the loans were entirely at the lender's risk. We find that at least in the case of the loan from Mr Field some £104,000 worth of it was made available to the Appellant before the loan agreement was signed.

286.It is HMRC's case that it was very easy for the Appellant to borrow money. Firstly, we don't agree with this. The appellant may have been able to borrow £300,000 easily enough but the interest payments were exceptionally, usuriously high: in 2005 he offered and paid 10% *per month* (120% per year). In 2006 this reduced to 6% *per month* but that still equates (ignoring compounding) to a rate of 72% per year.

287. What is the significance of this? It was *not* HMRC's case that these lenders were in any way connected with the organisers of the fraud. There was absolutely no evidence of this.

288.We find that all the loans show is that the Appellant was prepared to borrow money at usurious rates of interest from friends and acquaintances. We do not know whether the bank would not loan the money or whether the appellant chose not to approach a bank: we do find it shows that the appellant was expecting to make very

high profits in a short space of time in order to be able to fund these very high rates of interest.

Conclusions

289.We find that the following were known to Dr Okposin at the time of the deals. We also find that his response was to the effect that he did not at the time think any of the following was odd:

(a) Extremely high profits for doing little more than issuing invoices and meeting customers and suppliers;

(b) That in some cases his customers were prepared to pay before the goods were shipped or inspected on their behalf;

(c) That the company's suppliers offered easy credit terms enabling the appellant to trade;

(d) That in a transparent web-based market, no one acted to cut out the middlemen and get to the source of the goods;

(e) That the goods originated abroad were sold through at least 2 UK companies before being shipped out of the UK;

(f) That the deals were very easy to find and back to back.

290.We do not accept Dr Okposin's evidence on this as reliable.

291.It was not entirely consistent. In re-examination he agreed with his counsel that it was odd in retrospect. Yet the whole tenor of his evidence to us in cross-examination was that he did not think it odd now or then.

292.We think Dr Okposin did really understand both now and in 2006 what was odd about it. We note that sometimes he avoided giving an answer, gave an answer that did not answer the actual question, or gave an evasive answer (for example, on a number of occasions when asked if he thought something odd, his reply was, in paraphrase, no, it was not odd because it was lawful. But whether something is lawful is not an answer to the question of whether it was odd in a commercial market.) From his desire to evade answering the question, we concluded that he understood that their tendency was not to show him in a good light and that means he did understand the point. As he understood the point in 2011, we think he understood the point in 2006.

293.Further, the combination of these factors are plainly odd to any person of ordinary intelligence. While Dr Okposin did make some foolish statements such as saying that one of the appellant's suppliers was also supplying another of the appellant's supplier was a "fantastic" comparison to the fact (in his view) Tesco's Asda's and Sainsbury might buy from the same supplier, we think he was deliberately evasive and did understand the point. We do not think he was ignorant of how markets work because, apart from holding a PHD in economics, he had prior business experience. We find his repeated statement that he did not find things odd, when we

find that it was clear to him that they were odd, was to disguise the fact that he could give no answer to the Tribunal consistent with innocence.

294.In conclusion, we find that taking into account only the information known to Dr Okposin at the time of these deals the market was uncommercially benign for all the reasons set out above. And further, we also find that Dr Okposin knew that it was uncommercially benign and "too good to be true" for the reasons set out above.

The appellant's actions

295.It was HMRC's case that bearing in mind what Dr Okposin knew about the fraud, his actions were only consistent with actual knowledge that he was participating in fraudulent supply chains. We go on to consider whether this case is made out.

Dr Okposin's hard work

296.Mr Bridge maintained that Dr Okposin put in considerable hard work and effort into securing the deals and that this indicated that he was not aware of the fraud.

297.While we do not accept Dr Okposin's suggestion that he worked any harder than ordinarily businessmen might be expected to work, in any event even if we accepted it, it would tell us nothing, as a person could work as hard for illegal as for legal profits.

The appellant's financial commitment

298.As already mentioned, in 2005 the appellant borrowed some £300,000 from Dr Okposin's friends and acquaintances to fund its business. In most cases, the appellant has not repaid this money. Dr Okposin also re-mortgaged his home and invested the proceeds in the appellant's business. He lost his home in 2007 as he was unable to keep up with the repayments. At various times in 2005 and early 2006 the appellant received very substantial repayments of input tax, all of which were reinvested in the business, and if this appeal is unsuccessful, are lost.

299.Mr Bridge submits that Dr Okposin's personal financial losses and willingness to keep reinvesting in his company's business indicates he could not have been knowingly involved in the fraud. We do not agree. By itself it tells us nothing. Dr Okposin clearly knew he risked non-repayment by HMRC. It had happened before and he had been warned many times as mentioned above. The mere fact he took this risk, does not tell us whether he took this risk believing he was trading on a genuine market or whether he took this risk knowing that he was not but expecting HMRC to refund him anyway as they always had done so in the past even on one occasion when HMRC had found a connection to fraud.

Appellant's pricing and profit margins

300.The Appellant's profit margin was a constant 2% in all 74 deals, even though the deals involved different types of phones, different quantities of phones, different suppliers and did not always take place on the same day.

Appellant's submissions

301.Mr Bridge's submission is that Dr Okposin chose a profit margin of 2% below which he would not sell in order to maintain a high volume of trade. He suggests Dr Okposin's readiness to accept a low margin means he was an innocent dupe: someone "in the know", suggests Mr Bridge, would have asked for 6%, which Mr Bridge suggests we can take from other MTIC cases as the normal profit margin for brokers "in the know".

302.We reject Mr Bridge's suggestion that a 2% profit margin is by itself necessarily inconsistent with knowledge: 2% of a large sum is itself a large sum. As mentioned in paragraph 251-253 above, the appellant would have made a very great deal of money from the deals at issue in this appeal had the input tax been repaid. That 2% is lower than 6% tells us nothing.

303.Mr Bridge also says that HMRC are at fault for not querying the appellant's 2% profit margin at the time, so not putting the appellant on notice that there was a problem with it. As we have said before, such submissions are irrelevant to the question of knowledge. If the appellant knew its transactions were connected to fraud, it is immaterial if HMRC did not share its suspicions with the appellant. (Although, as noted above in paragraphs 213-237, HMRC did share its suspicions with Dr Okposin, although the profit margin specifically was not mentioned).

304.Dr Okposin claimed Mr Smallbone had actually told him that a 2% margin was okay. Mr Smallbone denied this. We prefer Mr Smallbone's evidence on this: not only have we find Dr Okposin's evidence to be largely unreliable and Mr Smallbone's to be reliable, it is very unlikely that Mr Smallbone would have said such a thing, and such a statement is not recorded in his contemporaneous notebook. We reject Dr Okposin's evidence on this.

The buying price

305.Is HMRC's case that the appellant's consistent 2% profit margin denotes knowledge made out? We found Dr Okposin's explanation of the pricing of the phones to be inconsistent and irrational. He accepted he did not negotiate his buying price. He spoke of a volatile market with sudden price drops but also said that the prices were fixed like those in any branch of Marks & Spencer, which was his explanation for why he did not negotiate his purchase price. It was put to him that market players ought to be trying to undercut each other and his reply was that they did not. He was asked to explain his very different prices for his UK to UK sales in the month after the last of his broker deals and his reply was that market prices had dropped, although later he gave as the explanation that when selling cross border a trader could add shipping costs.

306. But we find that different UK companies on the IPT were paying different prices for exactly the same phones, in the same quantify on the same day. For instance, each buffer in each chain paid slightly more than the previous buffer. Dr Okposin claimed it was a grey market, where the price of phones changed daily, but we find that over time the appellant largely paid the same price for the same phone.

307. In conclusion, no rational or consistent explanation was given by Dr Okposin for why he did not attempt to negotiate his buying price, nor why the fact that it was not negotiated did not put him on notice of a connection to fraud.

Did Dr Okposin negotiate the appellant's selling price?

308. In his witness statement Dr Okposin says he chose a low profit margin of a constant 2% to remain competitive and to close the deal quickly before it was lost to another company. At first in his oral evidence before us, Dr Okposin similarly said that he had taken the decision in early 2006 to trade on a 2% profit margin. He said he would offer customers a price that was 2% above his purchase price and he would not be knocked down.

309. However, a few minutes later he changed his evidence and said he would offer customers a price that was above 2% but would never agree a price below 2%, implying he was knocked down from his asking price. Later, in a different context, he said his customers would negotiate on price. We therefore found that Dr Okposin gave an inconsistent explanation for his consistent profit margin. We found his evidence unreliable.

310. We note in addition his evidence that it was well known in the trade that the three companies to which the appellant sold would take any quantity of stock. This does not sound like a genuine competitive market.

311. We have already noted that the appellant's 13 buffer deals in June 2006 were similarly part of an orchestrated fraud and we do not think that it is a coincidence that the companies which bought from the appellant and occupied the position of broker similarly made exactly 2% profit on their deals.

Conclusion on pricing and profit margin

312. In conclusion, although Dr Okposin denied that he had had his 2% margin dictated to him, in view of

(a) his admission he did not negotiate his purchase price;

(b) his failure to give a consistent and rational explanation for the pricing structure in the market in which he traded

(c) his failure to give us a consistent and rational explanation of why 74 deals all had the same margin of 2%;

(d) our finding that all the deals were in fact orchestrated; and

(e) that we do not think it a coincidence that the brokers in the 11 of the appellant's 13 deals in June also make a margin of exactly 2%;

we find that Dr Okposin knew that he was not negotiating his price on an open market but having his pricing dictated to him. We bear in mind, therefore, that Dr Okposin knew he did not chose his margin *and* that he chose to deny this to the Tribunal. We find it difficult to see how this behaviour is consistent with anything other than knowledge the appellant's transactions were not on the open market and were therefore part of a deal chain orchestrated for the purposes of fraud.

Protecting itself from risk - insurance

313.HMRC's case is that the appellant was underinsured and this indicates that Dr Okposin was not concerned with ordinary commercial risks because he knew that the transactions were not genuinely commercial but served the purpose of fraudsters.

314.The appellant's case is that it paid a very substantial insurance premium which by itself is an indicator of innocence and that if it was underinsured it was inadvertent.

315.The appellant's case in detail is that up to March 2005 it relied on insurance held by the freight forwarder. We were given no evidence of this, such as a copy of the freight forwarder's policy, although the appellant claimed it existed. Dr Okposin's evidence was that the appellant then took out its own policy from March 2005 to February 2006. This was not produced to the Tribunal although Dr Okposin claimed he had given a copy to Mr Smallbone at the time.

316.The appellant's accounts covering this period make no mention of a freight insurance policy although the accountant was careful to specify that the company spent £556 on general insurance. The appellant did not suggest that this included freight insurance: we find it did not as from the evidence of the price of insurance in 2006, this was far too cheap apart from only being described as general insurance. The appellant's case is that the cost was wrapped up in the entry in the accounts of "costs of sales freight charges" at £76,000. We do not accept this either as we consider the cost of insurance is not a freight charge and would have been separately itemised. An accountant would not itemise the cost of an inexpensive general insurance policy and fail to itemise the much more expensive freight insurance.

317.We did not find Dr Okposin a reliable witness. We note that he claimed that an earlier version of the loan agreement with Mr Field existed yet this contradicted Mr Field's evidence. We take into account that the accounts do not show a premium being paid. We find that this policy did not exist and that the appellant did not hold freight insurance up to March 2006.

318.The appellant did hold insurance from March 2006 onwards and ostensibly it would have covered all the deals in this appeal. The policy was for a year and its cost of £85,000 was to be paid in 4 instalments. We find the appellant paid the instalment due in April 2006. We reject the Dr Okposin's oral evidence that the appellant paid the next instalment due in July 2006 because there is no evidence of this from the bank statements and, its input tax having been withheld and trading having ceased, it

seems most unlikely it would have paid for a policy it no longer needed and could not afford. In any event, Dr Okposin, having indicated it would have been paid, then said he could not remember if it had been paid. It does not matter. The issue for the Tribunal is the position March-June 2006 when the deals the subject of this appeal took place.

319.The question for the tribunal is whether the insurance that the appellant held and had paid for and which ostensibly covered the deals at issue in this appeal, was held because the appellant considered it was trading on a genuine market subject to normal commercial risks or because it wished to give that impression to HMRC. In other words, HMRC's case is that it was window dressing.

320.HMRC say it was window dressing because it left the appellant underinsured and the appellant must have known this. If the appellant was genuinely concerned about risk, runs HMRC's argument, the appellant would have been properly insured.

321.The policy insured goods up to the value of £75million per year and any single consignment up to a value of £0.5million. We find that 17 out of the 56 consignments made by the appellant were in excess of the £0.5million limit. Dr Okposin's evidence was that this was a mistake that neither he nor the insurer had noticed at first. He says that he rang the insurer when he realised this and the insurer had okayed the position.

322.Dr Okposin was unable to produce any documents to verify this. Even more significantly we do not accept that the insurer knew the limit was being breached. We find that the appellant sent monthly schedules of shipping to its insurers. It showed deal values but not consignment values so the insurer would not have known when the consignment limit was breached. More importantly, the schedules significantly under-declared the transactions. For instance, the schedule for March said "Declaration of stock shipped: March 2006" but listed only 6 of the 28 deals in March.

323.Dr Okposin's explanation of these discrepancies was that the insurer only wanted a sample and in any event the appellant would have given the insurer the release notes as well. We do not find the explanation credible. Firstly, the schedules are not described as samples and as they carry a "total" they do not look like samples. Secondly, the total value of his deals for three months ending April 2006 was £63million so it was obvious his policy limit (at £75million per year) was likely to prove too low. Thirdly, Dr Okposin said himself that the insurer would have known the value of the consignments from the schedules and described the schedules in his 3rd witness statement as a "declaration of the stock we had shipped that month", neither of which statements would be right if they were merely samples. Fourthly, good sense suggests that the insurer would want a complete schedule so that they could check that the appellant was not under-insuring. A sample would be useless.

324.In conclusion we find that the appellant was under-insured and took steps (with its inaccurate schedule) to conceal this from the insurer. Dr Okposin denied this but we find that the allegation was well made for the reasons given above.

325. We find that Dr Okposin did on or around July 2006 negotiate an increased consignment limit with the insurer (from £0.5 million to £2million per consignment). However, this was by a document dated 24 July and was too late for the deals in the appeal. We also find Mr Smallbone had earlier in June 2006 written letters to the Appellant querying the extent to which it held insurance.

326. In summary, we find that Dr Okposin left the freight uninsured up to March 2006 and although he purchased a policy at that time, he kept the price of the policy down by under-declaring the value of his consignments. He was significantly underinsured.

Protecting itself from fraud - IMEI numbers

327.Dr Okposin's story is that when he started trading in mobile phones in 2004 he was advised by his HMRC officer Alan Baker that he should (amongst other things) get the freight forwarder to produce a list of the IMEI numbers of all the phones so that Harwich could forward it to HMRC. We find Harwich forwarded the IMEI numbers of its stock to HMRC up to early 2005.

328.However, in mid 2005 the appellant had a shipment temporarily held up at Heathrow and five phones removed from it on the basis the IMEI numbers on the boxes did not match the numbers on the paperwork. Dr Okposin's evidence is that he then took a commercial decision to stop collecting and providing to HMRC IMEI numbers of the phones in which he traded.

329.Dr Okposin's evidence was also that his then VAT officer Mr Wright had said it was all a mistake by HMRC and there was no problem with the IMEI numbers on that shipment. We don't accept that. Mr Wright gave a witness statement in which he said that the paperwork did not match the boxes and that he had specifically *not* said to Dr Okposin said that the mistake was HMRC's. The appellant had the opportunity to cross examine Mr Wright on this evidence but chose not to do so. We therefore accept Mr Wright's evidence in preference to Dr Okposin's.

330.Therefore, whatever the reason was that the appellant ceased to keep IMEI numbers, it was not because HMRC had created an unnecessary problem for them by mixing up numbers over this one shipment.

331.We find that Dr Okposin was well aware that HMRC wished the appellant to record IMEI numbers. Mr Smallbone advised the appellant of this many times and repeated it in January 2006. Dr Okposin continued not to check IMEI numbers of his stock.

332.We find from his evidence Dr Okposin did understand why HMRC wanted the IMEI numbers: this was because it would identify phones that had been traded in more than once and were therefore being carouselled (a hallmark of MTIC fraud). Dr Okposin's point is that HMRC's checks would be too late for him in that the goods would already have been sold on before HMRC would have been able to tell him that they were being carouselled. Therefore, he said, he preferred to avoid the expense of having IMEI numbers listed. We consider this a poor excuse: while we agree the

check would have been too late for any individual consignment, it would have given the appellant the knowledge with hindsight that a particular supplier was connected to fraud. It could have informed its future dealings if it wished to avoid fraudulent chains.

333.Further, we find that the appellant's own due diligence on their suppliers required their suppliers to warrant that the IMEI numbers were not previously allocated to them. Yet despite requiring his suppliers to know what the IMEI numbers were, Dr Okposin never asked them to be supplied to him which would have avoided the expense of a second check being undertaken by the appellant. His explanation for not asking for the IMEI numbers was that the information was confidential. We found this answer to be unreliable: it is plain that since the appellant was buying the phones the IMEI numbers of them were not something which could be kept confidential from the appellant nor would there be any reason to do so. Further, later when it was put to him that the Veracis reports showed that his suppliers did not keep IMEI numbers and that therefore their warranty to the appellant that they did was false, Dr Okposin indicated that he did not care "if they choose not to [keep the IMEI numbers], then that is between them and their customs officer".

334.So we find he did not ask his suppliers for the IMEI numbers because he knew from the Veracis reports that they did not have them and he did not care that they falsely declared to the appellant that they did.

335.In conclusion, we find despite frequent requests, that the appellant chose not to provide HMRC with the IMEI numbers of the phones in which it dealt. We do not accept that it chose not to participate simply because it wished to avoid future problems of mis-matches on the paperwork or the cost of checking the numbers. It is clear that Dr Okposin did not want to keep a record of IMEI numbers. He asked for a warranty from his suppliers but did not care that his suppliers ignored it. The appellant's behaviour was not consistent with that of a trader anxious to cooperate with HMRC and avoid MTIC fraud chains.

Protecting itself from fraud – due diligence

Appellant's submissions

336.The appellant's case is that it protected its commercial interests by not releasing goods until it was paid and not paying for the goods until they were received. It also carried out due diligence on its trading partners.

337.It is Mr Bridge's case that, however good or otherwise the due diligence was, there was no real means by which the appellant could have established whether or not the phones the appellant was purchasing had earlier been sold by a seller who would fraudulently default on the VAT. We agree that Dr Okposin would not have had the means to discover the identity of anyone in the chain above his supplier. But the question is not whether the appellant knew the identity of the fraudster but whether it knew its transaction was connected to fraud.

Mrs Barker's involvement in due diligence

338.Mrs Barker was largely employed in order to carry out due diligence, and, we find, she genuinely considered that she was carrying out due diligence.

339.However, Mrs Barker had no previous experience in the mobile phone industry nor in carrying out due diligence. Her understanding of her role was that she had for the most part to ascertain that the trading partner was validly registered for VAT and validly registered as a company. She said she took all documents at face value. It is clear her role did not involve an evaluative function.

340.It was the appellant's case that her involvement as an obviously innocent "mature" employee to arrange the deals by completing the trading board and conduct the due diligence indicates the appellant's innocence.

341. We do not agree. We find the trading board did not reflect the deals at issue in this appeal. This is because it is alphabetical and of the many companies listed, of the trading partners at issue in this appeal it only mentions TM Global and Zain. It was also Mrs Barker's evidence that she did not witness Dr Okposin negotiating any deals and did not conduct deals herself. So far as due diligence was concerned her role was to collect and not evaluate information about prospective trading partners. Her employment tells the tribunal very little.

342.We find it far more informative to consider what Dr Okposin did (or did not do) with the information she collated and to consider the due diligence Dr Okposin could have carried out but did not. And we consider these matters below.

Customs' alleged sign off on due diligence

343.It was also the appellant's case that it had HMRC's sign off on its due diligence processes so at the least that would have led it to believe that there was nothing wrong with its due diligence.

344.It was Dr Okposin's evidence that the appellant's VAT officer in mid-2005, Mr Wright, was "very satisfied" with Harwich's due diligence. However, in his witness statement Mr Wright denies this and says he would have advised Dr Okposin to read Notice 742 for due diligence checks and as a matter of policy no HMRC officer would ever say to a trader that its due diligence was satisfactory. The appellant chose not to challenge this evidence and therefore we accept it: we find Dr Okposin was not told by Mr Wright that the appellant's due diligence was satisfactory.

345.In any event Mr Smallbone became the appellant's VAT officer in mid-2005 and his evidence, which we accept, is that the appellant was advised on how to improve its due diligence. For example, in a meeting between Mr Smallbone and Dr Okposin in January 2006, after advising Dr Okposin that the only way to avoid being caught up in fraud was to stop doing these sorts of deals (we have discussed this above), Mr Smallbone went on to suggest two improvements to the appellants's due diligence checks. These were to (a) record IMEI numbers; and (b) ask for independent credit checks on customers and suppliers.

346.We do not find that Dr Okposin was in fact given any comfort that his due diligence was considered acceptable by HMRC. We do not find that Dr Okposin even relied on what advice he was given: he did not take Mr Smallbone's advice to record IMEI numbers or have credit checks on his customers although he did start or at least continue to obtain independent credit checks on his suppliers.

Basic registration checks

347.We find that the appellant always checked that its trading partners were validly incorporated and validly VAT registered. This of course could give it no comfort that its trading partners were either financially sound or not involved with fraud. It merely ensured that the invoices were valid.

Trade references for suppliers

348.We find that although the appellant normally obtained two trade references on a trading partner these were often not obtained before trading with the new supplier commenced (this was the case with Zain, Euro Asia, Cell Express and Global Roaming).

349.We also find that the trade references in many cases would provide little comfort either of credit worthiness or that the supplier was unlikely to be involved in fraud. For instance, one of the two references for TM Global was written by a shareholder in TM Global and could not be considered to offer an independent view. Other trade references were written by companies who ought to have been competitors as they were all suppliers to the appellant. For example, Zain had a reference from Team Mobile, and Global Roaming had a reference from Cell Express. The other reference for Global Roaming was from Universal Distribution Ltd, a company with which Dr Okposin said the appellant had ceased to trade because of VAT defaults in its supply chain.

350.Dr Okposin's evidence was that he was not concerned with any of these connections.

351.Further, with respect to Euro Asia we found that the trade reference given (that Euro Asia paid on delivery) was inconsistent with the report from Veracis (which said Euro Asia traded on suppliers' credit). Dr Okposin's evidence was that this was not inconsistent. We cannot agree with him and we think he understood the point, but was trying to explain away what could not be explained away.

Trade references for customers

352.The main due diligence on its customers was trade references. Again we find that Dr Okposin explained himself to be unconcerned about oddities in the references. For example, the reference for Celcom was given by Fluid Trading, a company with which Dr Okposin said he was unacquainted. The reference said that Fluid had traded with Celcom 3 months and allowed Celcom £1million credit. Dr Okposin said he found this quite reasonable. We did not believe that he genuinely thought a trade

reference from a company that professed to offer £1million credit after a very short trading history could give much comfort.

Credit checks

353.The appellant did not ask to see the accounts of its trading partners. Dr Okposin's evidence was that he did not need to see the accounts because he relied on the credit checks. Although this was not the case for 2005, we find for the deals at issue in this appeal the appellant held a credit check report on all its suppliers before the deals in question.

354.However, we find that the credit checks could not have given the appellant any comfort as to the credit worthiness of its trading partners. Firstly, the credit reports obtained showed that the companies had either no or a low credit limit (eg on of the highest ratings given to its suppliers was for TM Global which was given a limit of £7,000). Dr Okposin maintained that Global had good creditworthiness yet its credit report showed that it had a recommended credit limit of only £7000 whereas the deals with the appellant were for £100,000s.

355.Dr Okposin's answer to why the credit checks often showed no credit limit was because the company was too new to have financial information and they would get a credit rating when they had been trading longer: while this appears to be a correct explanation of why the companies in question had a nil credit rating, we find it in no way explains why Dr Okposin was prepared to trade with companies in millions of pounds' worth of goods who had virtually no track record.

356.We also find that where the credit check did have some financial information it showed (eg as for Global Roaming) a large turnover but no profit and loss information and no asset base. Dr Okposin's evidence was that he was not concerned by this.

Veracis reports

357.As with credit reports, Veracis reports were a new due diligence check introduced by the appellant in early 2006. Nevertheless, in at least one case the appellant did not obtain the report before reaching the decision to trade with a new supplier: Veracis was instructed to carry out the report on 28 February 2006 on Global Roaming, the first trade with Global Roaming by the appellant was on 24 March 2006 and the Veracis report was received on 21 April 2006. Dr Okposin's explanation for this was that due diligence was a continuing process.

358.We find that the Veracis reports invariably revealed that the companies with which the appellant was dealing had come from nowhere in a short time to reach very high turnovers. For example, one of the appellants' suppliers with the longest existence was TM Global which was incorporated in 2003 and in 2005 expected a turnover of £50million; Xytel was incorporated in September 2005 and a few months into its existence said it was expecting a turnover of £50 million. Dr Okposin's evidence was that he did not consider this odd.

Bank references on suppliers

359.No bank references were produced for its suppliers. Although normally the trading partners would be asked to and would sign an authority for the appellant to apply for a bank reference, there was no evidence that the appellant applied for the reference. Mrs Barker's evidence was that the appellant stopped asking banks for references because banks levied charges for them. She went on to say that nevertheless the appellant would ask for a bank reference for an important trading partner, but no evidence was produced of a bank reference for any of its 7 suppliers at issue in this appeal so we do not accept that it did so. It may be that Mrs Barker was thinking of bank references on the customers to which we refer below.

Bank references on customers

360.The appellant did seek a bank reference on two of its three customers, Freshnet and MS Enterprise. Its request asked FCIB how long the company had held an account, whether it was credit-worthy and whether the account had third party beneficiaries. The bank answered only the first question. Dr Okposin's evidence was that the appellant sought a bank reference because it was what HMRC wished to see. We found he was unable to give a satisfactory explanation of why he had not chased the bank to answer the last two questions

361. We find therefore that all the bank reference did was confirm that the company held an account with FCIB. This cannot have provided the appellant with any comfort over its creditworthiness as the mere holding of an account gives no indication of creditworthiness.

Accountants' references.

362.Dr Okposin did not ask for an accountants' reference but Veracis usually did. Dr Okposin's evidence was that he chose to rely on trade references rather than accountants' references. Further, he said he was not concerned that the Veracis reports showed that in many cases (eg Global Roaming and Xytel) an accountant's reference had been requested and not received. It was put to Dr Okposin that the significance was the fact that the reference had been asked for and not received: he did not answer the question save to say it was of no concern as he didn't seek an accountants' reference. We find he understood the significance of the point counsel was putting to him but did not answer it as he had no satisfactory answer.

Addresses

363.In many cases the information showed the companies as either having changed offices frequently in quick succession or to have more than one address at the same time. Dr Okposin said he did not raise questions about this or think it odd.

364.He was also not concerned when the Veracis reports showed, as they often did, that the company the subject of the report had not provided a copy of their lease to Veracis or had provided a lease which showed it only had a very short term right to occupation.

365.Dr Okposin also told us that he was not concerned that the majority of his suppliers and customers had connections to Lancashire. Most had addresses in or near Preston and Blackburn. Four of the companies had directors born in Lancashire in 1978.

IMEI number warranty

366. Veracis often reported that the supplier did not keep IMEI numbers. The only exception was MP3 which claimed to carry out a 10% IMEI scan. Nevertheless, each supplier would sign the appellant's standard conditions saying that it checked IMEI numbers. We have discussed this before in paragraph 327-335.

367.Dr Okposin said he was not concerned that his suppliers did not keep IMEI numbers as the appellant did not. We accept that he was not concerned with IMEI numbers. It was put to him that therefore the terms in his suppliers' declaration about the keeping of IMEI numbers was meaningless window dressing. He denied this but we do not accept the denial: he clearly did not expect or require his suppliers to keep IMEI numbers so asking them to warrant that they did so was pointless other than to give the appearance of being concerned with IMEI numbers.

Due diligence on customers

368.Dr Okposin admits his due diligence on the appellants' customers was less extensive than on his suppliers. We find he did not visit his customers. The appellant carried out no credit checks on its customers despite (a) knowing that it was possible to obtain such reports on foreign companies and (b) a recommendation from HMRC to do so.

369.Dr Okposin gave three explanations for this. He said that he did not understand how carousel fraud worked and thought he only really needed to check his suppliers. We do not accept this explanation as reliable: it was clear from his earlier evidence on IMEI numbers that he was well aware of the risk of the goods circulating. We find his evidence was inconsistent and unreliable on this point as on many others.

370. He also gave as an explanation that Mr Smallbone had told him that due diligence on customers could be less extensive. We do not accept that. Mr Smallbone's evidence, on the contrary, was that he had not said this and that in 2005 HMRC had raised queries on some of the appellants' customers. We find that Mr Smallbone also routinely took away the due diligence packs on both customers and suppliers. We also find that Dr Okposin was well aware of Notice 742 (it was mentioned in letters from the appellant) and Notice 742 makes no distinction between suppliers and customers but requires a trader to check its entire supply chain. We have already noted a recommendation in early January 2006 made by Mr Smallbone that Dr Okposin carry out credit checks on customers. So we reject this as the explanation of why Dr Okposin did not carry out more checks on his customers.

371.The third reason given for the the lesser checks was that the appellant had no risk as it was paid on time. We reject this as a valid explanation. Although the appellant

was sometimes paid before it shipped the goods, in most cases it was not. It was therefore financially at risk that it could be left with a contract to buy goods for which it had already incurred the costs of shipping to France but for which it had no payment by the customer.

372. We find Dr Okposin gave no satisfactory reason of why he did not consider much due diligence needed to be carried out on his customers.

Flow chart of due diligence processes

373. We also find that the appellant put forward as evidence a flow chart of its due diligence process. It said that it would check with banks whether third party payments were made and would check that the supplier and bank shared the same country of residence. It was pointed out that none of his suppliers and customers shared the same country of residence with their bank. Dr Okposin said he was not concerned: he refused to give any answer as to why the appellant had this as part of its due diligence process (other than to say banking in Harwich did not make the appellant a fraudster). He denied it was window dressing but we do not accept this denial.

Conclusions

374. It was, as mentioned, Mr Bridge's case that in any event no due diligence to any standard would have revealed any connection to fraud. We consider that (even if true), this would be irrelevant to the question of knowledge: if the appellant *knew* that its transactions were connected to fraud, whether or not due diligence would have revealed the connection it already knew is irrelevant. If the appellant did not know, whether due diligence could or did reveal the connection is of course a very material matter.

375. Aside from the question whether there is means of knowledge if better due diligence would have revealed the connection, the appellant will be fixed with the knowledge of the information revealed by the due diligence which was in fact carried out. And if that, together with all other factors known at the time to the appellant, did reveal the connection in the sense, as put in *Mobilx*, that "a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion" then the appellant will have means of knowledge.

376. We consider actual knowledge first. It was the appellant's case that it undertook substantial due diligence on its trading partners. We do not agree that the appellant carried out substantial or effective due diligence. We have found that the appellant always checked that the companies with which it traded were validly incorporated and validly VAT registered. This could only provide an assurance that the invoice was validly issued. It was prepared to trade without trade references. Its only independent reports were credit reports and Veracis reports. It did not seek independent references from its suppliers' banks or accountants.

377.It traded without regard to any negative indicators, such as trade references which revealed that the market was not properly competitive (because suppliers were connected). It was unconcerned by nil or low credit ratings. It ignored the odd geographic connections between many of its suppliers and customers. The Veracis report, although independent, provided little worthwhile information and Dr Okposin was unconcerned by negative indicators such that its trading partners were very new companies with massive turnovers who did not provide an accountant's reference when asked.

378.Even less due diligence was carried out on the appellant's customers. No credit check was obtained, and Dr Okposin was satisfied with a bank reference which confirmed only what he must have already known which is that the company had an account with FCIB.

379.We find that the appellant carried out transactions in millions of pounds' worth of goods with very little due diligence on its suppliers and customers. We find that he did this at a time when he had been told most of his previous transactions had been traced back to a fraudulent default and he understood what MTIC fraud was.

380.We find that, despite its claims, the appellant's due diligence was not improved following the warnings from HMRC in January and February 2006. Although it carried out more credit checks and commissioned Veracis reports these added nothing as Dr Okposin never reacted to any negative indicators contained in them but carried on trading regardless. He did not ask his suppliers to change their suppliers: he was content to send out a letter asking for confirmation of his suppliers' due diligence procedures and carried on trading (in one case) without a reply.

381. We find that Dr Okposin did at the time understand ordinary commercial matters. He was an economist and had tried to set up a business before this one. He accepted it was important that his customers were able to pay.

382.As Dr Okposin knew that he needed to protect his company from contrived MTIC transactions while at the same time protecting his company from customers who could not pay, we consider why he failed to ask for many obvious due diligence items such as IMEI numbers and accountants' reports, why he ignored the many negative indicators (such as trading with new companies with huge turnovers, unexplained connections between many of his trading partners). We also ask why he asked for declarations from his suppliers on things he admitted he had no concern with (such as IMEI numbers).

383.We find that he did these things for a smoke screen to hide the fact that he would trade in any event. He did not carry out due diligence with a view to protecting his company from uncreditworthy trading partners or trading partners involved in fraud. If he had done this, his due diligence would have been very different. We consider the reason he carried out due diligence was the same reason he asked his suppliers for declarations on IMEI numbers despite knowing the declarations were false: it was to create the appearance of effective due diligence.

384.The only reason we can think of why Dr Okposin would wish to create a false picture of due diligence while at the same time not actually carrying out effective due diligence was that he knew the transactions were connected to fraud and indeed he knew that his transactions facilitated that fraud but nevertheless wished to ensure HMRC repaid his input tax.

385.This is all much of a muchness with Dr Okposin's willingness to continue to trade with 3 suppliers and 2 customers even after knowing a previous purchase from or to that trader had been traced back to fraud. It is consistent with our finding that in face of a warning letter from HMRC he said that he would continue to trade regardless. It is consistent with his sending out a letter to Cell Express, after he had been informed it had supplied him goods connected to fraud, asking Cell to confirm their due diligence procedures and continuing to trade without waiting for a reply. His due diligence was nothing more than rather poor window dressing.

386.We move on to consider the contractual terms on which the appellant traded.

The contractual terms on which the appellant traded

Inadequate specification of goods?

387.We find that most purchase orders from the appellant's three customers and suppliers do not specify the goods they wish to purchase by anything other than quantity and model. The appellant's invoices also lack the same details. Typically they specify only make, model, "new" "sim free" and "CE spec".

388.Dr Okposin's explanation for this was that the specification was important to the customer but it was contained in the appellant's inspection report which was given to the customer. However, when it was pointed out that the inspection report was often not dated until a day or two after the deal was done and the goods had been shipped, Dr Okposin's explanation was that the specification was negotiated orally.

389.We do not accept this evidence as reliable. It was not the original explanation. In any event, we do not accept that *if* the customer was concerned with specification (as Dr Okposin said that it was), bearing in mind the value of the contract, it would be content to negotiate it orally but not then record the end result of the negotiations in its purchase order. We note that we have found Dr Okposin's evidence to be unreliable elsewhere and find it unreliable here. We note in this context that when asked why in 8 of its deals the appellant's invoice contained even less detail than usual, Dr Okposin's reply was that the appellant only included a specification required by its customers. This of course contradicted his evidence that his invoices carried less specification than required by his customers.

390.And apart from Dr Okposin's rejected oral evidence, there was no other evidence that the customers were concerned with the specification of the goods. As we have found as a fact that these deals were orchestrated for the purpose of fraud, it is of course very unlikely that the customers would have had any interest in the specification of the goods as they were merely a vehicle for fraud.

391.We also note that "CE spec" is meaningless. Dr Okposin said that it meant that the phones carried all European languages but the inspection reports make it clear that this was not the case: the phones were much more limited and varied in their languages. It was obvious that "CE spec" failed to specify the actual language of the phone and that the language of a phone would be very important to the ultimate consumer and therefore would be important to a genuine wholesaler.

392.Therefore we find that the specifications used on the documentation were more limited than in a commercial deal. Further we find that the appellant's customers had no interest in the specification of the goods, and Dr Okposin knew they had no interest because it was not on the purchase orders, it was not orally negotiated and he knew that his customers often did not see the inspection report before entering into the deal.

Inadequate specification of contractual terms?

393.There were virtually no terms and conditions of trading specified by either the appellant or its suppliers. Dr Okposin said that the appellant had terms and conditions but this, we find on the basis of his later evidence, was a reference to the supplier declaration which the appellant had signed by both suppliers and customers. It contained no terms of payment; no terms about the passing of risk and title and nothing about faulty goods. Dr Okposin's oral evidence was that the appellant's ordering and return procedures were notified to customers on the phone.

394.We do not accept this evidence: we have not found Dr Okposin to give reliable evidence and we think that as he put other things in writing (eg the supplier's declaration), if he had wanted to protect the appellant's position he would have put terms and conditions in writing too.

395.We find that there was a failure by all parties including the appellant to specify normal contractual terms. Dr Okposin did not suggest he did not understand the need to protect the appellant's position with its terms and conditions of trading: indeed he said that he had. Yet he clearly was not concerned that the appellant had any need to protect its position in these contracts because he did not do so. We find this must have been because he expected to be paid in any event, and did not expect the customer to return the goods as faulty or not up to specification. And the only reason for this must have been that he knew that the relationship was not an ordinary commercial relationship but an artificial trading relationship for the purposes of fraud.

Cooperation with HMRC

396.One part of the appellant's case was that it had always cooperated with HMRC. However, although we find that during 2005 and early 2006 the appellant would ordinarily supply requested information, it did not always do so. Its solicitors refused to provide some information required in March 2006; similarly they refused to provide information on insurance in May 2006 (although it was later provided). Bearing in mind that the information had to be provided in order to obtain a refund,

we do not think the fact that ordinarily the appellant did provide the information tells us anything other than it wished HMRC to process its refund claim.

Conclusions on knowledge

397.Reverting back to the character evidence given by the Rev Field and Mrs Barker, the question is what weight to attach to this opinion evidence. Our conclusion is that we attach no weight to it. This is for three reasons. Firstly, we know virtually nothing about Mr Field and Mrs Barker but what we do know suggests to us that their judgement is far from infallible. Both of them invested in a business whose transactions have been shown in this Tribunal to have come into existence solely to facilitate fraud. There is absolutely no suggestion that either Mr Field or Mrs Barker knew or should have known this: nevertheless they made their loans despite knowledge of the extraordinarily high rate of interest and, we find, at least some knowledge that there was fraud in mobile phone trading. We think they should at least have been suspicious and that they were not shows poor judgement. Secondly, and rather more importantly, in contrast to their opinion of his honesty, we found that Dr Okposin's evidence was quite unreliable: it was put to him that he was untruthful on various matters and we find that he was (as explained in various places above). Thirdly, and most important of all, their opinion is contrary to the opinion which we have formed based on all the evidence of what the appellant actually did and what Dr Okposin knew in 2006. We much prefer to rely on the evidence of what a person actually did and said to assess that person' honesty rather than the opinion of witnesses.

398.Many of Dr Okposin's answers were incredible and inconsistent. He says he found nothing odd about his transactions at all. We took into account his qualifications and earlier failed business attempt. We took into account that he certainly seemed to understand that his answers could lead to unfavourable inferences. We found that he does understand basic economic concepts and he did not act in the manner that he did out of ignorance. We are driven to the conclusion that he knew what he was doing and in particular he knew there was no other possible explanation for the opportunity that he was offered save fraud. His frequent statement that something was not "odd" was because he had no explanation consistent with innocence.

399.Dr Okposin not only had an understanding of what the fraud was, and was well aware of HMRC's concerns, by February 2006 and just before the deals in question Dr Okposin was very well aware that a great number of the deals which the appellant had entered into in 2005 had been traced to a fraudulent VAT default. Despite this the appellant hugely increased its volume of trade and continued to trade with previous trade partners with whom it had traded in chains it now knew (if it had not known at the time) were connected to fraud. We find for the reasons given above Dr Okposin knew that the company had an unrealistically benign trading environment where it was able to make a great deal of money for doing virtually nothing but paperwork and taking the risk the VAT would not be repaid. We find that he did not negotiate the appellant's prices. We find the appellant's due diligence was for the reasons given above window dressing. He refused to undertake due diligence which

might have been effective (such as IMEI numbers) and ignored negative indicators from the due diligence it did undertake. The appellant was underinsured and Dr Okposin took steps to hide this from the insurers: we find he was more concerned in appearing to have a policy than in ensuring it was valid should the company need to call on it. His contracts did not specify the goods adequately nor contain normal terms and conditions and Dr Okposin was not concerned by this. Dr Okposin told HMRC that he would trade regardless of warning letters from HMRC and we find that that is what he did.

400.The overwhelming conclusion on this evidence is that the Dr Okposin was well aware that the appellant's transactions were connected with fraud. He acted as someone would act if he knew he was not dealing at arms length, did not need terms & conditions, insurance, had no interest in the specification of the goods or his trading partner's creditworthiness or trading history. He ignored many factors which should have put him on notice such as the benign trading environment and explicit warnings from HMRC. He was warned not to do this sort of deal. He carried on. Dr Okposin's actions were only consistent with actual knowledge that the transactions were connected to fraud.

401.We take into account Dr Okposin's previous and subsequent good character as set out in paragraphs 204-205 but weighed in the scales against the evidence we had of his behaviour as director of Harwich, it did not affect our conclusion. We find for the reasons given above that Dr Okposin was well aware that Harwich's opportunity to realise its profit was because its transactions were connected to fraud.

402.Having found actual knowledge, we do not need to consider means of knowledge. However, had we to consider this, we would find HMRC had also proved means of knowledge, and for much the same reasons as given above. The appellant via Dr Okposin was on notice that not only was there a real risk of fraud in mobile phone trading, it was on notice that its own trading in the past had involved connection to fraud. Combining this knowledge with what Dr Okposin knew at the time about the appellant's own deals, such as the unrealistically benign trading environment, that its pricing was dictated to it, that its due diligence showed he was trading with companies that had in a short time shot from nothing to dealing in vast sums with no asset base nor substantial credit rating, the odd connections between companies and directors which should have been in competition, etc, ought to have indicated to Dr Okposin that the company's deals were connected to fraud. There was no other rational explanation for the opportunity the company was offered. From what Dr Okposin already knew about the transactions he ought to have known (and we find he did know) that the only reasonable explanation for the circumstances in which the company's purchases at issue in this appeal took place were that they were transactions connected with fraudulent evasion of VAT.

403.The appeal is dismissed.

404. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

Barbara Mosedale

TRIBUNAL JUDGE

RELEASE DATE: 30 April 2012

Anderson	Anderson Cellular
C & E Enterprises	C&E Enterprises (UK) Ltd
Computec	Computec Solutions Ltd
Cellcom	Cellcom Trading BV
Cell Express	Cell Express Ltd
Euro Asia	
Europe Communications	Europe Communications OU
Excelsius	
First Associates	First Associates Ltd
Fluid	Fluid Trading
Freshnet	Freshnet International
Global Access	
Hexamon	
MP3	MP3.com
MS Enterprise	
SL Computer	SL Computer Electronics
Stylez	
Team Mobile	
TM Global	
Trade Eazy	
Worldwide Enterprise	Worldwide Enterprise Ltd
Xytel	Xytel Ltd
Zain	Zain Communications