TC02760

Appeal number: LON/2008/1472

VAT – Whether appellant's transactions were 'connected' to MTIC fraud – Yes – Whether appellant knew or should have known of connection – Yes – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

FACE OFF SOUTH LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
ANDREW PERRIN FCA

Sitting in public at 45 Bedford Square, London WC1 on 29 & 30 October 2012 and at the Royal Courts of Justice, London WC2 on 8 – 19 April 2013

Imran Khan, Solicitor, of Imran Khan & Partners solicitors for the Appellant

James Waddington and Laura Mackinnon, Counsel, instructed by Howes Percival LLP, for the Respondents

DECISION

Introduction

1. Face Off South Limited ("FOS") appeals against the decision of HM Revenue and Customs ("HMRC"), contained in a letter dated 23 May 2008, that it was not entitled to deduct input tax in the sums of £1,260,525.00 and £1,129,187.50 claimed in its quarterly VAT accounting periods ended on 30 June 2006 (06/06) and 31 December 2006 (12/06) respectively. HMRC's decision was made on the basis that the transactions to which the claims related were connected to the fraudulent evasion of VAT and part of a missing trader intra-community ("MTIC") fraud and that FOS knew or should have known that this was the case.

2. FOS was represented by Imran Khan of Imran Khan & Partners, solicitors, and James Waddington and Laura Mackinnon, both of counsel, appeared for HMRC. Although throughout this decision we have referred to the respondents as HMRC this should also be read, where appropriate, as a reference to HM Customs and Excise.

MTIC Fraud

3. A description of the nature of MTIC fraud can be found in many decisions of this Tribunal and also in the decisions of the appellate Courts and Tribunals, eg in *POWA (Jersey) Ltd v HMRC* [2012] UKUT 50 (TCC), Roth J said:

> "[1] This is yet a further case of so-called missing trader or "MTIC" fraud on the system of VAT. The decision of the First-tier Tribunal ("FTT") conveniently describes the nature of a typical MTIC fraud as follows:
>
> > "5 … goods (almost always small but valuable items such as mobile phones and computer chips) are acquired by a registered trader in the United Kingdom from a trader in another member State, and sold to a second UK-registered trader. The goods then usually change hands several times within the UK before they are sold to an overseas trader which, if it is located in a member State of the European Union, is registered for VAT in that member State. Commonly the transactions all occur within a few days of the entry of the goods into the UK, sometimes even on the same day, so that goods enter the UK in the morning, pass through the hands of several UK traders during the day, and are exported again in the afternoon.
> >
> > 6. The first UK vendor, the acquirer from overseas, charges VAT on the consideration paid by his purchaser, but fails to account to the respondent Commissioners for that tax, and disappears. Such documentation as he may have had—if any—relating to his acquisition is never produced to the Commissioners. For the scheme to work he must be a VAT-registered trader who provides the purchaser with a genuine VAT invoice, on the strength of which the purchaser claims an input tax credit. The purchaser's own sale, and those of the

> other UK traders save the last in the sequence, usually generate a small profit and, consequently, a small net VAT liability, for which those traders account. The last trader, selling overseas, claims credit for the input tax he has incurred, but has no output tax liability since the sale is zero-rated. Usually this trader makes a significant profit, though that is not invariably the case; occasionally one of the antecedent traders can be shown to have made the greatest profit of all those in the chain. All of these sales and purchases, including the sale to the overseas buyer, are almost always properly documented.

[2] In the jargon that has developed to describe the various participants in such chains, the initial importer of the goods who fails to account for the output tax he has charged to his purchaser and disappears, is known as the "defaulter" or "missing trader." The trader at the end of the UK chain who sells the goods to a purchaser overseas is known as a "broker". The traders between the defaulter and broker are referred to as "buffers". In the present case, it is alleged that PJL was a broker.

[3] There are various variations and developments of this typical scheme of MTIC fraud. One of these, of which three of the transactions in the present case are said to be an example, comprises what is called "contra-trading". I again gratefully adopt the description given by the FTT:

> "9 A contra-trader, a broker in one chain of transactions—again adopting the commonly used jargon, a "dirty" chain—in which a default has occurred, buys goods from a supplier in another member State, and sells them to a UK customer; after one or more further sales and purchases they are sold to a customer in another member State. The contra-trader and, usually, all the other traders in this chain account correctly for their VAT liabilities; taken by itself it is a "clean" chain. The acquirer in the clean chain has incurred a liability for output tax which (because the values are engineered to achieve this result) matches the input tax credit due to him (or ostensibly due to him) as the broker in the dirty chain. He does not need to make a large repayment claim, attracting the Commissioners' attention, but instead makes a modest payment, or a minimal repayment claim. The same result may be achieved by undertaking a number of transactions generating an aggregate input tax credit matching the broker's output tax liability for the relevant accounting period. It is then the broker in the clean chain who has an input tax claim which, unless they can establish a link between the clean and dirty chains, the Commissioners must meet since the goods in the clean chain have not themselves been used for fraudulent purposes.""

Law

4. It is not disputed that HMRC bears the burden of proof in this appeal.

5. As Moses LJ said, in the conjoined appeals of *Mobilx Ltd (in Administration) v HMRC; HMRC v Blue Sphere Global Ltd ("BSG"); Calltel Telecom Ltd and another v HMRC* [2010] STC 1436 ("*Mobilx*"), at [81]:

> "It is plain that if HMRC wishes to assert that a trader's state of knowledge was such that his purchase is outwith the scope of the right to deduct it must prove that assertion. No sensible argument was advanced to the contrary."

6. However, the standard of proof was not considered by the Court of Appeal and therefore the prevailing authority is the decision of the House of Lords In *Re B* [2009] 1 AC 1. This was confirmed by the Supreme Court in *Re S-B (Children)* [2010] 1 AC 678 Lady Hale giving the judgment of the Court said, at [34]:

> "… there is no necessary connection between the seriousness of an allegation and the improbability that it has taken place. The test is the balance of probabilities, nothing more and nothing less."

7. The right to deduct input tax is derived from Articles 167 and 168 of Council Directive 2006/112/EC of 28 November 2006 which has been implemented into UK domestic law by ss 24-26 Value Added Tax Act 1994 and Regulation 29 of The VAT Regulations 1995 under which an exporter is, in principle, entitled to claim a deduction of input tax.

8. However, an exception to this right was identified by the European Court of Justice ("ECJ"), as the Court of Justice of the European Union ("CJEU") was then known, in its judgment, dated 6 July 2006, in the joint cases of *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL* (C-439/04 and C-440/04) [2006] ECR 1 – 6161 ("*Kittel*") in which the Court stated:

> "[51] … traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud, be it the fraudulent evasion of VAT or other fraud, must be able to rely on the legality of those transactions without the risk of losing the right to deduct the input VAT.
>
> [52] It follows that, where a recipient of a supply of goods is a taxable person who did not and could not know that the transaction concerned was connected with a fraud committed by the seller, Article 17 of the Sixth Directive must be interpreted as meaning that it precludes a rule of national law under which the fact that the contract of sale is void, by reason of a civil law provision which renders that contract incurably void as contrary to public policy for unlawful basis of the contract attributable to the seller, causes that taxable person to lose the right to deduct the VAT he has paid. It is irrelevant in this respect whether the fact that the contract is void is due to fraudulent evasion of VAT or to other fraud."
>
> …
>
> [56]. … a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be

> regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.
>
> [57] That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.
>
> [58] In addition such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them.
>
> [59] Therefore, it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and do so even where the transaction in question meets the objective criteria which form the basis of the concept of "supply of goods effected by a taxable person acting as such" and "economic activity".
>
> …
>
> [61] … where it is ascertained, having regard to objective factors, that the supply is to a taxable person who knew or should have known that, by his purchase, he was participating in a transaction connected with the fraudulent evasion of VAT, it is for the national court to refuse that taxable person entitlement to the right to deduct."

9. The decision of the ECJ in *Kittel* was considered by the Court of Appeal in *Mobilx* where Moses LJ, giving the judgment of the court, said:

> "[59] The test in *Kittel* is simple and should not be over-refined. It embraces not only those who know of the connection but those who "should have known". Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in *Kittel*.
>
> [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."

10. On 21 June 2012 judgment was given by the CJEU in the joined cases of *Mahagében kft* v *Nemzeti Adó-és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága* and *Pétér Dávid v Nemzeti Adó-és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága* [2012] EUECJ C-80/11.

11. In *Mahagében* the question before the CJEU was whether the Hungarian tax authority could refuse the right to deduct on the grounds of improper conduct on the

part of one of his suppliers without establishing whether the taxpayer had been aware of that improper conduct. In *Pétér Dávid*, heard at the same time as *Mahagében*, the issue before the CJEU was whether the tax authority could refuse the right to deduct on the grounds that the taxpayer had not satisfied himself of specific matters relating to his supplier. Both decisions were consistent with the principles the CJEU had enunciated in *Kittel*. In its judgment the Court said:

> "[45] … a taxable person can be refused the benefit of the right to deduct only on the basis of the case-law resulting from paragraphs 56 to 61 of *Kittel and Recolta Recycling*, according to which it must be established, on the basis of objective factors, that the taxable person to whom were supplied the goods or services which served as the basis on which to substantiate the right to deduct, knew, or ought to have known, that that transaction was connected with fraud previously committed by the supplier or another trader at an earlier stage in the transaction.
>
> [46] A taxable person who knew, or ought to have known, that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of Directive 2006/112, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods or the use of the services in the context of the taxable transactions subsequently carried out by him (see *Kittel and Recolta Recycling*, paragraph 56)."

Evidence

12. We were provided with witness statements made by the following officers of HMRC:

(1) Jennifer Carter, the officer allocated to undertake the extended verification of the deals undertaken by FOS in 06/06;

(2) Marva Harry, the officer allocated to undertake the extended verification of the deals undertaken by FOS in 12/06

(3) Andrew Monk, who made a pre-registration and subsequent visits the business premises of FOS and who undertook extended verification of a repayment claim made by FOS in its 06/06 VAT return. His statement also included evidence in relation to Many Services Limited;

(4) Peter Morehead, whose evidence concerned the storage and freight forwarder 1st Freight Limited ("1st Freight");

(5) Angela McCalmon, whose evidence was in relation to the IP addresses used for making transactions in accounts held at the First Curacao International Bank ("FCIB");

(6) Nigel Humphries, whose evidence concerned the transactions chains of the contra-traders Global Roaming Limited ("Global Roaming") and Famecraft Limited trading as Bristol Cash and Carry ("Famecraft");

(7) Daniel O'Neil, whose evidence was about Global Roaming;

(8) Peter Cameron-Watson, whose evidence concerned Famecraft;

(9) Susan Okolo, whose statement also was in relation to Famecraft;

(10) Michael Penry, his evidence concerned Powerlink Limited ("Powerlink");

(11) Timothy Reardon, his evidence was in relation to Compufix Services Limited ("Compufix");

(12) Steve O'Hara, whose evidence was about the 06/06 FCIB transactions;

(13) Martin Evans, whose evidence concerned 3D Animations Limited ("3D");

(14) Jennifer Davies, her evidence was about Birdwood Limited ("Birdwood");

(15) Barry Patterson, his evidence concerned E K Hassan Foods Limited ("E K Hassan");

(16) Michael Quartey, whose evidence was in relation to UR Traders Limited ("UR Traders");

(17) Andrew Leatherby, who gave technical evidence as to the IP addresses used for FCIB banking;

(18) Mark Hughes, whose evidence concerned Barato Wholesalers Limited ("Barato"); and

(19) Roderick Stone, whose statement consisted of generic evidence, which has been used in many MTIC proceedings, providing an overview of the history of HMRC's policies and some of the commercial practices relevant to this and similar cases.

13. Jennifer Carter, Marva Harry, Andrew Monk, Peter Morehead, Angela McCalmon and Nigel Humphries also gave evidence before us and, other than Mr Humphries, all were cross-examined by Mr Khan. Although we did not hear from the other officers their evidence was not challenged and their statements were admitted in evidence.

14. We also heard from John Fletcher, a director of KPMG LLP, called as an expert witness by HMRC and cross-examined by Mr Khan.

15. Mr Fletcher had provided three witness statements, the first of which dated 25 September 2009, was in the form of a report and has the heading *Mobile Phone Handset Distribution Authorised and Grey Markets in 2006*. This contained evidence about the mobile phone industry and the wholesale "grey market" for mobile phones in the UK during 2006. In his second witness statement, dated 2 September 2011, Mr Fletcher amends his first statement having reviewed "evidence in a recent Tribunal which pertains to the trading of handsets in the grey market." His third statement confirmed that the previous statements he made complied with Part 35.3 of the Civil Procedure Rules and related practice directions (duty of expert to the court).

16. The director of FOS, Nadeem Ahmed, having made six witness statements on its behalf, also gave oral evidence. In addition we heard from Anthony Elliot-Square and David Tatter. All three were cross-examined by Mr Waddington

17. Mr Elliot-Square had been instructed by FOS to assess and comment in reply to the witness statements of Mr Stone and Mr Fletcher, and to comment on the basis for HMRC's decision to deny input tax where any of those factors are areas in which he had knowledge of the industry practice. However, when cross-examined after querying the evidence of, as he put it "so-called expert witnesses", Mr Elliot Square said that he was not "saying I am an expert witness" and had never "pretended to be" one. Although he also gave evidence on some factual matters he seemed reluctant to give straight answers to questions and when he did was partisan in his approach. In the circumstances we did not find his evidence to be of much assistance.

18. Mr Tatter, the manager of ASK Lettings Limited, explained how he was able to assist FOS in the recovery of documents relating to this appeal that had been retained by a landlord when FOS moved from its premises. This resulted in a further bundle of documents being provided to the Tribunal by FOS.

19. We were also provided with extensive documentary evidence which, including witness statements and the further FOS bundle, was contained in 72 lever arch files.

20. On the basis of this evidence we make the following findings of fact.

Facts

Establishment and VAT Registration

21. FOS was incorporated on 11 February 2004. Mr Ahmed was, and still is, the sole director of FOS and his father, Safraz Ahmed, the company secretary. FOS operated from Stratford, East London and its initial business was the sale of mobile phone accessories to retail outlets in London which were purchased from a Face Off Limited, a company based in Birmingham run by a family friend.

22. Contrary to Mr Ahmed's assertion that he had some 15 years in the mobile phone business his only experience of the trade sector before FOS was established was a Saturday job which he had in a mobile phone shop whilst at school.

23. On 21 March 2004 FOS applied to be registered for VAT completing form VAT 1. On this form the business was described as "import and export of mobile phone accessories" and it was confirmed that FOS did not expect to receive regular VAT repayments. It estimated its annual taxable supplies for the first 12 months trading at £150,000.

24. A 'pre-registration visit' to the business premises of FOS was undertaken by HMRC Officer Andrew Monk on 10 May 2004. During the visit he discussed the trading activities of FOS with Mr Ahmed. Mr Monk noted that a considerable amount of stock was visible and that the nature of this stock was consistent with the Trading activities described by Mr Ahmed, namely the sale of mobile phone accessories.

25. Mr Ahmed told Mr Monk that FOS only intended to trade in mobile phone accessories and had no intention of undertaking any overseas trade in mobile phones. Following the visit Mr Monk completed his report stating he was satisfied that FOS

was making taxable supplies and that there were no grounds to deny its application for registration. FOS was registered for VAT with an effective date of registration of 21 March 2004.

Pre-06/06 VAT Return periods

26. The first VAT return for FOS was for the period 06/04. Outputs of £4,551 were declared and a small amount of input tax, consistent with the establishment of a business, was claimed. In subsequent periods up to and including 12/05 FOS declared modest sales figures which rose gradually to £51,073.

27. Although FOS had an account with Barclays Bank, following an application made on 8 July 2005 by Mr Ahmed, it opened an account with the FCIB on 27 July 2005. Mr Ahmed explained that the FCIB account was opened as "everyone was using this bank" by which he meant everyone in the mobile phone business.

28. In a letter dated 24 August 2005, Kala Associates, FOS' accountant, notified HMRC that FOS had started "exporting on a regular basis" and requested that it be allowed to submit monthly VAT returns.

29. On 21 September 2005 a "standard MTIC fraud letter" was sent to FOS by HMRC. This letter stated:

> HM Revenue and Customs are still experiencing certain problems with businesses in your trade sector offering commodities regularly involved in Missing Trader Intra Community (MTIC) VAT fraud. MTIC fraud may involve all types of VAT standard rated goods and services including computer equipment, mobile phones and ancillary items. The current estimate of the VAT loss from this type of fraud in the UK alone is between £1.06 and 1.73 billion per anum.

The letter then advised that all future VAT number verifications should be faxed to the Redhill VAT office and that the National Advice Service would no longer verify VAT numbers before continuing:

> Although the Commissioners may validate VAT registration details, it does not serve to guarantee the status of suppliers and purchasers nor does it absolve traders from undertaking their own enquires in relation to proposed transactions. It has always remained a trader's own commercial decision whether to participate in transactions or not and transactions may still fall to be verified for VAT purposes.

It states in the letter that a copy of HMRC's Notice 726 was enclosed and that the following information should be provided to HMRC when verifying the VAT status of new or potential Customers/Suppliers:

(1) The name of the new or potential customer/supplier.

(2) Their VAT registration number.

(3) Their contact numbers (including telephone number, fax number, e-mail address and mobile numbers if known).

(4) Copies of any supporting documentation (ie VAT certificate, letter of introduction, certificate of incorporation etc.).

(5) The Directors and/or responsible members.

(6) Whether they are buying or selling goods.

(7) The nature of the goods.

(8) The quantities of the goods.

(9) The value of the goods.

(10) Their bank sort code and account number.

(11) A request to forward, on a monthly basis, a purchase and sales listing with identifying VAT Registration Numbers against the suppliers/customers to the traders your local VAT office.

30. Mr Ahmed confirmed that he had received this letter but said that a copy of Notice 726 had not been enclosed. However, even before FOS had received this letter it had contacted HMRC's National Advice Service to verify VAT registration numbers.

31. A VAT Assurance visit to FOS was undertaken by HMRC Officer Vaufrouard on 11 October 2005. He noted that FOS was about to engage in the purchase of mobile phones for sale to existing UK customers and that nothing had been written to suggest FOS was dealing with exports of goods. On this basis he suggested that the request for monthly returns be refused.

32. On 6 October 2005 FOS exported 86 Nokia 3120s to Line-to-Line Trading, a Dubai company. Mr Ahmed explained that he had purchased these phones from retailers such as Tesco, Woolworths and WH Smith and sold them at a profit to Line-to-Line Trading which was operated by a friend of Mr Ahmed's from China.

33. From 03/06 FOS began to export mobile phones. Its turnover increased from the £51,073 it had achieved in its previous quarter to £1,438,5777. Following the submission of its VAT return for the period FOS received a repayment of approximately £275,000 from HMRC.

34. FOS was able to finance its involvement in the wholesale export of mobile during this period as Mr Ahmed had received a £150,000 loan from his father in March 2006. £100,000 was paid into FOS's Barclays account on 21 March 2006 with a further £50,000 paid into the same account on 23 March 2006.

35. Mr Ahmed explained that FOS advertised on and used the International Phone Traders ("IPT") and Phone Trader websites to obtain contacts with potential customers and suppliers in the wholesale mobile phone market. During this time a person referred to by Mr Ahmed simply as a "Karim" who "helped out" at FOS as a friend of Mr Ahmed. As Karim did not have a national insurance number he was not employed by FOS but provided "with subsistence" by Mr Ahmed. Karim was responsible for the paperwork, including due diligence checks, and making calls to potential customers and suppliers.

06/06 VAT Return

36. The turnover for FOS shown in its 06/06 VAT was £7,770,921. This included the following transactions.

37. On 15 June 2006 FOS sold 1,500 Nokia 8800 Black mobile phones to MS Enterprises Limited ("MS Enterprises"), a company registered in France, making a profit of £58,500.

38. Although the company had a French address and its director had his home in Leicester the French authorities were informed by an employee that MS Enterprises was run from Blackpool by another person. Information also provided by the French authorities indicates that MS Enterprises is a missing trader that has been fined over €64m for issuing fictitious invoices.

39. FOS had purchased the phones from Team Mobile International ("TMI") which, in turn had acquired them from Global Roaming. Global Roaming had been supplied by Etecom, a Cypriot registered company whose director has a mailing address in Manchester and personal address in Bolton.

40. In this and all subsequent deals with which this appeal is concerned, FOS did not enter into any written agreements with its purchasers or suppliers. Neither did it arrange insurance cover despite the value of the goods. Mr Ahmed said that this was not necessary as the risk was carried by his customers and suppliers and this was made clear in FOS's terms and conditions.

41. Global Roaming, which features in this and subsequent deal chains, was a contra-trader, based in Manchester, that has made large input tax claims which have been traced back to defaulting traders 3D, Birdwood, E K Hassan and Many Services.

42. 3D was incorporated on 5 April 2006 and registered for VAT on 3 May that year. Its intended business activity was "Design, Multimedia and Animation Graphics" and its anticipated turnover was £89,000. Although it was required to submit quarterly VAT returns no returns were in fact submitted as it was de-registered by HMRC before the end of its first quarter. On 1 June 2006 3D's principal place of business was visited by HMRC Officer Thomas Lane as information obtained from freight forwarders suggested that 3D had been allocated substantial amount of stock consisting predominantly of mobile phones. The premises turned out to be a residential address and Officer Lane was unable to make contact with anyone and posted, through the letterbox, a letter bringing forward the VAT return date to the date of the letter together with another letter giving 3D seven days to contact HMRC to confirm it was actively trading from that address failing which it would be de-registered. 3D failed to respond to these letters. On the basis of the evidence from the freight forwarders it appeared that the gross sales of 3D were in the region of £886m and assessments were issued for approximately £129m which has not been paid and remains outstanding. 3D went into compulsory liquidation on 20 September 2006.

43. Birdwood was incorporated on 9 March 2006. It applied for VAT registration on 5 April 2006 and its intended trade was "suppliers of towels, hats, cutlery and

general products". The estimated turnover was £200,000. Following its registration information was obtained by HMRC following a visit to its freight forwarders. This indicated that Birdwood had, contrary to the information provided on its registration application, bought and sold mobile phones acquiring these from European Union countries and selling them to UK companies. In the circumstances HMRC officers called at the company's principal place of business on 9 June 2006 but were unable to obtain an answer. A letter was posted through the door amending the VAT accounting period to end on 9 June 2006. Other than a telephone call to HMRC's National Advice Service on 9 June by its director regarding the VAT registration number there has been no response from Birdwood and HMRC has not been able to establish any contact. Assessments, based on the information obtained from its customers by HMRC, have been raised against Birdwood totalling £25,848,709 which remains unpaid. Birdwood went into compulsory liquidation on 10 January 2007.

44. E K Hassan, was first registered for VAT as a partnership. Following its incorporation, on 5 April 2004, and subsequent transfer of the business as a going concern the VAT number was transferred to the company. On its application to register for VAT, sent to HMRC at the same time as details of the transfer as a going concern, the main business of the company was described as "general grocery". The application also stated that no VAT repayments were expected and gave the anticipated turnover as £150,000. Information obtained by HMRC from freight forwarders in 2006 showed that E K Hassan was trading in mobile phones and that 57,247 phones had been traded over two days. The company was identified as a potentially missing trader and a visit was made to the business address but E K Hassan could not be found. On 25 October 2006 an assessment for £28,347,908.02 was sent to the company by letter and remains outstanding. On 17 July 2007 further letters requesting payment were sent to the company's principal place of business, registered office and director's home address and an address believed to be new business premises. Further assessments were issued for £437,224 on 21 November 2007, £610,960 on 14 March 2008 and £1,185,250 on 9 June 2008. E K Hassan was wound up on 12 December 2007 without payment of any of the outstanding VAT.

45. Many Services was incorporated on 4 August 2005 and was registered for VAT from 1 February 2006 as an importer and exporter of wine. Its anticipated turnover for the first twelve months trading was £100,000 and it expected to acquire £50,000 worth of goods form EU suppliers during that period. Enquiries were first raised by HMRC as a residential address, with insufficient space to store wine, had been given as the company's principal place of business. Further enquiries and documents obtained from freight forwarders showed Many Services was acquiring large consignments of mobile phones from a Cypriot company, Leriant Trading, and that it was operating from a different address from that stated on its application for registration. HMRC Officer Andrew Monk attempted to visit the company but was unable to make contact with its director and left a de-registration letter at its address. Assessments of approximately £24m were subsequently issued against the company which have not been paid. Also there has been no appeal against its de-registration.

46. In this deal and others referred to below in which Global Roaming participated, it acquired the goods before supplying them to TMI which made an onward sale to

FOS and it was FOS that exported the goods. In this way Global Roaming was able to balance its input and output tax.

47. FOS sold 2,000 Nokia 9300s to MS Enterprises on 19 June 2006 at a profit of £55,000 having itself acquired the phones the same day from TMI. TMI had been supplied by Global Roaming which had acquired the phones from Excelsius Import Export Limited ("Excelsius") another Cypriot registered company which has its main address in Manchester with its director having a Preston.

48. On 21 June 2006 FOS sold 1,100 Nokia 8800s to MS Enterprises achieving a profit of £33,000. It had purchased the phones from TMI and its supplier was Global Roaming, Etecom had supplied Global Roaming.

49. A document headed "Shareholder Loan Agreement", dated 22 June 2006, which Mr Ahmed said he had drafted, records that:

> I the shareholder Mr D S Kataria of FACE OF SOUTH LTD … have loaned the company monies to the sum of £93,500 (Ninety Three thousand and five hundred pounds) the monies are to be returned to me on a demand basis and at an interest rate of 12% per anum.
>
> The above is agreed by both the Director and Company Secretary.

The signatures to the documents are witnessed by and stamped Shah & Co. Solicitors, of Ilford Essex.

50. Mr Ahmed described Mr Kataria as a "good friend of mine", who had no experience in the mobile phone industry but who was willing to invest approximately £750,000 in FOS on the basis of information provided on the IPT website showing that the industry was "booming at the time". No further information had been supplied to Mr Kataria who appears to have accepted assurances from Mr Ahmed that "everything should be fine". Mr Kataria is not shown as a director of FOS at Companies House and was not called as a witness by FOS despite his financial commitment to the company.

51. As a result of receiving these funds FOS was able to acquire 1,700 Nokia 9500s which it sold to Eurl Imanse ("Eurl") a French Company on 27 June 2006 making a profit of £33,320. FOS bought the phones from Com 2 Limited trading as Delltronics ("Delltronics"). Delltronics had been supplied by Bevex Limited ("Bevex") which in turn had acquired the phones from Ultimate Wholesale Limited ("UWL"). Its supplier was Carpaa which had been supplied by Principle Trades Limited ("PTL") which had itself been supplied by UR Traders.

52. The evidence of HMRC Officer Michael Quarty that UR Traders is a defaulting trader which has unpaid VAT of £66,463,666 was not challenged by FOS.

53. On 27 June 2006 FOS also sold 1,200 Nokia 8800 Blacks to Eurl at a profit of £37,800. The supply chain was identical to the previous transaction.

54. Also, on 27 June 2006 FOS sold 4,000 Sony Ericsson 810i mobile phones to Alimed, a Spanish Company which paid FOS a higher price for these than it could have obtained elsewhere allowing FOS to make a profit of £85,400. FOS had purchase the phones from Glasgow Data Limited ("Glasgow Data") and its supplier was Famecraft which in turn had acquired the phones from Sinderby Enterprises Limited ("Sinderby"). Sinderby is a Cypriot company whose director is based in the West Midlands.

55. Famecraft which traded as Bristol Cash and Carry is also a contra-trader. Its transactions have been traced back to Barato. FOS did not challenge the evidence of HMRC Officer Mark Hughes that Barato is a defaulting trader owing VAT of £22,967,287.

56. FOS entered into a further "Shareholder Loan Agreement" on 29 June 2006. Other than the amount of the loan from Mr Kataria which this time was £250,000 the terms of this agreement were identical to that of 22 June 2006.

57. Also on that day, 29 June 2006, FOS sold Alimed 4,000 Sony Ericsson 810is achieving a profit of £85,400. The supply chain was identical to the previous transaction leading to Sinderby via Glasgow Data and Famecraft. Further transactions involving the same participants also took place on 29 June 2006 in which FOS sold 4,000 Nokia N80s and 3,000 Nokia N91s to Alimed making profits of £86,800 and £65,100 respectively.

58. FOS made additional "Shareholder Loan Agreements" with Mr Kataria on 18 July and 20 September 2006 under which Mr Kataria lent FOS £75,000 and £130,000 respectively on the same terms as he had in the previous agreements.

59. Mr Ahmed said that FOS had repaid £320,000 to Mr Kataria, raised by way of re-mortgage on Mr Ahmed's father's house. However, the balance remains outstanding and Mr Kataria has not taken steps to recover it.

60. On 10 August 2006 HMRC wrote to FOS stating that the 06/06 return was being allocated to the MTIC team at its Stratford office for repayment verification.

61. In a letter, dated 25 September 2006, HMRC advised FOS that three deals in its 03/06 VAT period had been traced back to tax losses amounting to £275,912.88

62. On 26 September 2006 HMRC Officer Andrew Monk visited FOS's business premises with Officer Paul Armand as part of the extended verification process of the 06/06 return where he met with Mr Ahmed and Karim. During this visit Mr Ahmed told Officer Monk that he was aware of MTIC fraud, which Officer Monk had explained in general to him, but said he had not been issued with Notice 726. He also explained Karim's role within the FOS was to help with paperwork and due diligence checks but that he, Mr Ahmed, was solely responsible for arranging and negotiating deals. When asked to describe a typical deal Mr Ahmed explained that he was first contacted by customers and would then contact suppliers to source the goods. Once he had struck a deal and payment made to his supplier the goods would be released and

shipped but not released to the customer until FOS had been paid and that FOS only paid its supply after receiving payment from its customer.

63. A letter summarising the points covered in the meeting was sent by Officer Monk to FOS on 27 September 2006.

64. On 29 September 2006 HMRC sent FOS a copy of Notice 726. Although Notice 726 is concerned with "Joint and Several Liability" it is made clear (at section 1.3) that it should be read by all VAT registered businesses that trade in goods or services that are subject to MTIC fraud, which includes mobile phones (section 1.4). Section 4.4 of the Notice asks "How can I avoid being caught up in MTIC fraud?" It is answered in section 4.5 which advises that "reasonable steps" are taken to "establish the legitimacy of your supply chain and avoid being caught up in a supply chain where VAT would go unpaid." It continues:

> We [HMRC] do not expect you to go beyond what is reasonable. You are not necessarily expected to know your supplier's supplier or the full range of selling prices throughout the supply chain. However, we would expect you to make a judgement on the integrity of your supply chain.

Although examples of checks are contained at section 8 of the Notice section 4.6 makes it abundantly clear that these are "guidelines" only, as "a definitive checklist would merely enable fraudsters to ensure that they can satisfy such a list."

65. Officers Monk and Armand made a further visit to the business premises of FOS on 20 October 2006 in order to view CMR documentation as evidence the goods had been removed from the UK. On 27 October 2006 FOS was sent a letter from Officer Monk explaining that five of the 06/06 deals had been traced back to a tax loss and the remaining deals traced back to a contra-trader and all bore the typical hallmarks of a typical MTIC deal.

66. A further request for monthly returns by Kala Associates on 28 November 2006 was rejected by HMRC on 11 January 2007.

09/06 VAT Return

67. During this period FOS appears to have returned to its original trading activity and did not engage in any large scale wholesale trading and its turnover was £28,175.

12/06 VAT Return

68. In its 12/06 VAT quarter FOS resumed its wholesale trade in mobile phones achieving a turnover of £17,645,120.

69. On 23 November 2006 FOS sold 10,000 Nokia N73 mobile phones to Sarl My Pleasure, a French company at a profit of £245,000. It had obtained the goods from Jaiden. Jaiden's supplier was Exigra Computer Services Limited ("Exigra") which in

turn had acquired the phones from Powerlink. Powerlink had been supplied by a Croatian company Cel Star Doo.

70. Powerlink was incorporated on 4 February 2003 as ANM Services Limited. In its application for VAT registration, under its original name, the business of the company was described as being a "mobile car wash". On 16 June 2006 HMRC were advised of that the company had changed its name to Powerlink on 31 May 2006 and that its new business activity was "freelance valet and cleaning services, mechanical and recover service". Although VAT returns had been submitted for each VAT quarter until 07/06 not further returns were received by HMRC. In October 2006 Powerlink started trading in Intel Processers and Nokia mobile phones importing goods from Croatia. HMRC Officers Michael Penry and Clive Bright were unable to trace anyone from the company on a visit to its principal place of business on 14 November 2006 and on 22 November 2006 it was de-registered for VAT. Further attempted visits proved equally unsuccessful. Assessments to a total of value of £1,515,106 were issued against Powerlink. No appeal has been made against these assessments which remain unpaid.

71. FOS engaged in further sales to Sarl My Pleasure after acquiring goods from Jaiden. On 23 November 2006 it sold 5,000 Nokia E50-1 at a profit of £142,500 and on 1 December 2006, 10,000 Nokia N91s at a profit of £440,000. The supply chain in each of these sales was identical the above 23 November 2006 transaction and the goods can be traced back from Jaiden to Cel Star Doo via Exigra and Powerlink.

72. On 1 December 2006 FOS also sold 5,000 Nokia 6233s to Sarl My Pleasure at a profit of £135,000 having acquired the phones from Jaiden. In this transaction the supply chain can be traced to Cel Star Doo via Exigra and Compufix.

73. Evidence of Compufix being a defaulting trader with unpaid VAT of £1,842,093.75 was not challenged by FOS.

74. On 28 February 2007 the director of HMRC's MTIC Compliance wrote to FOS to inform it that the VAT repayment claim for 12/06 would be subject to verification.

Freight Forwarders/Storage

75. During the 06/06 period FOS used several freight and storage companies including Pauls Freight Forwarders Limited, used by FOS because they were used by TMI and 1st Freight Limited. 1st Freight Limited was incorporated on 25 January 2005 and registered for VAT on 1 February 2006. Officer Moorhead who visited the company calculated that the maximum number of pallets that could be stored at its premises at any one time was 264 whereas an examination of CMR documents suggests that on 29 June 2006 there were 321 pallets there.

76. Mr Ahmed said that he had visited 1st Freight which had "quite a large warehouse" in Chadwell Heath and was satisfied that it could accommodate the stock FOS had there.

77. For the 12/12 period FOS used Jamber Freight Limited ("Jamber") to store, inspect and arrange transportation of its goods. Officers who visited the company found virtually no evidence that it was involved in storing or transporting mobile phones. Mr Ahmed also said that he visited Jamber and inspected goods for "every deal we did through them" and "was always satisfied that the goods were genuine and in good condition".

Banking

78. During the 06/06 period FOS used the either the International Credit Bank ("ICB") or the FCIB as did all participants in its respective deal chains. Mr Ahmed was unable to say where the ICB was based but explained that it used internet banking. FOS had used the ICB in its deals where it had been supplied by TMI and had opened the account on recommendation of others in its deal chain.

79. Analysis of the FCIB accounts by HMRC Officer Steve O'Hara, which was not challenged by FOS, show a circular flow of funds, that foreign suppliers and customers in the FOS deal chains were operated by UK residents and that the defaulting traders either never retained funds in their account to pay VAT or, in the case of UR Traders, did not receive payment at all. In addition there was no evidence that any manufacturers or retailers or end users of the phones were involved in the chains.

80. In the transactions during this period that involved the contra-trader Global Roaming all participants, other than FOS, used the same Internet Protocol ("IP") address to access and transfer funds through their separate FCIB accounts. HMRC Officer Andrew Leatherby, whose evidence was not challenged by FOS, explained that the use of the same IP address by several users could occur if different users were at the same location or if they shared a centralised server as often happens within a business.

81. In its 12/06 transactions FOS, and all participants in its deal chains, used Atlantic Credit and Trust ("ACT"), a company based in a serviced office in Singapore to transfer funds. Although it did not have a banking licence and therefore was not a bank it was regarded as such by Mr Ahmed.

82. Mr Ahmed had applied to open the account with ACT on 5 October 2006 on the recommendation of its supplier Jaiden which had itself opened an account with ACT a short time before.

Due Diligence

83. Mr Ahmed said "due diligence was just to confirm they [a company] are who they are". He explained that the following checks were undertaken:

(1) looking at the status of the company concerned held at Companies House;

(2) engaging Creditsafe to look at accounts and directorship to identify multiple directorships; and

(3) verification of VAT numbers.

FOS also requested copies of company and VAT certificates together with identification documents for the directors. In addition payment from customers was required before goods were released by FOS.

84. FOS obtained reports from The Due Diligence Exchange Limited on TMI, Glasgow Data and Delltronics FOS's suppliers in its 06/06 transactions. These reports contain no financial information about the companies concerned and the report on Delltronics was sent to FOS on 10 July 2006, some two weeks after the transactions had taken place. However, FOS received a Creditsafe report on Delltronics on 27 June 2006

85. The due diligence undertaken in relation to My Pleasure SARL and Jaiden, the customer and supplier of FOS in its 12/06 transactions was limited to obtaining basic VAT and company information.

86. FOS also instructed Aberdale Inspections and Jamber to carry out inspections initially giving instructions for an inspection of 10% of the stock as that was all that was needed and "it was cheaper" than a 100% inspection although it later requested 100% of stock and IMEI numbers. FOS used Aberdale to carry out the inspections as the company was recommended by TMI, FOS's supplier.

Discussion

87. To consider the issues in this appeal we adopt the following questions asked by the Tribunal in the *BSG* appeal and which were approved by the Court of Appeal in *Mobilx*, at [69]:

(1) Was there a tax loss?

(2) If so, did this loss result from a fraudulent evasion?

(3) If there was a fraudulent evasion, were the appellant's transactions which were the subject of this appeal connected with that evasion? and

(4) If such a connection was established, did the appellant know or should it have known that its transactions were connected with a fraudulent evasion of VAT?

Tax loss

88. Although not admitted by FOS, in view of the unchallenged evidence adduced by HMRC regarding defaulting traders and unrecovered VAT we find that there was a loss of tax in each of the deal chains in which FO participated either directly or via contra-traders.

Fraudulent Evasion

89. Given the involvement of many of the same participants in the same order together with the circularity of funds and the use of the same IP address in the

transactions described above, it would seem highly improbable that these were commercial transactions between unconnected parties. Indeed the evidence leads us to conclude that there was a contrived scheme for the fraudulent evasion of VAT, resulting in a loss of tax, with each of the deals having been pre-arranged.

Connection

90. Although in cross-examination Mr Ahmed accepted that the transactions of FOS were, as a matter of fact, connected to the fraudulent evasion of VAT Mr Khan contends that this is not sufficient for us to find the requisite connection in this case. He argues that the use of the word "connected" in *Kittel* at [61] (see paragraph 8, above) was intended to reflect the idea that the transactions in some way facilitated the fraud.

91. This argument, unsupported by any authority, is reminiscent of that based on the French text of the *Kittel* judgment where the phrases "connected with fraud" and "connected with fraudulent evasion of VAT" are expressed as "il participait à une opération impliquée dans une fraude". It was argued that the French text indicated a closer involvement in the fraud than the broader English expression "connected with" and that the French text should be given priority as it is both the working language of the CJEU in which the judgment was drafted and the language of the case. However, this argument was rejected as "misconceived" by Roth J in *POWA (Jersey) Ltd* at [28].

92. As Roth J emphasised, at [34], the question is not whether the trader is "connected with" the fraud but whether his *transaction* is so connected which is a question of fact. Like Mr Ahmed, Mr Khan accepts that the transactions of FOS are, as a matter of fact, connected to fraud. In view of the evidence this must be right, and therefore we find that that the transactions were connected to the fraudulent evasion of VAT either directly or via a contra-trader.

Knew or should have known

93. Having found that the transactions entered into by FOS were connected to the fraudulent evasion of VAT we now consider whether it, through Mr Ahmed, knew or should have known that this was the case at the time the transactions took place.

94. In doing so it is clear from *Mobile Export 365 v HMRC* [2007] EWHC 1737 (Ch), at [20(4)], that we are entitled to rely on inferences drawn from the primary facts. However, we are mindful of the observations of the Court of Appeal in *Creditcorp Limited v King, Kingston, Stevens and Flood* (the *Independent* 4 September 1992), to which we were referred by Mr Khan, that:

> "It is not correct to say that a fraud case cannot properly be pleaded on inferences. On the contrary, it is by the drawing of inferences from circumstantial evidence that most fraud cases are pleaded. That is also the way most fraud cases are proved at trial. On the other hand, a court must always be conscious of the risk of piling inference upon

> inference, that being one manifestation of the drawing of illegitimate inferences."

95. It is also clear, from the approach taken by Christopher Clarke J in *Red12 v HMRC* [2010] STC 589 which was adopted by Moses LJ in *Mobilx* that we should not unduly focus on whether a trader has acted with due diligence but consider the totality of the evidence. Moses LJ said, at [83]:

> "… I can do no better than repeat the words of Christopher Clarke J in *Red12 v HMRC* [2009] EWHC 2563:-
>
> > [109] "Examining individual transactions on their merits does not, however, require them to be regarded in isolation without regard to their attendant circumstances and context. Nor does it require the tribunal to ignore compelling similarities between one transaction and another or preclude the drawing of inferences, where appropriate, from a pattern of transactions of which the individual transaction in question forms part, as to its true nature e.g. that it is part of a fraudulent scheme. The character of an individual transaction may be discerned from material other than the bare facts of the transaction itself, including circumstantial and "similar fact" evidence. That is not to alter its character by reference to earlier or later transactions but to discern it.
> >
> > [110] To look only at the purchase in respect of which input tax was sought to be deducted would be wholly artificial. A sale of 1,000 mobile telephones may be entirely regular, or entirely regular so far as the taxpayer is (or ought to be) aware. If so, the fact that there is fraud somewhere else in the chain cannot disentitle the taxpayer to a return of input tax. The same transaction may be viewed differently if it is the fourth in line of a chain of transactions all of which have identical percentage mark ups, made by a trader who has practically no capital as part of a huge and unexplained turnover with no left over stock, and mirrored by over 40 other similar chains in all of which the taxpayer has participated and in each of which there has been a defaulting trader. A tribunal could legitimately think it unlikely that the fact that all 46 of the transactions in issue can be traced to tax losses to HMRC is a result of innocent coincidence. Similarly, three suspicious involvements may pale into insignificance if the trader has been obviously honest in thousands.
> >
> > [111] Further in determining what it was that the taxpayer knew or ought to have known the tribunal is entitled to look at the totality of the deals effected by the taxpayer (and their characteristics), and at what the taxpayer did or omitted to do, and what it could have done, together with the surrounding circumstances in respect of all of them."

96. Relying on the following passage from the judgment of the CJEU in *Mahagében*, Mr Khan submitted that there were no indications pointing to an

infringement or fraud and as such FOS was not required to do more than it did to satisfy itself that there were not irregularities or fraud at the level of the traders during any part of the deal chains:

> 61. … the tax authority cannot, as a general rule, require the taxable person wishing to exercise the right to deduct VAT, first, to ensure that the issuer of the invoice relating to the goods and services in respect of which the exercise of that right to deduct is sought has the capacity of a taxable person, that he was in possession of the goods at issue and was in a position to supply them and that he has satisfied his obligations as regards declaration and payment of VAT, in order to be satisfied that there are no irregularities or fraud at the level of the traders operating at an earlier stage of the transaction or, second, to be in possession of documents in that regard.
>
> 62 It is, in principle, for the tax authorities to carry out the necessary inspections of taxable persons in order to detect VAT irregularities and fraud as well as to impose penalties on the taxable person who has committed those irregularities or fraud."

However this does not address the position where a trader acting on his own volition has information, not detected by HMRC, which connects his transactions to a fraudulent loss of tax in such circumstances that he either would or should have known of the connection to fraud. In such a situation it is inconceivable that a trader's entitlement to deduct should not be lost as it would be inconsistent with the principles established by *Kittel* and *Mobilx* to retain an entitlement to deduct in such circumstances.

97. It is clear that Mr Ahmed was aware of the extent and prevalence of MTIC fraud in the wholesale mobile phone trade, the sector in which FOS was operating. He had received visits and letters from HMRC where it was explained to him and he agreed in cross-examination that "MTIC had been explained" to him and confirmed in re-examination that he was aware of MTIC fraud.

98. Although Mr Ahmed asserted that he, and therefore FOS, did not know and could not have known that the transactions in which FOS was involved were connected to the fraudulent evasion of VAT we did not find him to be a convincing witness.

99. He claimed to have 15 years experience in dealing in mobile phones giving the impression that he was an experience trader in this sector. However, it transpired that other than a Saturday job, which he had for about two years when at school, in a mobile phone shop he had no such experience and he did not have any full time job until FOS was established.

100. Also he was unable to be certain on the chronology of a deal or even explain how the deals were put together other than saying these was due to "supply and demand".

101. Mr Ahmed told Officer Monk and said in cross-examination that a buyer would "always" contact FOS first whereas during his examination in chief said that "the

suppliers would phone us up [and] say we have this stock available" and when asked "what happens then?", said "we would contact buyers and obviously put a mark- up from our suppliers and offer them the stock." He also told Officer Monk that he alone arranged and negotiated the deals but during cross-examination said that he would tell Karim to "contact companies and try and get the products cheap as possible and, obviously if we're selling, try to maximise profit" and confirmed Karim was given free rein to make his decisions on that. He also said that "Karim was the main contact" with MS Enterprises.

102. As we have already noted (at paragraph 76, above) Mr Ahmed said that he had visited Jamber and inspected goods for "every deal we did through them" and "was always satisfied that the goods were genuine and in good condition". However, he was unable to tell us even approximately where Jamber was based.

103. When asked to explain why an inspection report had referred to the colour of 1,500 Nokia 8800s as "Silver Steel" when a request had been made for an inspection of "Black" handsets, Mr Ahmed said that this was due to a typing error by the inspection company.

104. Mr Ahmed also sad that he and Karim had drafted FOS's terms and conditions explaining, for the first time, that the use of legal terminology, eg references to warranties, indemnities etc., in these was due to Karim "who was studying law at the time." However, he was unable to say where Karim was studying and when it was pointed out that Karim was responsible the due diligence for FOS said that he was not studying "at that particular time, but he had studied in university law".

105. In our judgment it is simply not credible for any legitimate business to achieve a profit in excess of £1.5m, as FOS did, in deals that "presented no commercial risk" to the company, using institutions "recommended" by its suppliers to move funds, being always able to obtain the type and quantity of the stock required by the customer and make no losses whatsoever on similar deals in what Mr Ahmed agreed was "very fast moving back-to-back trading where money was moved within minutes". Clearly such an opportunity was too good to be true and as such we consider that the only reasonable explanation for these transactions is that they were connected with fraud.

106. Therefore, as Mr Khan submitted the only credible explanations for FOS finding itself in such a situation is that Mr Ahmed was either dishonest and fraudulent or an was innocent dupe caught up in the fraud of others.

107. Even if we accept that Mr Ahmed was an "innocent dupe", as Mr Khan contends, we find that, given his knowledge and awareness of MTIC fraud in the industry and the circumstances of the deals themselves, he, and therefore FOS, should have known that the only reasonable explanation for the transactions in which FOS was involved was that they were connected with fraud. To use the words of Moses LJ said in *Mobilx* at [84] we consider this to be a case where:

> "… a 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."

108. Our finding that FOS should have known that its transactions were connected to the fraudulent evasion of VAT is sufficient for us to dismiss the appeal in any event. However, having regard to all the circumstances of the case we find, on a balance of probabilities, that Mr Ahmed did know the transactions were connected to the fraudulent evasion of VAT.

109. It therefore follows we find that HMRC were correct to deny FOS recovery of its input tax.

Costs

110. In a direction released on 19 January 2012 Judge Cornwell-Kelly directed:

> "…pursuant to the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 Schedule 3 paragraph 7, for the purposes of this appeal rule 29 of the VAT Tribunal Rules 1986 shall have effect in substitution for rule 10 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009."

The effect of this direction is to give the Tribunal a general discretion as to costs.

111. Both parties applied for their costs if successful. Therefore, in view of our conclusion we find that it is appropriate to award HMRC its costs of and incidental to and consequent upon the appeal.

Decision

112. The appeal is therefore dismissed with costs to be paid by FOS to HMRC with such costs to be assessed if not agreed.

Right to Apply for Permission to Appeal

113. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 20 June 2013