TC04268

Appeal number: LON/2007/01703

VALUE ADDED TAX – repayment of input tax refused – alleged MTIC fraud – Appellant alleged to have traded in "contra-trading" chain – application by Appellant for the appeal to be decided in his favour without a hearing on the basis that any hearing would be not be a fair trial – application by Appellant not giving oral evidence to withdraw his witness statement over the objections of the Respondents – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALEENA ELECTRONICS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MRS SHAHWAR SADEQUE

Sitting in public in London on 18-22, 25 and 27-29 November 2013

Mr A Young, counsel for the Appellant (on 18-20 November 2013 only)

Mr M Holland QC and Mr H Watkinson, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Aleena Electronics Limited ("Aleena", the "Appellant" or "the Appellant company") appeals against a decision of the Commissioners of Her Majesty's Revenue & Customs ("HMRC"), notified in a letter dated 31 August 2007, denying it entitlement to the right to deduct input tax in the total sum of £1,032,255.00 claimed in the VAT quarterly accounting period 02/06.

2. The grounds for the challenged decision were that HMRC considered that the Appellant's transactions in which the relevant input tax was incurred were connected with the fraudulent evasion of VAT, and that the Appellant knew or should have known of such a connection. HMRC consider that the fraudulent evasion is missing trader intra-Community ("MTIC") fraud.

3. The director of the Appellant company is Mr Yusuf Rab. In VAT period 02/06 the Appellant company entered into 6 transactions involving the purchase and re-sale of mobile telephones. HMRC contends, and the Appellant has not denied, and on the evidence the Tribunal finds, that in each of these 6 transactions, the Appellant purchased mobile phones from a company called Phones2connect.com Limited ("P2C"), the director of which is Mr Imran Awan. The Appellant then sold on all of those mobile phones to a company called Rezaco Trading Ltd ("Rezaco"), a company incorporated in Cyprus. Those 6 transactions represented virtually the entirety of the Appellant's trade declared on its VAT return for the period in question.

4. HMRC accept that there was no tax loss in these 6 transaction chains. The HMRC case is that these transactions were "clean" or "contra-trading" chains that were part of a larger scheme involving also other transaction chains in which there was a tax loss (the latter being referred to, *inter alia*, as "dirty" chains), and that the sole purpose of the larger scheme was to defraud the Revenue. HMRC accept that the Appellant was not one of the traders involved in the trading in the "dirty" chain. However, the HMRC case is that the Appellant knew or should have known that his 6 transactions were connected to fraud. According to HMRC:

> The contra entry of inputs and outputs from an apparently "clean" chain (i.e. where there are no tax losses) against a "dirty" chain disguises the VAT repayment claim, which has at least 2 attractions to those engaged in MTIC fraud: it is hoped to lessen the chance that HMRC will notice the transactions and subject them to verification; and it distances some of those engaged in the fraud from the "missing trader".

5. The Appellant's grounds of appeal as formulated in his notice of appeal filed on 3 October 2007 are as follows:

> The decision to deny input tax was incorrect as I have never been involved in MTIC fraud. All my transactions with the companies involved were all above board. I believe I am being tarnished with the

> same brush as the phone industry has had a lot of fraudulent activity in the last few years.

6. The Appellant's case as presented via the witness statement of Mr Rab is in effect that the Appellant undertook appropriate due diligence checks on its supplier and customer when engaging in its 6 purchases and sales of mobile phones, that there was nothing suspicious about the transactions, and that the Appellant did not know, and had no reasonable basis for suspecting, that those transactions were connected with the fraudulent evasion of VAT.

7. The Appellant's case as presented in the Appellant's skeleton argument and orally by his representative at the hearing is, *inter alia*, that the HMRC decision against which he appeals is contrary to EU law, that there was no loss of revenue in the chain of transactions in which the Appellant was involved, and that EU law does not allow tax authorities to deny recovery of input tax on the basis of actions of other traders in other transaction chains. In the skeleton argument and at the hearing, the Appellant also argued that he could not afford legal representation and that a fair hearing of this appeal was not possible.

The applicable law

8. The principal legislative provisions relied upon by HMRC are Article 17A of Council Directive 77/388/EEC (the "Sixth VAT Directive"); Articles 167 and 168 of Council Directive 2006/112/EC (the "Principal VAT Directive"); sections 24, 25 and 26 of the Value Added Tax Act 1994 ("VATA"), and regulation 29 of the Value Added Tax Regulations 1995, SI 1995/2518.

9. It is unnecessary to set out the text of these provisions. The effect of the applicable legislation is that if a taxable person has incurred input tax that is properly allowable, that person is entitled to set it against that person's output tax liability and, if the input tax credit due exceeds the output tax liability, receive a payment.

10. In this case, as in other cases involving alleged MTIC fraud, HMRC relies on the principles established in Joined Cases C-439/04 and C-440/04, *Kittel v Belgium*; *Belgium v Recolta Recycling* [2006] ECR 1-6161 ("*Kittel*"), in which the ECJ said:

> [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.
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> [57] That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.
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> [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 to do so even where the transaction in question meets the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity.'
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> [60] It follows from the foregoing that the answer to the questions must be 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.
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> [61] By contrast, 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.

11. HMRC also rely on *Mobilx Ltd v HM Revenue & Customs* [2010] EWCA Civ 517, [2010] STC 1436 ("*Mobilx*"), in which Moses LJ (with the agreement of the other members of the Court of Appeal) said that:

> [52] If a taxpayer 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, not as a penalty for negligence, but because the objective criteria for the scope of that right are not met. It profits nothing to contend that, in domestic law, complicity in fraud denotes a more culpable state of mind than carelessness, in the light of the principle in *Kittel*. 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. …
>
> [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*. …
>
> [64] On my interpretation of the principle in *Kittel*, there is no question of penalising the traders. If it is established that a trader should have known that by his purchase there was no reasonable explanation for the circumstances in which the transaction was

> undertaken other than that it was connected with fraud then such a trader was directly and knowingly involved in fraudulent evasion of VAT. The principle in *Kittel*, properly understood, is, as one would expect, compliant with the rights of traders to freedom from interference with their property enshrined in Art. I of the First Protocol of the European Convention of Human Rights. The principle in *Kittel* does no more than to remove from the scope of the right to deduct, a person who, by reason of his degree of knowledge, is properly regarded as one who has aided fraudulent evasion of VAT.
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> [82] … Tribunals should not unduly focus on the question whether a trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is that his transactions have been or will be connected to fraud. The danger in focussing on the question of due diligence is that it may deflect a Tribunal from asking the essential question posed in *Kittel*, namely, whether the trader should have known that by his purchase he was taking part in a transaction connected with fraudulent evasion of VAT. The circumstances may well establish that he was.

12. However, the Appellant's case, which is considered below, is that these authorities relied on by HMRC do not apply to the circumstances of the present case.

The hearing

13. Prior to the hearing, on 10 October 2013, HMRC made an application to amend their statement of case, and to file and serve further witness statements of HMRC officers Dean Walton and Barry Patterson.

14. By a further letter dated 13 November 2013, HMRC made proposals in relation to the hearing and requested further directions.

15. The hearing took place on 18-22, 25 and 27-29 November 2013. The Appellant was represented by Mr Young on 18-20 November 2013 only. Mr Young indicated that he could not represent the Appellant in relation to the substance of the appeal. He said that the Appellant could not afford legal representation, and that he was providing *pro bono* representation that was limited to arguing the preliminary applications dealt with by the Tribunal at the outset of the hearing, and then to making an oral opening statement of the Appellant's case. On the remaining days of the hearing, the Appellant was unrepresented and its director Mr Rab did not attend or participate in the hearing in person.

16. Given that a full transcript of the hearing was taken, it is unnecessary in this decision to set out in detail the evidence and submissions presented.

17. There were four main preliminary applications dealt with at the outset of the hearing.

18. First, there was an application by the Appellant that the Tribunal should decide the appeal in his favour substantively without a hearing on the basis that any hearing of

the substantive appeal would be unfair, and that he would be denied his human right to a fair trial, given that he is unable to afford legal representation and given that HMRC has refused to release some of the input tax claim that is the subject of this appeal in order to enable him to afford legal representation. In relation to this matter, the Appellant's skeleton argument stated, for instance, that:

> The Appellant asserts that it is suffering severe inequality of arms and that this position has been deliberately inflicted by the Crown. Accordingly, the Appellant's participation in its own defence against the grave and serious allegations made by The State against it is prejudicially reduced to the extent that the proceedings now violate both Community and Convention law. ...
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> The Appellant would of course reconsider its position if the Respondents would advance a portion of its own input tax to it which until such time as the national court rules otherwise belongs to the Appellant. This would necessitate an adjournment of the hearing as listed. …
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> The Appellant is simply unsure of the case that will be run by the Respondents. The Respondents have made an application dated Thursday 10 October to amend their Statement of Case and file additional evidence. The evidence relates to a matter nearly 8 years old. What opportunity does the appellant now have to make investigations of its own at all or within such a short time frame?
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> Why did the Respondents, represented by leading Counsel, Junior Counsel, a dedicated team of Solicitors a dedicated team of officers, professionally tutored witnesses with accompanying witness support officers choose to wait until shortly before the substantive hearing to make this application? How could even an adequately funded Appellant analyse, react and obtain further evidence of its own if so advised in such a short time frame. …
>
> In the absence of any power by the Tribunal to ensure that the Appellant can have access to its funds to defend itself, English law conflicts with the Community principles of Equivalence and Effectiveness. In a domestic action, a Judge would have the power to order the release of some funds for the defence. This happens regularly in matters involving insolvency. The Judge balances the interests of the creditors with those of justice.

19. This application was the subject of lengthy argument on the first and second days of the hearing, and Mr Peter Smallwood, the Appellant's VAT consultant, was called by the Appellant as a witness to give evidence in support of the application. At the end of that argument and evidence, the Tribunal gave an oral decision, refusing the application. A written version of that decision is at Annex 1 of the present decision.

20. Secondly, there was an application by HMRC to admit additional material. That application was opposed by Mr Young on behalf of the Appellant. The Tribunal refused that application in relation to additional material sought to be introduced by HMRC relating to the Transpacific Insurance Corporation ("Transpacific"), on the

basis that this material was late, bulky (especially for an appellant in person) and not crucial. The Tribunal allowed the application in relation to new material relating to the disqualification of Mr Awan for 15 years under the Company Directors Disqualification Act 1986, on which HMRC seek to rely in support of an argument based on *HMRC v Greener Solutions Ltd* [2012] UKUT 18 (TCC) ("*Greener Solutions*").

21. Thirdly, there was an application by the Appellant to withdraw Mr Rab's witness statement in these proceedings. That application was refused by the Tribunal. A written version of the Tribunal's decision on that application is at Annex 2 of the present decision.

22. Fourthly, there was an application by the Appellant to introduce into evidence a further e-mail from Mr Awan relating to the circumstances of his disqualification under the Company Directors Disqualification Act 1986, which was said to cast doubt or raise questions in relation to the new material from HMRC in relation to this issue. Mr Smallwood was recalled to give further evidence in support of this application. The representative for HMRC did not object to this document being admitted, subject to the right of HMRC to make submissions that the document was not reliable as to the truth of its contents. The Tribunal admitted the document on that basis.

23. Mr Young also suggested that Mr Awan be called as a witness. The Tribunal decided that it would not itself call Mr Awan as a witness, but that either party was free to do so, and that the Tribunal would otherwise consider any submissions by the parties as to what weight to give to whatever evidence is before it relating to Mr Awan. The representatives for HMRC indicated that while HMRC had no intention of calling Mr Awan as a witness, they were prepared to act as a point of contact for Mr Awan to facilitate his attendance, and the Tribunal requested HMRC to pass on a contact number to Mr Rab for that purpose.

24. At the hearing, the Tribunal informed the Appellant and Mr Rab, though Mr Young, that Mr Rab was still entitled to come and give evidence at the hearing, and that he could change his decision not to do so at any time during the hearing. The Appellant and Mr Rab were also advised through Mr Young that as Mr Rab's witness statement was now in evidence, if there was anything in that witness statement that Mr Rab wished or needed to correct, he should notify the Tribunal of that while the proceedings were still continuing. The Appellant was also invited to inform the Tribunal of any witnesses that the Appellant considered the Tribunal should hear orally, or of particular issues or points that the Appellant considered that the Tribunal should explore with witnesses. The Tribunal also stated that Mr Rab was entitled to be present during any or all of the hearing, whether or not he was represented or gave evidence. [See, for instance, Transcript, 19.11.13, pp 90, 95, 103-104, 133; Transcript, 20.11.13, pp 13.]

25. Mr Rab was also advised directly by the Tribunals Service by e-mail that if he attended, he would not be required to give oral evidence unless he chose to do so, and that he would first be given the opportunity to explain to the Tribunal his concerns about being cross-examined. The Tribunals Service received e-mails from Mr

Smallwood, one of which forwarded an e-mail from Mr Rab, advising that Mr Rab would not be attending the hearing. That e-mail from Mr Rab stated that "I would've loved to come on the stand and speak to him [the judge] and not with that QC around bullying me or making me look more stupid than I already am".

26. The remainder of the hearing proceeded as follows.

27. First, Mr Young made an opening statement on behalf of the Appellant.

28. After Mr Young withdrew from the hearing, the Tribunal then heard opening submissions on behalf of HMRC, followed by oral witness evidence of Mr Roderick Stone, Mr John Fletcher, Mr Dean Walton, Miss Verna Gellvear and Mr Barry Patterson. Each of these witnesses adopted their witness statements, and were asked questions by the Tribunal, and in some cases by the representative of HMRC. Given that the Appellant was not in attendance and was unrepresented during the witness evidence, the Tribunal sought to explore certain areas of their evidence that were relevant to the Appellant's case as the Tribunal understood it, but the Tribunal did not see it as its role to cross-examine the witnesses.

29. The Tribunal then heard closing submissions on behalf of HMRC. The HMRC representatives also produced a written closing argument incorporating material from their earlier skeleton arguments. The Tribunal is grateful to the HMRC representatives for the care and attention that has been given to the presentation of a complex body of material to the Tribunal.

30. Before the hearing concluded, a further written submission was received from Mr Young dated 27 November 2013, entitled "Recent authority", referring in particular to Case C-494/12, *Dixon's Retail plc v HMRC*. Another written submission from Mr Young included a copy of a lecture by Lord Justice Laws.

31. After the hearing, in an e-mail dated 27 January 2014, HMRC drew to the attention of the Tribunal that the Upper Tribunal had now given judgement in *Edgeskill Limited v Revenue & Customs* [2014] UKUT 38 (TCC) ("*Edgeskill*").

32. By a further e-mail dated 25 March 2014, HMRC drew to the attention of the Tribunal that the Upper Tribunal had now given judgement in *Lifeline Europe Limited v Revenue & Customs* [2014] UKUT 135 (TCC) ("*Lifeline Europe*").

33. Following that e-mail, on 25 March 2014 Mr Smallwood sent an e-mail to the Tribunal stating that "The Appellant is unable to fully respond to these further submissions as it does not have the funding to instruct Counsel", and making certain observations which the Tribunal has taken into account.

The evidence

General

34. There is a bundle of witness statements, and some 10 binders of exhibits to the various witness statements. Additionally, there is a core bundle, a preliminary bundle containing additional evidence material, and a bundles of appendices to the HMRC skeleton argument. There are three binders of authorities.

The evidence of Mr Rab

35. The witness statement of Mr Rab states amongst other matters as follows.

36. Mr Rab is the director of the Appellant company. He began his career as a desktop and network engineer in the IT industry. He owned a car showroom for some 4 years. He then became interested in the air conditioning industry. The Appellant company was incorporated in 2005. It was originally founded as a wholesale business of air conditioning pumps and units, primarily exporting to Bangladesh. However, Mr Rab did not manage to do any trading in air conditioning units with Bangladeshi customers. He then became interested in the mobile phone industry toward the end of 2005. His research showed that there was a market in Bangladesh and he intended to trade mobile phones in Bangladesh using his contacts there. He was unaware that he had to inform HMRC of a variation of business.

37. From his research into trading in mobile phones, Mr Rab had a basic knowledge of what MTIC fraud is, but did not understand contra-trading. In order to protect himself he considered it important to conduct due diligence procedures on his supplier and buyer.

38. Mr Rab came into contact with P2C through his friend Mr Awan who he has known since 2002. Mr Rab was aware that Mr Awan traded in the mobile phone industry. Mr Rab informed Mr Awan of the stock he required and Mr Awan said he would be able to source it. Mr Rab sourced buyers in Bangladesh using his contacts. A large group of companies there called the Mohammadi Group agreed verbally to buy his stock, and Mr Rab then made an offer to P2C to purchase the necessary stock. However, the Mohammadi Group then verbally pulled out of the deal. Because P2C had already ordered the stock from their own suppliers, they were keen for Mr Rab to proceed with the purchase of their mobile phones.

39. Mr Rab was unable to find another buyer. In order not to find himself in breach of contract, he agreed to Mr Awan acting as broker to find him alternative buyers. It made commercial sense for Mr Awan to act as both broker and supplier. The broker agreement that he entered into with Mr Awan was the subject of some negotiation. Mr Rab wanted to add conditions due to concerns with MTIC fraud, while Mr Awan considered that these terms were too harsh. It was eventually agreed that Mr Rab would be given full contact with the buyer and that the commission would be payable only after the Appellant had received the VAT repayment from HMRC.

40. From research previously conducted on MTIC fraud, Mr Rab knew that it was important to be sure that he was dealing with a legitimate supplier and buyer, and he voiced his concerns in correspondence with P2C. Mr Rab conducted due diligence checks on P2C. Mr Awan vouched for the integrity of their supplier and said they would take full responsibility if Mr Rab were to become liable for any unpaid VAT. Mr Rab therefore did not consider it necessary to conduct due diligence of all members of the supply chain, which would have been impossible. Mr Rab set up the Appellant company's due diligence procedures. He carried out as much due diligence as he considered practical, possible and reasonable. Nothing in the due diligence checks gave rise to any suspicion that transactions were connected with a fraudulent chain, and Mr Rab was satisfied that there was no risk.

41. It was standard practice to raise invoices before and then transfer the goods on payment. All of the invoices for the 6 transactions which are the subject of this appeal were concluded at the same time. This is also a common practice within this market.

42. To begin trading, Mr Rab borrowed £850,000 from Syed Khalid Najmi, secured on four properties owned by Mr Rab. This was used to pay the deposit for P2C. Because Mr Najmi is aware of Mr Rab's situation, he is willing to wait to receive payment without taking action against Mr Rab's properties. Mr Rab has known Mr Najmi for years, and was not aware that he had any business within the mobile telephone industry and had no reasons to doubt the legitimacy of his loan.

43. Mr Rab agreed a markup of between 0.1% and 0.2% with P2C, and a markup of 4.2% with Rezaco. This was standard for the industry.

44. The price of stock was negotiated with Mr Awan by telephone with no written correspondence, as it had to be done quickly. As broker Mr Awan negotiated a general region of prices with Rezaco, and Mr Rab then negotiated an exact price.

45. The Appellant company used the banking services of the First Curacao International Bank ("FCIB") so that transactions could be instantaneous. UK banks were not willing to set up accounts for traders in the mobile telephone market.

46. The Appellant company used the insurance services of Transpacific in Gibraltar who were highly recommended. Transpacific exempted the Appellant from some of their conditions (e.g., the requirement to keep IMEI numbers of all stock) because they used an authorised freight forwarder.

47. The Appellant company used the freight forwarding services of Aquarius Freight Forwarders ("Aquarius") as they were used by P2C and meant that the stock did not require being transferred. Once the phones were at the freight forwarders, Mr Rab inspected them himself, and the freight forwarders checked them. This was sufficient for his business purposes. The freight forwarders did not list the IMEI numbers as the insurers had exempted them from this requirement, and there was no commercial reason to do so.

The evidence of Dean Walton

48. Mr Walton is an officer of HMRC, and a member of its MTIC team.

49. The first witness statement of Mr Walton dated 17 November 2008 states amongst other matters as follows.

50. The Appellant company was incorporated and VAT registered in 2005. Its application for VAT registration indicated that its business was "Wholesale business of air conditioning pumps and units". Mr Rab is the sole director. The first VAT return due from the Appellant was the 4 month period to 30 November 2005. The second return due was for the 3 months to 28 February 2006. The first return indicated sales of £3,637 and made a net repayment claim of £701.86. The second return, the 02/06 return to which this appeal relates, made a repayment claim of £1,032,255. It declared zero-rated sales to EC customers of £6,146,341, and standard rated purchases within the UK of £5,898,600 with input tax claimed of £1,032,255 on those purchases.

51. The 02/06 return was selected for verification by HMRC. An HMRC officer contacted the Appellant to request supporting documents for the repayment claim, and these were provided. HMRC also made an unannounced visit on the Appellant in June 2006. No one was there, so the HMRC officer left a letter requesting that the Appellant contact HMRC within 7 days, failing which the Appellant would be deregistered. There was no contact from the Appellant, so Mr Walton de-registered the Appellant on 26 June 2006.

52. On 27 June 2006, Mr Walton wrote to the Appellant explaining that he had been unable to obtain key documents to verify the claim (namely evidence that the goods were exported), and that he was therefore assessing all supplies made by the Appellant at the standard rate. The result was that the Appellant was now required to make a VAT payment of £43,354.67 for period 02/06.

53. On 10 July 2006, Mr Walton met Mr Rab and his agent. On 19 July 2006, Mr Walton informed the Appellant's agent that he was not convinced that the case for re-instatement of the Appellant's VAT registration had been made.

54. There were further exchanges of correspondence and the Appellant provided further documents. On 15 January 2007, the Appellant's VAT registration was reinstated. The Appellant has declared no sales in the period 1 June 2006 to 30 May 2008 but has made minor reclaims of input tax. The Appellant was not responsive to requests for further documents and information. On 31 August 2007, Mr Walton then advised the Appellant that the right to reclaim input tax within the 02/06 return was denied on the basis that the Appellant knew or should have known that the deals were part of an overall scheme to defraud the Revenue.

55. The witness statement then sets out what Mr Walton considers to the evidence of the defaulter chain, of the contra-trading chains, of the fact that the whole scheme of trading was contrived, and of the Appellant's knowledge or means of knowledge that this was the case.

56. The second witness statement of Mr Walton dated 17 July 2009 sets out a detailed analysis of information obtained from the Dutch server of the FCIB.

57. The third witness statement of Mr Walton dated 7 February 2013 sets out a detailed analysis of information obtained from the Paris server of the FCIB.

58. A further witness statement of Mr Walton dated 20 November 2013 gives evidence that in October 2012 Mr Awan was disqualified as a director for 15 years under the Company Directors Disqualification Act 1986.

The evidence of Verna Gellvear

59. Miss Gellvear is an officer of HMRC involved in VAT assurance.

60. Miss Gellvear's first witness statement dated 13 October 2008 deals with the company Easiblaster. She states amongst other matters as follows.

61. Her first direct involvement with Easiblaster was on 11 April 2005 when she contacted its director, Christopher Wildon, at the request of HMRC's MTIC Central Coordination Team. Easiblaster was incorporated in November 1982. It is owned in equal shares by four shareholders, Andrew Marsh, Christopher Wildon, Kevin Wildon and Patricial Wildon. The company registered for VAT in January 1982, giving its business details as "sales of equipment". On 2 February 2004, Easiblaster's 01/04 VAT return reclaimed £73,196.56, this being its first ever repayment VAT return. The activities declared on that return were identified by HMRC as MTIC-type trading activities. HMRC officers visited Easiblaster in February 2004, and correspondence between Easiblaster and HMRC ensued. In May 2004, HMRC advised that the £73,196.56 would be repaid on a without prejudice basis pending further enquiries. Correspondence continued between Easiblaster and HMRC, in the course of which concerns about MTIC fraud were expressed by HMRC. In February 2007, Easiblaster was advised that its 12/06 return would be subject to extended verification due to suspected involvement in MTIC fraud. The correspondence then continued. The witness statement then sets out an analysis of the exhibits to that witness statement and the conclusions drawn by HMRC.

62. Miss Gellvear's second witness statement dated 12 February 2013 provides some updated information in relation to Easiblaster and in relation to Monster Trading Limited ("Monster"), one of the companies mentioned in her earlier statement.

The evidence of Roderick Stone

63. Mr Stone is an officer of HMRC with extensive experience of MTIC fraud. His principal duties are to provide technical oversight and coordination in respect of MTIC compliance and enforcement activities. His witness statement dated 15 November 2008 deals generally with how MTIC fraud works, typical features of an MTIC fraud, HMRC's measures against MTIC fraud and the effect and extent of MTIC fraud. At the hearing, Mr Stone gave oral evidence as a witness.

64. When assessing Mr Stone's evidence, the Tribunal has considered Mr Young's submission that regard must be had to the fact that Mr Stone is an employee of HMRC rather than an independent expert, and to the concession by Mr Holland that Mr Stone's evidence is a mixture of factual evidence and comment on the law. The Tribunal has also taken into account that the evidence of Mr Stone relates to MTIC fraud generally, rather than the specific circumstances of this particular case in which it has not been conceded by the Appellant there even was any MTIC fraud.

65. The Tribunal notes that while there have been many MTIC cases before the First-tier Tribunal (Tax Chamber), that does not mean that the Tribunal can be assumed to have a background knowledge of how MTIC fraud works, or that it can take judicial knowledge of such matters. It is understood that the evidence of Mr Stone is intended to provide evidence of such background matters.

66. In his evidence, Mr Stone said amongst other matters as follows.

67. HMRC's estimate of the loss to public revenue caused by MTIC fraud in financial year 2006-07 is between £1 billion and £2 billion. In 2005 and 2006, mobile phones were the goods most commonly used to commit MTIC fraud. One typical way in which MTIC fraud operates is as follows. A UK VAT registered entity (the "acquirer") purports to acquire goods zero-rated from another EU Member State, sells them in the UK charging VAT at the standard rate, and disappears before accounting for the VAT due to HMRC. The goods pass through a transaction chain of other UK traders (the "intermediary" or "buffer" traders) who account in VAT returns for output tax and reclaim input tax. The final entity in the UK transaction chain (the "broker") then exports the goods to another EU Member State, and in so doing, is entitled to zero-rate the goods sold and to reclaim the input tax.

68. In July 2005, HMRC identified a counter-measure introduced by HMRC fraudsters in response to HMRC efforts to combat MTIC fraud. This involved a "contra-trading" chain of transactions. In this variant, the "broker" trader in the chain described above (the "dirty" chain) also acquires goods from another EU Member State in the same VAT period, and sells these on to another UK trader. There is no defaulting trader in the contra-trading chain (also referred to for this reason as the "clean" chain). The effect is that the broker in the dirty chain does not make a large VAT repayment claim, as the output tax on its sales in the clean chain and the input tax repayment claim on the sale in the dirty chain effectively cancel each other out. Rather, the large input tax repayment claim is made by the broker in the clean chain. This results in the large input tax repayment claim being submitted by a broker trader who, at first sight, does not appear to be participating in a transaction chain that begins with a missing trader, who will argue that there are therefore no grounds for HMRC to withhold payment of the VAT repayment claim.

69. It is not necessary for the buffer and broker traders to have knowledge of all participants in the fraudulent transaction chain, and they may not know the identities of anyone other than their immediate supplier and customer. However, their transactions will almost inevitably display different characteristics to those occurring in genuine "arm's length" trading. These features may include the following. Goods

physically remain at the address of a freight forwarder as they change hands between several traders. When the goods are exported, they are sent to another freight forwarder's address in the destination country. The buffers undertake no process to add additional value and incur minimal if any costs of sale. In 2005-06, many EU suppliers, defaulting traders, buffers, brokers, contra-brokers and overseas customers in the computer and mobile phone sectors whose transactions were connected to MTIC fraud opened bank accounts offshore, the most popular off-shore bank being the FCIB in the Netherlands Antilles.

70. There is a small grey market in mobile phones. Grey market trading chains are very short because the longer the chain, the less profit there is to be made. A trader buying goods, for instance, from Spain for a customer in Germany, would not transport them via the UK because if they were shipped direct from Spain to Germany this would maximise the trader's profit and avoid UK VAT implications. Simply specifying the brand and model number of a mobile phone is not an adequate description for traders' purposes, since the ability to sell the item in a particular market at a particular price will depend on additional matters such as its colour, and the language of its keyboard, and the software with which it is loaded.

The evidence of Barry Patterson

71. Mr Patterson is an officer of HMRC involved in VAT assurance. Mr Patterson's first witness statement dated 1 October 2008 deals with HMRC's dealings with and enquiries into Goodluck Employment Services Limited ("Goodluck"). Further information was provided in his second witness statement dated 13 November 2008.

The evidence of Andrew Leatherby

72. Mr Leatherby is an officer of HMRC, posted within the Specialist Delivery Branch of HMRC's Criminal Investigation Directorate. He is the author of two reports dated 12 August 2010 dealing with the recovery of information held on the computer systems of FCIB. In a witness statement dated 29 November 2012 he confirms that while he is an employee of HMRC, he is aware of his prime duty to the Tribunal as a witness with a professional qualification to assist the Tribunal with independence of mind and to provide sufficient understandable information to allow the Tribunal to give informed decisions. Mr Leatherby did not give oral evidence at the hearing.

The evidence of John Fletcher

73. Mr Fletcher is a principal adviser at KPMG. He was instructed by HMRC to give expert evidence in relation to the mobile handset industry, including in relation to the grey market for mobile handsets in 2006. He has provided two witness statements dated 15 December 2008 and 2 September 2011 respectively. In his oral evidence at the hearing, he adopted and made certain changes to his witness statements.

74. On the basis of the information he has provided as to his professional experience, the Tribunal finds that he is qualified to give expert evidence in relation to the matters dealt with in his evidence.

75. In his evidence, Mr Fletcher said amongst other matters as follows.

76. There is a legitimate and vibrant grey market in mobile phones. Grey market trading in mobile telephones is of four kinds: arbitrage (where a particular model of mobile phone can be bought more cheaply in one country and then sold in another where the price is higher); box-breaking (where handsets are purchased at a subsidised price in a country where networks provide such subsidies, and are sold in another country where such subsidies do not exist); volume shortages (where a particular model of handset is purchased in a country where there is an available supply and sold in a country where there is a market shortage); and dumping (where outmoded or unpopular handsets are purchased in one country and sold in another where there is still some demand for that model). Arbitrage opportunities did not exist at the time in the case of Nokia phones because of their worldwide pricing policy. Mr Fletcher is deeply sceptical of the need for phones to move through the hands of several traders before finding their way to another market, and of the need for goods to be imported into and quickly re-exported from the UK as part of that process, since legitimate traders would want as few links as possible.

77. It is important that the telephones are properly specified in the commercial documentation. If a telephone has the wrong power cable for the intended market, replacing the cable could eat up most of the profit as the margins are so low. If the software on the phone is in the wrong language, replacing this may invalidate the warranty, and if they keyboard is in the wrong language, replacing this may be expensive. Also, the warranty on some phones is not worldwide, and in 2006 not all mobile phones actually worked in all parts of the world. Expressions such as "Euro Spec" are not adequate specification, since even within Europe there are several variants of identical model mobile phones (for instance, with different keyboards in Greece, the Balkans and the Nordic countries). Expressions such as "Euro Spec" would work as a shorthand only if everyone involved understands what that shorthand means. Mr Fletcher is not satisfied that the grey market industry knows what is meant by expressions such as "Euro Spec". It would not be at all difficult for a trader to properly specify what they are looking for.

78. As a measure against being involved in MTIC fraud, traders will on a purchase order reserve the right to reject a phone with an IMEI number identical to a phone that they have already traded. It would not be possible for an arbitrage trade invoice to be prepared months in advance. It would be very foolish of a trader to enter into what is effectively a forward contract for a mobile phone without having a reasonably high degree of certainty as to what the price of the phone will be at the relevant time in the future. A purchaser offered trade credit would under normal circumstances take full advantage of that trade credit.

The submissions of the Appellant

79. The principal submissions of Mr Young on behalf of the Appellant were as follows.

80. In this appeal there are no losses in the Appellant's supply chain. The Appellant's VAT returns were filled in correctly. No amount of due diligence on the Appellant's trading partners could have given any indication about alleged irregularities in a different chain. In Tribunal appeals when due diligence is good HMRC claims it is evidence that supplies are contrived as it is too good to be true, but when due diligence is poor HMRC claims that this is evidence that supplies have been contrived. Since evidence relating to due diligence is used either way as "evidence" of the HMRC case, this cannot be fair or reliable.

81. The allegations made by the Respondents are grave and serious. It is and was incumbent upon HMRC to have ascertained adequate facts to arrive at their decision.

82. HMRC rely upon expert evidence of Mr Fletcher. No attempt was made to appoint a joint expert. It is not known how much HMRC spent on Mr Fletcher. In another case where an appellant had had the funding to instruct an expert of its own, Mr Fletcher's evidence was not accepted in full (reference was made to *CCA Distribution Ltd v Revenue & Customs* [2013] UKFTT 253 (TC)).

83. Steps taken by HMRC to protect its financial interests and the prevention of possible tax evasion, avoidance or abuse must be proportionate (reference was made to Case-25/07, *Sosnowska v Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu Case* [2008] ECR I-5129).

84. Contra-trading is in fact a normal activity practiced by many taxable persons in the business of export, and is a legitimate means for managing cash flow (reference was made to the transcript of proceedings in another case before the Tribunal). There is nothing unlawful in contra-trading *per se*.

85. There is no domestic statutory or regulatory basis to deny the right to recover input VAT as regards knowledge or means of knowledge cases. The Tribunal only has the power to refuse the right to deduct input tax where this power exists under EU law. The only source of the power to refuse the right to deduct is Article 22(8) of the Sixth VAT Directive. *Kittel* is an application of the power under that provision, which must be interpreted teleologically, and the European case law on this provision cannot be expanded upon domestically. There is no room for domestic judge made law in this context. In *Mobilx* at [59] Moses LJ said that "The test in *Kittel* is simple and should not be over-refined". The development of a domestic UK jurisprudence surrounding so called contra-trading is an over refinement which cannot be found in any decision of the European Court of Justice. The doctrine of *stare decisis* does not apply to matters concerning EU law: as a matter of Community law, a party cannot be debarred from asking a court or tribunal to correctly apply Community law.

86. The return filed by an alleged contra-trader that enters the actual details in the correct boxes cannot be a false instrument. At its highest, there may have been a

dishonest cover up in a different supply chain to which the contra-trader was also a party. There is no suggestion by HMRC that they ever gave warnings as to the existence of contra-trading. HMRC Notice 726 does refer to the joint and several liability provisions at s 77A of the Value Added Tax Act 1994 ("VATA"). In Case C-409/04, *R (on the application of Teleos Plc) v Customs and Excise Commissioners* [2007] ECR I-7797, [2008] QB 600 ("*Teleos*"), the ECJ held that sharing of the risk between the supplier and the tax authorities, following fraud committed by a third party, must be compatible with the principle of proportionality. *Kittel* and s 77A VATA can therefore envisage only liability arising in the same supply chain and cannot have any application to contra-trading. Reference was made to the opinion of the Advocate General. It would impose too heavy a burden on traders to require them to inform themselves as to the background of goods being traded in a parallel supply chain. In Case C-324/11, *Gábor Tóth v Nemzeti Adó- és Vámhivatal Észak-magyarországi Regionális Adó Főigazgatósága*, at paragraphs 2 and 4 of the dispositif, the ECJ referred to cases where a trader "knew or should have known that the transaction relied on as a basis for the right to deduct was connected with a fraud committed by the issuer or another operator supplying inputs in *the chain of supply*" (emphasis added). Reference was similarly made to paragraph 1 of the dispositif in Joined Cases C-80/11 and C-142/11, *Mahagében kft v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága*. Reference was also made to Cases C-285/11, *Bonik EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto'*, in which the Court referred to refusal of the right to deduct VAT in view of fraud or irregularities committed "*upstream or downstream in the chain of supply*" (emphasis added).

87. There is no decided case of the ECJ where input tax has been denied in any case other than where tax losses occur in the same supply chain. The ECJ has expressly ruled against the globalisation of taxpayers' affairs (reference was made also to *Commissioners of Customs and Excise v Thorn Materials Supply Ltd and Thorn Resources Ltd* [1998] UKHL 23, [1998] 3 All ER 342). In globalising the Appellant's affairs, the Respondents are over refining the *Kittel* test. This is not permissible. In this case, the right to claim input tax has been refused to an intra-Community trader on grounds of a default on the part of another taxable person in a wholly different supply chain involving purely domestic supplies, whilst allowing full rights of deduction to other taxable persons in the same supply chain, who have engaged in purely domestic transactions. This treats purely domestic supplies more favourably than intra-Community supplies. In seeking to make an intra-Community trader liable for the losses in a different supply chain, the Crown has violated the principle of neutrality and the principle of non-discrimination encapsulated in 22(8) of the Sixth VAT Directive.

88. The United Kingdom has not been given any authorisation by the Council under Article 27 of the Sixth VAT Directive.

89. It is open to the Tribunal to refer this question to the European Court of Justice.

90. The Appellant asserts its rights under the Bill of Rights 1689. The Crown through HMRC is acting unconstitutionally and unlawfully. For HMRC to disallow

input tax, they must have a statutory basis for doing so conferred upon them by Parliament. There is no provision in either EU or domestic law to enable a taxable person to be denied the right to deduct input tax as a consequence of losses in a different supply chain (reference was made to *R v Customs and Excise Commissioners Ex parte Kay & Co Ltd* [1996] STC 1500).

91. The present case is being argued differently to *Mobilx*, and there are relevant decisions of the ECJ that post-date *Mobilx*. This Tribunal's discretion cannot to be fettered by *Mobilx* (reference was made to Case 166/73, *Rheinmuhlen-Düsseldorf v Einfuhr-und Vorratsstelle fur Getreide und Futtermittel* [1974] ECR 33).

92. The Appellant has not had the benefit of being able to analyse the detail of the complex evidence put before this Tribunal and can neither admit or deny it. Since the Appellant is unable to attend the hearing in full due to inequality of arms, it is unable to put evidence to proof and test it through cross examination.

93. As to the FCIB evidence, the HMRC officers' transpositions and schedules have not been checked for accuracy. No expert has been instructed to investigate whether the data actually used by officers was correctly extracted without error in the first place. There are issues as to whether the evidence has been tampered with and as to the reliability of the software used to prepare the data. The HMRC expert Mr Fletcher has accepted in several appeals that large accountancy firms and the community generally were unaware of the scope and extent of MTIC fraud before the extended verification exercise which led to the decision to deny credit in this case (reference was made to the transcript of hearing in another case before the Tribunal).

94. The Appellant is confident that Mr Fletcher would upon proper cross-examination agree that there was nothing unusual about the mark ups, prices or back to back transactions that differed from a normal grey market transaction. Thus there could be nothing to put the Appellant on notice that there may have been an irregularity, which as a matter of fact there was not in the Appellant's supply chain.

95. The allocation to the Appellant of tax losses in a different supply chain is arbitrary. An officer with no knowledge of the intentions of the parties simply allocates one loss to another. Different officers would allocate differently. The officer arbitrarily decides who and who not to "connect" to fraud. It cannot be said that the Appellant should have known that its supply would be connected to fraud simply because an officer may single it out in the future after that purchase. This breaches at least three principles of Community law: neutrality, legal certainty and legitimate expectation. Due to lack of resources, the Appellant is unable to cross examine on the allocation point. Connection of the kind envisaged by Community VAT law is simply not possible in the context of contra-trading.

96. These proceedings are unfair as a consequence of severe inequality of arms. This is the deliberate choice of the Crown's Commissioners. Evidence which the Appellant cannot test should be disregarded.

The submissions of HMRC

97. The principal submissions on behalf of HMRC were as follows.

98. HMRC accept that they bear the burden of proof but "…there is no necessary connection between the seriousness of an allegation and the improbability that it has taken place" and "The test is the balance of probabilities, nothing more and nothing less" (referring to *Re S-B Children*, [2009] UKSC 17 at [34]).

99. What has to be proved is that a trader "should have known" that his transaction was connected with the fraudulent evasion of VAT, not that that the trader could have discovered a *particular* tax loss in a *particular* chain. A clear example is where a trader should have realised that however much a counterparty "checked out," the transaction gave him a profit which was just too good to be true; or exhibited features such as goods coming to this country for no apparent commercial reason, only to be immediately re-exported. *Mobilx* cautions against undue emphasis on due diligence and what it might achieve, and carrying out checks on his counterparties does not excuse the trader from considering the circumstances of his transactions in the round. Thus, there is no requirement upon the Respondents to prove either that the Appellant knew that the chains in which it was involved were specifically of the contra-trading variety or that it knew the identities of the companies involved (reliance was placed on *Megtian Limited (in Administration) v The Commissioners for HMRC* [2010] EWHC 18 (Ch) at [37]-[38]; .

100. In the present case Mr Rab should have known in the circumstances that the only reasonable explanation for the circumstances in which the transaction took place was that in some way it was connected with the fraudulent evasion of VAT.

101. HMRC are not inviting the Tribunal to "globalise" the Appellant's transactions, but rather inviting the Tribunal to discern the true character of the individual transactions by reference to all their attendant circumstances, including the facts of the other transactions that surround them. Reliance was placed on *Mobilx* at [82]-[84].

102. As to the Appellant's argument that there is no legal basis upon which a taxable person can be denied the right to recover input VAT, and that *Kittel* does not apply to contra-trading, HMRC rely on *Mobilx* at [45]-[49], *Powa (Jersey) Ltd v Revenue & Customs* [2012] UKUT 50 (TCC) ("*Powa*") at [53] and [2013] EWCA Civ 225; *Softhouse Consulting Limited v HMRC* (PTA/333/2013) (unreported); and *Fonecomp Ltd v Revenue & Customs* [2013] UKUT 599 (TCC) [in which the result was known but written decision not yet available at the time of the hearing]. The *Kittel* test, as a matter of logic, must apply to contra-trading, and to interpret the CJEU authorities otherwise would simply be to create a fraudster's charter. The *Kittel* test is whether the Appellant's transactions were connected with the fraudulent evasion of VAT, not whether there are tax losses in the Appellant's supply chains. The doctrine of *stare decisis* does apply to matters concerning EC law (reliance was placed on *S & I Electronics plc v Revenue & Customs* [2012] UKUT 87 (TCC) at [13]-[19] and *Powa* at [52]). In any event, the Tribunal should reject the argument that the existing case law is incorrect and should not be followed.

103. The application of *Kittel* to contra-traders does not discriminate against intra-Community traders and is not disproportionate (reliance was placed on *Powa* at [116]-[120]; *Honeyfone Ltd v HMRC* [2008] UKVAT 20667 at [25]-[32]; *Calltel Telecom Ltd & Another v HMRC* [2009] EWHC 1081 (Ch) at [97]-[99]; and Mobilx at [66]). There has been no allocation of tax losses in this case and the contrary assertion of the Appellant is factually incorrect. There is no breach of the principles of equivalence or effectiveness.

104. In *Greener Solutions*, the appellant company's transaction was in the main part undertaken by an agent of the company. The agent knew that the transaction was connected with fraud. The appellant company relied on the agent to identify the buyer and seller, conduct due diligence on them and deal with all aspects of the transaction, keeping it informed and ultimately putting forward the transaction for it to sign the final deal. The Upper Tribunal determined that the agent's knowledge should have been attributed to the appellant company for the purpose of the test in *Kittel*. Mr Awan of P2C is claimed to have performed a near identical role for this Appellant to that of the agent in *Greener Solutions*. HMRC assert that Mr Awan knew that the transactions were connected with fraud, and that this knowledge should be attributed to the Appellant in the present case.

105. Detailed submissions were then presented on behalf of HMRC in relation to the evidence in this case, and the findings of fact that the Tribunal was invited to make, and conclusions that the Tribunal was invited to draw, on the basis of this evidence. It is unnecessary to set out these submissions in detail.

The Tribunal's findings of law

106. In *Mobilx* at [81], Moses LJ said that "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". The Tribunal has proceeded on that basis.

107. The Tribunal considers that there is no reason why the Tribunal should not proceed to decide the questions of fact and law in this case on the basis of the material before it in the usual way. It is not uncommon for appellants before the Tribunal to be unrepresented, even in MTIC cases. Had Mr Rab attended the rest of the hearing of this appeal, the Tribunal could have afforded him what assistance it could to present his case in person. However, Mr Rab did not attend the hearing after Mr Young's participation ended. That was his choice, and the Tribunal draws no adverse conclusion from that fact. However, the Tribunal cannot accept that Mr Rab's non-attendance and lack of legal representation mean that the Tribunal should draw inferences favourable to the Appellant or should disregard any evidence that has not been tested by the Appellant.

108. On behalf of the Appellant, Mr Young argued at some length that it would be contrary to EU law to deny the right to recover input tax under the principle in *Kittel* other than in cases where tax losses occur in the same supply chain as that in which the Appellant traded. After the hearing, HMRC drew the Tribunal's attention to the

decisions in *Edgeskill* and *Lifeline Europe.* The Tribunal considers that it is bound by these decisions of the Upper Tribunal, and rejects the Appellant's argument that the principle of *stare decisis* does not apply in matters of EU law. HMRC's reliance on this case law subsequent to the hearing has been drawn to the attention of the Appellant, who has had the opportunity to make submissions on it, even if he may continue to maintain that he lacks the resources to engage professional representation.

109. The Tribunal finds that *Edgeskill* (particularly at [117]-[126]) and *Lifeline Europe* dealt with and rejected essentially the same arguments that Mr Young was advancing before the Tribunal in the present case.

110. In *Edgeskill*, the Upper Tribunal said that "the rationale of *Kittel* applies to contra-trading as it does to the simpler or 'plain vanilla' single chain species of MTIC fraud" (at [117]), "nothing in the judgment in *Mahagében* was intended to restrict *Kittel*" (at [127(1)]), "nothing in *Mahagében* …, *Tóth*, *Bonik*, or any other CJEU authority cited … involves any departure from or restriction of the *Kittel* principles as interpreted in *Mobilx*" (at [124]), "The argument that the *Kittel* principles do not apply to contra-trading is untenable" (at [126(3)]), and "test is the same in the context of contra-trading cases as in others: did the claimant/Appellant know or should it have known of the connection between its transaction and the fraudulent evasion of VAT or its disguise" (at [126(5)]). In particular, at [126(5)], the Upper Tribunal said that:

> … there is no requirement upon the Commissioners to prove either that the Appellant knew that the chains in which it was involved were part of a contra-trading stratagem, or the identities of the companies involved. It is the knowledge of fraudulent evasion which is of the essence; not its mechanics or labels. See further *Megtian Limited (in Administration) v The Commissioners for HMRC* [2010] EWHC 18 (Ch) at [37]-[38], where Briggs J explained:
>
> > "In my judgment there are likely to be many cases in which a participant in a sophisticated fraud is shown to have actual or blind-eye knowledge that the transaction in which he is participating is connected with that fraud, without knowing, for example, whether his chain is a clean or dirty chain, whether contra-trading is necessarily involved at all, or whether the fraud has at its heart merely a dishonest intention to abscond without paying tax, or that intention plus one or more multifarious means of achieving a cover-up while the absconding took place.
> >
> > Similarly, I consider that there are likely to be many cases in which facts about the transaction known to the broker are sufficient to enable it to be said that the broker ought to have known that his transaction was connected with a tax fraud, without it having to be, or even being possible for it to be demonstrated precisely which aspects of a sophisticated multi-faceted fraud he would have discovered, had he made reasonable inquiries. In my judgment sophisticated frauds in the real world are not, invariably susceptible as a matter of law, to being carved up into self-contained boxes even though, on the facts of particular cases including Livewire that might be an appropriate basis for analysis."

111. *Lifeline Europe* (in which Mr Young was counsel for the Appellant) followed and approved the earlier decisions of the Upper Tribunal in *Edgeskill* and *Fonecomp Ltd v HMRC* [2013] UKUT 0599 (TCC). In this appeal, the Tribunal proceeds on the basis of those decisions.

112. The Tribunal also proceeds on the basis of the following observations in *Red 12 Trading Ltd v Revenue & Customs* [2009] EWHC 2563 (Ch) ("*Red 12*"), which were quoted with approval by Moses LJ in *Mobilx*:

> [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.

113. As Moses LJ said himself in *Mobilx* at [84]-[85]:

> Such circumstantial evidence … will often indicate that 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. ... I am doing no more than echoing the warning given in HMRC's Public Notice 726 in relation to the introduction of joint and several liability. In that Notice traders were warned that the imposition

> of joint and several liability was aimed at businesses who "know who is carrying out the frauds, or choose to turn a blind eye" (3.3). They were warned to take heed of any indications that VAT may go unpaid (4.9). A trader who chooses to ignore circumstances which can only reasonably be explained by virtue of the connection between his transactions and fraudulent evasion of VAT, participates in that fraud and, by his own choice, deprives himself of the right to deduct input tax.

114. The Tribunal adds for completeness that it would have reached the same conclusions as in *Edgeskill* and *Lifeline Europe* even if it had been unconstrained by precedent.

The Tribunal's findings of fact

General

115. The Tribunal's findings in this decision are based on its consideration of the evidence and submissions of both parties as a whole. There was a very considerable amount of evidence in the case, and very detailed submissions were made by HMRC in relation to the evidence. It is not possible or necessary to set out the totality of that detail in this decision. The main evidence in relation to each issue is set out below, and bundle references to main items are given for convenience.

Findings in relation to the Appellant

116. On the basis of the evidence, the Tribunal makes the following background findings of fact in relation to the Appellant company and its director Mr Rab.

117. Aleena was incorporated on 17 May 2005 *[EX2-360]*. From the company's inception Mr Rab acted as its director *[EX2-361]*. In August 2005, Mr Rab applied for Aleena to be registered for VAT. In support of the application for VAT registration Mr Rab initially provided a costing for a refurbishment including air conditioning work from The Engineering Company UK Ltd, dated 10 August 2005 *[EX1-5-7]*. On 8 September 2005 Mr Rab provided in support of the application for VAT registration an invoice for £3,273.56 dated 3 August 2005 for the installation of air conditioning equipment *[EX1-8-9]*.

118. Aleena was registered for VAT with effect from 3 August 2005. Aleena's first VAT return, for the 4 months to 30 November 2005, showed outputs of £3,637 and a repayment claim of £701.86 *[EX5-79]*.

119. Aleena's second return, for VAT period 02/06 (1 December 2005 to 28 February 2006), showed that Aleena had made sales of £6,146,341.00 and reclaimed £1,032,255 in input tax *[EX2-367]*. By a letter dated 12 May 2005 (but presumably sent 12 May 2006), HMRC requested the VAT working papers and 5 largest purchase and sales invoices for the return *[EX1-11]*. On 19 June 2006, HMRC officers attempted to make an unannounced visit at Aleena's registered address, but Mr Rab was not present. The address appeared to be a residential flat, and the occupant of a

neighbouring flat confirmed that Mr Rab lived there *[EX1-35-48]*. The HMRC officers left a letter at Aleena's premises stating that the officers had been unable to establish that the business was operating and that if the company did not contact HMRC within 7 days it would be deregistered from VAT *[EX1-32-33]*. In a fax to HMRC dated 27 June 2006 Sawhney Consultants, who were Aleena's accountants, said that the company was trading and should not be deregistered and that Mr Rab had tried several times unsuccessfully to contact HMRC *[EX1-40]*. By a letter dated 27 June 2006 to Sawhney Consultants, HMRC stated that they had not been contacted by Mr Rab and that Aleena had been removed from the VAT register with effect from 26 June 2006 as it was not clear that it was trading or intended to trade *[EX1-46]*. By a letter dated 27 June 2006 to the Appellant, HMRC stated that evidence of removal of the goods from the UK had not been provided and that HMRC therefore considered that the Appellant owed £1,075,609.67 output tax on the sales during 02/06, such that rather than having a repayment claim, the Appellant was now required to pay £43,354.67 for that quarter *[EX1-46]*.

120. On 3 July 2005, the Appellant advised HMRC of a change of address *[EX1-53]*. On 10 July 2006 HMRC officers visited Aleena at its new business address and spoke with Mr Rab and his VAT representative Mr Andrew Lynch. Mr Rab informed the officers that *[EX1-58-76]*:

(1) Aleena was established in May 2005 to trade in air conditioning.

(2) Mr Rab's full time job was in the residential lettings market.

(3) Mr Rab had an account in his name at Barclays, and Aleena had accounts in its name at Natwest and FCIB.

(4) Finance for Aleena was provided by a personal loan of £75,000 from Barclays and a finance deal permitting up to £850,000 to be drawn down from a friend, Syed Khalid Najmi of Orient Motors FZE ("Orient"). (Mr Rab provided a copy of the Orient loan agreement (see below) but no documentation for the personal loan.)

(5) The Orient loan was secured on 3 properties owned by Mr Rab but the mortgagees of those properties had not been told that those properties had been put forward as security for that loan, and Mr Rab had made no repayment of capital or interest on the loan. (In addition, searches of the land registry showed that Mr Rab owned these properties, one of which was his home address, and that no charge on these properties had been registered by Mr Najmi.)

(6) Payments had been made by Orient to Aleena of £125,000 on 10 March 2006, £500,000 on 26 April 2006 and £164,513.80 on 27 April 2006.

(7) Mr Rab used trade websites such as Ali Baba and GSM Trade Exchange and that Aleena had his own website.

(8) During his research Mr Rab had looked into MTIC fraud and he understood about MTIC. He had loved mobile phones for years but had to be careful about his sources because of the possibility of MTIC fraud.

(9) He had been introduced to the business by Mr Awan of P2C, who had explained the importance of MTIC and joint and several liability to him. He had seen Public Notice 726.

(10) Aleena did not offer any credit to Rezaco; Aleena shipped goods on hold and then released them only when payment was made. However, Aleena's supplier P2C offered Aleena credit.

(11) Insurance for Aleena's transactions was provided by Transpacific based in Gibraltar and the premiums had been paid by cheque from the Barclays account.

(12) No IMEI numbers had been collected for the telephones traded because to do so was too expensive and there was not enough time. Inspection reports were undertaken by the freight forwarder "as a matter of course". Mr Rab had seen the goods personally on all occasions at Aquarius, the freight forwarder. He examined pallets of goods locked in a cage and on that basis he was satisfied that the goods existed.

(13) Aleena had no significant assets other than the claim for repayment of input VAT by HMRC.

(14) The principal place of business of Aleena (its new address) was the base of the lettings business in which Mr Rab owned a 50% share and Aleena had a licence to use the premises.

(15) Aleena's only supplier was P2C. Mr Rab had known Mr Awan for some 3 years.

(16) Aleena's checks included using the Europa VAT website and undertaking some research on the company but no Redhill verifications [that is, verifications with a specialist HMRC unit in Redhill] were carried out.

(17) Mr Rab had been introduced to his customer Rezaco by Mr Awan of P2C and the relationship between the three companies was described in a document entitled "broker agreement". The broker agreement was one in which Mr Awan sold the goods to Aleena and also negotiated the price at which the goods would be sold to Rezaco and other terms. On the basis of a successful deal Mr Awan would earn a commission. One of the conditions of the commission was whether Aleena could claim back the input VAT on the EU transactions.

(18) No trading had taken place since 19 June 2006 (the date of the original suspension of Aleena's VAT registration) because Mr Rab had no funds to trade in mobile phones. No trade in air conditioning units had taken place either.

121. At that 10 July 2006 meeting, Mr Rab provided HMRC with a document entitled "broker agreement", which bore a handwritten annotation "*copy*" *[EX1-108-112]*. This document provided that Mr Awan was *inter alia* to:

(1) solicit new prospective commercial clients for Aleena;

(2) provide completed initial document packages for Aleena's evaluation and possible acceptance;

(3) use reasonable efforts to secure the sale of listed products;

(4) oversee the freight and shipment of the products;

(5) ensure that no missing traders were involved in any supply/purchase chain;

(6) ensure that due diligence procedures would be conducted by a professional third party;

(7) assist Aleena in the formation of any due diligence documentation that it required; and

(8) advise and assist Aleena with any issues that arose.

122. According to this document, in return for his services Mr Awan would receive a commission of "up to 15% of the gross profit made by Aleena with any sale arranged" by Mr Awan. However, the agreement provided that no such payment would be made by Aleena to Mr Awan until Aleena had realised its profit through the sale of the goods to its buyer and no commission was to be paid "should Aleena never be repaid its vat return for the export of the goods or for some other reason".

123. Under cover of a letter dated 18 September 2006, Mr Rab subsequently provided another copy of the document entitled "broker agreement" *[EX1-199 & 246-250]*, which is not in all respects identical to the earlier document marked "copy".

124. At the 10 July 2006 meeting, Mr Rab also provided HMRC with a copy of the loan agreement between Mr Rab of Aleena and Mr Najmi of Orient, dated 16 January 2006 *[EX1-114-116]*. Under the terms of the agreement, Mr Najmi of Orient would lend Aleena up to £850,000, which could be called up within 12 months of the agreement. Within 12 months of the funds being transferred Aleena would pay back the capital amount plus related charges and interest. The loan agreement provides for an "annual percentage rate" of 9.75%, an arrangement fee of 1.5% (maximum £10,625), a late payment charge of 5% on any instalment not paid within 10 days of its due date, and certain other charges. It also contained clause whereby Orient would charge interest of 15% per annum on any unpaid balance after the date when final payment was due.

125. The loan agreement states that as security, Mr Rab "will guarantee the lender to obtain any equity outstanding from the sale of the following properties", and lists four properties owned by Mr Rab.

126. As at 12 July 2006, no charges had been entered by Mr Najmi or Orient into the Land Registry register for any of the 4 properties *[EX1-137-171]*.

127. Orient made three payments from its FCIB account to that of Aleena, totalling £789,513.80 (£125,000 on 10 March 2006, £500,000 on 26 April 2006 and £164,513.80 on 27 April 2006) *[EX1-117-119]*.

128. In a letter to HMRC dated 18 September 2006, Mr Rab confirmed that to that date, no payments had been made by him under the loan agreement *[EX1-201]*.

129. Mr Rab states in his witness statement that he had known Mr Najmi of Orient for over 5 years, that it was agreed that if he did not pay back the loan Mr Najmi would put a charge on his properties; however, because Mr Najmi was aware of Mr Rab's "situation" Mr Najmi was willing to wait to receive payment without taking action against Mr Rab's properties *[WS1-289 §§33-34]*.

130. In response to a 31 August 2006 request by HMRC to provide a correspondence address, date of birth and bank details for Mr Najmi *[EX1-183]*, Mr Rab stated in his letter dated 18 September 2006 that the information was private and confidential, that he had contacted Mr Najmi's brother as Mr Najmi was on holiday, and that Mr Najmi's response would be forwarded when received *[EX1-200]*. HMRC contend that no such response has been provided to HMRC.

Findings in relation to the transactions to which this appeal relates

131. In VAT period 02/06 the Appellant made six sales of quantities of mobile phones. In each sale, Aleena's customer was Rezaco, a company in Cyprus. The sales from Aleena to Rezaco were the subject of Aleena's invoice numbers 100003 to 100008, the first four of which were dated 22 February 2006 and the last two of which were dated 23 February 2006. Five of the invoices relate to Nokia phones, and in one invoice they are Samsung.

132. Exhibited to Mr Walton's first witness statement are documents showing the extended deal chains of which each of these six sales respectively formed part *[EX2-45-102]*, *[EX2-103-149]*, *[EX2-150-195]*, *[EX2-196-248]*, and *[EX2-249-320]*. A summary of the information contained in these documents is found at Appendices 1 and 2 to the HMRC skeleton argument. On the basis of this evidence the Tribunal finds as follows.

133. In each deal chain, the goods originated with a company in France called Bleu Opale Technique ("Bleu Opale"). Bleu Opale sold the goods to a UK company, Easiblaster Limited, trading as Universal Supplies ("Easiblaster"). Easiblaster then sold the goods to P2C. P2C then sold the goods to Aleena. Aleena then sold the goods to Rezaco.

134. The purchase orders and invoices relating to these deal chains are all dated January or February 2006. However, it was only in April 2006 that the goods were delivered to Aleena in the UK, and within a day Aleena then despatched the goods to a company called Stolz Transporte GmbH ("Stolz") in Germany, which was the stipulated address for delivery to Rezaco.

135. In each of the six sales by Aleena to Rezaco, the goods were sold at a price that amounted to a 4.2% markup on the price for which the goods had been acquired by Aleena from P2C. This was very significantly higher than the markup achieved by Easiblaster on its sales to P2C, or by P2C on its sales to Aleena.

136. Bleu Opale delivered the goods to Easiblaster at the address of the freight forwarder Aquarius in Middlesex. Aleena took delivery of the goods from P2C at that same address. The Tribunal infers that in the course of the intermediate sale from Easiblaster to P2C, the goods did not physically move from that address.

137. Other documents show that Rezaco subsequently sold the goods to V5 Solutions sarl ("V5"), a French company *[EX2-395-442]*. V5 took delivery of the goods from Rezaco at the address of Stolz in Germany.

The alleged MTIC fraud—general

138. As has been noted, HMRC do not suggest that there was any tax loss in the six deal chains involving the Appellant. Rather, the HMRC case is that those transactions were a "clean" chain of "contra-trading", intended to make it more difficult for HMRC to identify tax losses occurring in another "dirty" deal chain in which the tax loss occurred.

139. One of the two companies said to be involved in the dirty chain was Easiblaster. Another was Goodluck Employment Services Ltd ("Goodluck"). The Tribunal's findings relating to these two companies and their relevant trading are set out below.

Findings in relation Goodluck

140. Goodluck was incorporated on 28 May 2004; its director at the relevant times was Raja Muhammad Ishaq Shahid *[EX7-1]*. Goodluck was registered for VAT with effect from 1 July 2004, and was deregistered with effect from 27 April 2006. In its VAT1 form dated 5 July 2004 applying for VAT registration *[EX7-11-19]*, Mr Shahid:

(1) declared that the current and/or intended business activity of the company was "supplying labour force to various employers";

(2) estimated the value of taxable supplies in the next 12 months to be £500,000; and

(3) crossed out as inapplicable section 25 of the form dealing with goods likely to be bought from or sold to other EC Member States.

141. HMRC officers visited Goodluck on 23 September 2004 and Mr Shahid confirmed to the officers that Goodluck's business activity was the provision of labour to factories *[EX7-21-22]*.

142. On 15 February 2005 HMRC notified Goodluck that £7,039 in claimed input VAT had been denied because its supplier in the relevant transactions was not registered for VAT *[EX7-31]*. Goodluck was then assessed for the sum *[EX7-32]*.

143. On 23 February 2005 HMRC officers visited Goodluck in connection with a number of companies trading with it that were either unregistered or deregistered. HMRC officers terminated the interview because they considered that Mr Shahid had

become too distraught. Mr Shahid said that he was prepared to help if HMRC could protect him *[EX7-39]*.

144. On 9 December 2005 Mr Shahid informed HMRC that Goodluck had changed address *[EX7-76]*. On 18 January 2006 Mr Shahid wrote to HMRC stating that for the expansion of its business Goodluck "will need to trade in different industries (marketing, sales and promotion etc etc)" and he therefore requested that Goodluck's trade classification be changed to "general trading" *[EX7-83]*.

145. On 27 February 2006 HMRC issued a letter to Goodluck setting out the scale of MTIC fraud and the trade sectors affected by it, requesting that the company verify the VAT registration numbers of its counterparties with HMRC's Redhill office, and enclosing a copy of Public Notice 726 *[EX7-90-91]*.

146. On 7 March 2006 HMRC officers visited Goodluck but Mr Shahid was not available *[EX7-93-96]*. HMRC officers returned to Goodluck on 13 March 2006 and spoke with Mr Shahid who confirmed that Goodluck was presently operating an employment agency but that there was not much was happening with the company at present, that he had 20 people on his books but they were not currently working for Goodluck, that he was thinking about importing rice from Pakistan or setting up a nightclub, and that he did not expect to undertake any EC trade *[EX7-97-108]*.

147. In about April 2006 HMRC became aware from documents obtained from other companies (who appear to have been freight forwarders) that Goodluck was acquiring mobile telephones from French and Italian companies and selling them on in the UK *[EX7-3, 109-111], [WS1-140§30]*.

148. As a result of that information, on 24 April 2006 HMRC Officer Patterson visited Goodluck. Mr Shahid was not available and a Regulation 25 notice was left at the premises. The Regulation 25 notice shortened Goodluck's current VAT period to 24 June 2006 and required a VAT return for this period to be submitted by 25 June 2006 *[EX7-112-121]*. Officer Patterson returned to Goodluck the next day and spoke with Mr Shahid who confirmed that the company was trading in mobile telephones but said that all the transactions had been undertaken by an "administrator" and all the records were with his accountant. Mr Shahid stated that he had been told by the "administrator" that no VAT would be due on his sales and said that he would collect the company's records. Mr Shahid was advised that Goodluck would be deregistered from VAT. *[EX7-123-124]*.

149. Thereafter, between May 2006 and September 2007, HMRC issued Goodluck with assessments totalling some £18.8 million for undeclared output VAT on some £107.5 million of invoices known to HMRC issued by Goodluck between 6 March 2006 and 25 April 2006, many of which related to sales of mobile telephones *[E7-127-203], [WS1-141-144§§34-56]*.

150. One of these assessments, dated 29 January 2007, was for output VAT of £5,568,438.09 due on 12 invoices with a net total of some £31.8 million issued by Goodluck to Questline Solutions Ltd ("Questline") for the sale of Intel SL7Z9

computer chips *[EX7-156-159]*. These 12 invoices bore Goodluck's invoice numbers QST0288 to QST0299 respectively, dated between 24 March 2006 and 31 March 2006.

151. A notice of assessment dated 9 May 2006 also showed that in April 2006 Goodluck had acquired mobile telephones from Rezaco and E&I Trading Ltd ("E&I") of Cyprus *[EX7-127-129]*.

152. Despite requests to pay *[EX7-153]* Goodluck has neither paid nor appealed the assessments issued to it. HMRC attempted to visit the home address of the director and company secretary in August 2007 but to no avail *[EX7-164-175]*. Goodluck has not responded to requests to provide its business records and further letters sent to it have been returned undelivered *[EX7-176-193], [WS1-143-144§§50-56]*.

153. Goodluck was wound up by order of the Companies Court on 24 January 2007 *[EX7-196-199], [WS1-144§§57-59]*. There has been no contact from Goodluck and the assessments have neither been paid nor appealed *[WS1-145§§68-69]*.

154. It is the amounts of these assessments that have been unpaid by Goodluck which HMRC consider to be the tax loss in the "dirty" chain.

Findings in relation to Easiblaster

155. Easiblaster was incorporated on 22 November 1982 under the name Abrasive Blasting Co Ltd, and changed its name to Easiblaster Ltd in 1987 *[EX6-2, 10]*. Companies House records the nature of Easiblaster's business as "general mechanical engineering" *[EX6-2]*. An Experian report shows the company's principal activity as "manufacture and sale of sand blasting and glass engraving equipment" *[EX6-90]*. Easiblaster's directors at the time relevant to this appeal were Christopher Wildon (who was also the company secretary) and Andrew Marsh; the shareholders were Andrew Marsh, Christopher Wildon, Kevin Wildon and Patricia Wildon *[EX6-3-7, 91]*. Mr Wildon and Mr Marsh were also directors of AC Enterprises (UK) Ltd ("ACE") *[EX6-3-7]*.

156. Easiblaster applied to be registered for VAT in 1982, describing the nature of its business as "sales of equipment" *[EX6-8]*.

157. In October 2003 HMRC officers visited ACE, which was trading in mobile telephones. The officers issued Notice 726 and the statement of practice on invalid invoices to Mr Wildon *[EX6-72-77]*.

158. In November/December 2003, Easiblaster requested to be moved to monthly VAT returns, a request that was initially refused by HMRC on the ground that monthly returns were only allowed for traders who are entitled to regular repayment or forecast a repayment pattern *[EX6-12-19]*. In a letter dated 11 December 2003, Easiblaster claimed that it required monthly returns because it had set up a new trading division and had made zero-rated supplies to "a couple of customers" and said that they "needed to recover the VAT as soon as possible for the company's cash

flow" *[EX6-17]*. Easiblaster's 01/04 quarterly VAT return was the first return to show a repayment claim *[WS1-111-112§18]* and thereafter the company was moved onto monthly returns *[EX6-20]*.

159. On 11 February 2004, Mrs Wildon telephoned HMRC to chase repayment of input VAT claimed in the return for period 01/04 in respect of sales of some £500,000 of binoculars *[EX6-118]*. HMRC notified Easiblaster in a letter dated 12 March 2004 that its 01/04 period return was being verified and that two of the transactions had at the foot of the chain a defaulting trader *[EX6-22]*. On 2 April 2004, HMRC notified Easiblaster that evidence suggested that at least one of the transactions involved a trader using a hijacked VAT number and goods being moved into the UK from another Member State then through a series of transactions and back to a trader in another Member State *[EX6-24]*. On 28 May 2004, HMRC notified Easiblaster of the same, and added that in relation to two of the deals, it was clear that the UK trader at the foot of the chain had not paid its VAT, resulting in a significant loss of revenue. That letter also notified Easiblaster that its period 01/04 reclaim would be paid on a without prejudice basis *[EX6-28]*.

160. On 13 April 2005, HMRC Officer Gellvear telephoned Easiblaster and spoke with Mr Wildon in relation to information received by HMRC that Easiblaster had written to Hawk Precision Logistics to open an account with them. Mr Wildon stated that he had not in fact opened such an account and that neither Easiblaster nor ACE were currently undertaking any wholesale trade and that he would notify HMRC if either business intended to do so *[EX6-1]*. In fact there is no evidence that Mr Wildon ever notified HMRC that Easiblaster was going to start wholesaling *[WS1-109§7]*.

161. Easiblaster's 04/05 period VAT return showed a dramatic increase in turnover from £4,003 in the previous month to £219,896 *[WS1-121§59]*.

162. After a visit to Easiblaster in July 2005 HMRC officers reviewed the company's VAT return history and found that it was overall in a VAT payment position and that Mr Wildon had stated in a recent meeting with HMRC that his intention was to trade solely in the UK. Easiblaster was therefore moved back to a quarterly VAT return period *[EX6-31-32]*.

163. On 19 July 2005, HMRC issued a letter to Easiblaster advising it to carry out due diligence, to verify VAT registration numbers with HMRC's Redhill office, not to make third party payments, to retain records on a deal by deal basis and to familiarise itself with the documentation and guidance that had been provided to it in order to protect itself from the risks associated with MTIC fraud *[EX6-35-37]*.

164. On 31 January 2006, HMRC issued a letter to Easiblaster setting out the scale of MTIC fraud and the trade sectors affected by it, requesting that the company verify the VAT registration numbers of its counterparties with HMRC's Redhill office and enclosing a copy of Public Notice 726 *[EX6-39-40]*.

165. On 2 May 2006, Easiblaster submitted its 03/06 VAT return *[WS1-121§60-61]*. Later that month, HMRC received Easiblaster's records for VAT periods 12/05 and 03/06, as well as some previously missing papers from 09/05 *[WS1-115§§34, 62]*.

166. On 22 February 2007, HMRC notified Easiblaster that 12 of the transactions in its 03/06 VAT return (all involving Easiblaster's sales to Bleu Opale) commenced with defaulting traders, resulting in a revenue loss of approximately £5,568,438 *[EX6-53]*.

167. In a letter dated 13 June 2007 HMRC requested Easiblaster to provide paperwork for deals that it had undertaken since 1 April 2006 *[EX6-62]*. Easiblaster failed to produce these records *[EX6-64-60]*.

168. Easiblaster was wound up by order of the Companies Court on 8 July 2009 *[EX6-202]*.

169. Easiblaster's records for VAT period 03/06 show that in that quarter Easiblaster undertook 99 transactions as part of a turnover of £98.7 million *[WS1-121-122, 125§§63-64, 76-77]*. Of those 99 transactions:

(1) 12 were transactions where Easiblaster purchased central processing units ("CPUs") from traders in the UK and sold them to traders elsewhere in the EC, thereby generating a VAT repayment claim (referred to by HMRC as "broker" transactions in which Easiblaster was the "broker");

(2) 29 were transactions where Easiblaster purchased goods from traders elsewhere in the EC and sold them on to traders in the UK, thereby generating an output VAT liability (referred to by HMRC as "acquisition" transactions in which Easiblaster was the "acquirer");

(3) 58 were transactions where Easiblaster purchased goods from traders in the UK and sold them on to other traders in the UK, thereby generating both output VAT liability and input VAT deduction (referred to by HMRC as "buffer" transactions).

170. For convenience, the Tribunal uses the terms "broker", "acquisition" and "buffer", but only in the sense of the meaning in the previous paragraph.

171. In the quarterly VAT period 03/06 the overall value of the goods purchased by Easiblaster from elsewhere in the EC in the acquisition transactions (£31,830,424) closely matched the value of the goods sold by Easiblaster to traders elsewhere in the EC in the broker transactions (£31,841,853) *[WS1-121, 125§§60-61, 76]*.

172. The deal paperwork for the 12 broker chains is at *[EX6-120-201]*, and summarised at *[EX6-106-117]*. Each of the 12 broker chains involved the sale of Intel SL7Z9 CPUs through an identical chain of traders. In each chain, Goodluck in the UK sold to Questline in the UK, who sold to Easiblaster in the UK, who sold to Bleu Opale in France. In each of the broker chains, that series of transactions all happened on the same day. The sales from Goodluck to Questline are evidenced by Goodluck's 12 invoices bearing invoice numbers QST0288 to QST0299 respectively, that is to

say, each of the broker chains involved sales by Goodluck in respect of which Goodluck was a VAT defaulter (see paragraph 150 above). Eleven of the broker deals were for an identical number of CPUs and all 12 of them took place at an identical price *[EX6-106-117]*. Easiblaster's mark up in every deal was £0.03. The 12 broker transactions incurred input tax of £5,570,381.25 *[EX6-100]*. The total VAT defaulted upon by Goodluck in respect of its sale of computer chips to Questline was £5,568,438.00.

173. All 29 of the acquisition chains took place in January 2006. In these transactions, Easiblaster purchased goods from Bleu Opale in France. All of Easiblaster's onward UK sales were to P2C. Easiblaster's mark-up in the acquisition deals was between £0.10-£0.16. In these 29 chains P2C either sold the goods in broker transactions to two customers elsewhere in the EC (World Tagus and E&I) respectively), or else sold the goods on to three customers in the UK (Aleena, Bluesail Consortium Ltd ("Bluesail") or Image Printers Ltd ("IPL")) who in turn then sold them on in broker transactions *[EX2-450], [WS1-122-123§§65-67]*.

174. In these 29 chains, the ultimate input tax repayment claims of P2C, Aleena, Bluesail and IPL totalled £5,572,767.38 *[WS1-12§44]*.

175. The 58 buffer deals involved Easiblaster trading in CPUs (54 deals), razor blades (2 deals), Sony products (1 deal) and DVD players (1 deal) *[EX6-97-99], [WS1-128§§93-94]*. In 15 of the CPU deals its mark up was £0.10 and in 8 of the CPU deals its mark up was £0.15. That mark-up was achieved regardless of purchase price *[WS1-128-129§§95-100]*.

176. The output tax liability for Easiblaster's onward UK sales from its acquisition transactions was £5,571,760.00 *[WS1-123§67]*. Easiblaster offset that output tax liability against the input tax repayment claim of £5,570,381.25 leaving a net payment of just £1,378 *[WS1-123§67]*. When Easiblaster's buffer deals were taken into account the total VAT due to HMRC was £12,835.41.

Findings in relation to Bleu Opale

177. Information obtained by HMRC from French authorities indicates the following. The company was registered in France for VAT on 21 September 2005. The trading activities of the company were given as the wholesale of household equipment. The director was Mr Tahir Amin who resided in London and did not hold any bank accounts in France. The company has not submitted any VAT returns since it was set up. It was deregistered on 28 December 2006. *[WS1-126-127§§83-91.]*

Findings in relation to documents recovered in a criminal investigation

178. One of P2C's directors and beneficial owners, Ms Nuzzhat Arra Shugaa, lived at an address in Cricklewood, London (the "Cricklewood address") *[EX3-253-256]*. On 13 June 2006, police searched that address as part of a criminal investigation *[WS1-61-63§§48-53]*, and found certain documentation there (the "Cricklewood documents") *[EX5-147-315]*.

179. The first set of documents had a post-it note on the front page with "Red Sea" written on it *[EX5-148]*. Behind that document were a set of 10 CMRs dated with dates in April 2006 and photocopies with accompanying ferry and Eurotunnel tickets. Each of the CMRs referred to a quantity of SL7Z9 CPUs being consigned from Red Sea Solutions SPRL ("Red Sea") of Belgium to Aquarius Air Freight Logistics c/o "Good Luck Employment Services Ltd", to be released to "Good Luck Ltd", with the place of taking over of the goods being specified as the address in Spain of a company called Benal Logistics SL (which was the carrier), and the place of delivery specified as "London UK" *[EX5-149-171]*. A set of similar CMRs dated with dates in April 2006 and related tickets for goods sent by Red Sea to Aquarius c/o "Good Luck Employment Services Ltd" for release to "Good Luck Ltd" were behind a document with "Sam" written on it *[EX5-222-239]*.

180. A further set of CMRs dated with dates in May 2006 and related tickets were recovered from the Cricklewood address behind a document with a post-it note on it upon which was written "Bleu Opale CMR/CPUs Incoming" *[EX5-172]*. Those CMRs and tickets showed CPUs being consigned from Universal Supplies to Bleu Opale, with the place of taking over of the goods being specified as the address of Aquarius (which was the carrier), and the place of delivery specified as "Boston Freight Belgium" *[EX5-173-192, 195-214]*.

181. Another set of documents dated with dates in April 2006 showed Nokia and Samsung mobile telephones and "PSP"s being consigned by Bleu Opale to Aquarius for release to "Universal Supplies", with the place of taking over of the goods being specified as the address in Belgium of a company called Boston Freight (which was the carrier), and the place of delivery specified as "London UK" *[EX5-243-255]*.

182. At *[EX5-241]* is a handwritten note which states:

> *Good Luck Releases + Allocations
> *Questline Allocations + Releases
> *Univers Instructions of exportation
> ~~*P2C Releases for the first Batch (2 trucks) + Allocation~~
> ~~*6 Releases from Universal to P2C~~
> ~~* Redone~~ ~~Blue Sail~~ ~~Instructions~~
> D500
> D600
> *CHRIS TRUCKS PAID FOR
> *20K SPRINTERS
> *30K already 25 [illegible]
> Aquarius trucking.

183. At *[EX5-304-307]* are 3 pages of manuscript documents behind a document headed: "Blue Sail Docs, Image, P2C from Uni." The first page of those documents sets out the name and address of Benal Logistics SL in Spain, and includes the words "RED SEA", "Blue", "Ionis", "AQUARIUS" and "BOSTON" *[EX5-304]*. The second page of those documents states at the top "Intel Pentium P4 SL7Z9 85.97" *[EX5-306]*. The third page of the documents stated *[EX5-307]*:

**GOOD LUCK INTO AQUARIUS*
**PRINT PAPERWORK*
**GIVE TO GOOD LUCK.*

184. Also found at the Cricklewood address were what appears to be annotated drafts of the contents of introductory documentation for Transpacific *[EX5-296-302]* and 2 documents on Aquarius headed paper setting out the contents of 3 trucks (Sony, Nokia and Ericsson products) and the dates of their journeys *[EX5-314-315]*.

Findings in relation to insurance

185. At the 10 July 2006 HMRC visit, Mr Rab informed the HMRC officers that insurance for Aleena's transactions was provided by Transpacific based in Gibraltar and that the premiums had been paid by cheque from the Barclays account *[EX1-61]*. Mr Rab has provided documentation from Transpacific purporting to show that Aleena paid Transpacific for insurance services and that Transpacific insured Aleena's goods *[EX1-81-90]*.

186. P2C and Bluesail also claimed that Transpacific insured their goods *[WS1-31§96]*.

187. Transpacific was incorporated on the Autonomous Island of Anjouan in the Union of the Comoros *[EX4-93]*. The Gibraltan Financial Services Commission confirmed that despite Transpacific claiming to have an office in Gibraltar it was never authorised to carry on insurance business or insurance mediation in or from within Gibraltar *[EX2-348]*.

188. As part of its FCIB application Transpacific submitted a business plan summary in which it stated that the company was to be capitalised at $200,000 and that it was assumed that this would cover up to $200,000 worth of insurance in any month *[EX4-70]*.

189. At the time of the shipments of Aleena's goods the premiums said to be due to Transpacific had not been paid. The payments were still outstanding as at 4 July 2006 *[EX1-81-85]*.

190. The insurance certificates stated that for mobile telephones various additional documentation may be required such as "time dated photographic evidence of stock" and "100% IMEI number record of stock" *[EX1-85-90]*. Mr Rab then provided a letter from Transpacific dated 4 April 2006 that exempted Aleena from this requirement *[EX2-3-4]*. (The genuineness of this letter is disputed by HMRC).

Findings in relation to FCIB bank accounts

191. Aleena applied to open its FCIB account on an application form, dated 9 August 2005 and signed on 23 September 2005 *[EX3-138-141]*. The company history questionnaire submitted with the application *[EX3-149]* stated that "we are currently trading in air conditioning units and parts, we are also looking to trade supply in computer parts". Aleena's VAT registration certificate submitted in support of the

application *[EX3-156]* issued on 15 September 2005 indicated that its trade classification was "machinery used in industry, trade & nav". In support of his application for an FCIB account Mr Rab provided a letter from Mr Azeem Ibrahim of Ionis GmbH ("Ionis") *[EX3-146]* and a letter from Mr Awan of P2C *[EX3-147]*. Mr Rab also provided a letter of reference from Aleena's accountant Sawhney Consulting *[EX3-148]* of which the director was Mr Opinder Sawhney *[EX3-194-199]*. In a letter dated 14 October 2005, Mr Rab on behalf of Aleena stated that the company had been referred to FCIB by Mr James Mallaburn *[EX3-237]*. Mr Rab also submitted to FCIB a tenancy agreement for a premises in Wembley *[EX3-200]*. The landlord purported to be Mr Opinder Sawhney of an address in Warwick Grove. Mr Sawnhey, in addition to being Aleena's accountant *[EX3-194]*, was named as Transpacific's auditor *[EX4-59]*. Mr Rab owned the Warwick Grove address from 10 May 2004 *[EX1-170]* and the equity in that property one of the properties of Mr Rab that was intended to be used as security for the loan from Orient *[EX1-114-115]*. The witness to that tenancy agreement was the manager of AY Cars Ltd, whose name is not provided *[EX3-205]*. In his witness statement Mr Rab states that he owned AY Cars *[WS1-280§2]*.

192. P2C applied to open an FCIB account on an application form dated and signed 5 April 2005 *[EX3-254-257]*. James Mallaburn authenticated a document submitted in support of that application *[EX3-258]* and was a party to e-mails with the FCIB concerning P2C's application *[EX3-316-334]*. On 9 May 2005 Mr Mallaburn e-mailed FCIB in relation to P2C's account stating: "This case is linked to a number of other applications which are approved and they are all in a trading loop and cannot start until this account is operational" *[EX3-326]*. Mr Mallaburn wrote in a further email of 17 May 2005: "This case is extremely urgent and I would like to resolve this query ASAP so we can move forward and approve the account …, the situation is critical as this is one of a loop of trading accounts, which cannot start using our services until the trading chain is complete. I am under extreme pressure to complete this trading chain and have the account approved…" *[EX3-334]*.

193. Rezaco applied to open an FCIB account on an application form dated and signed 5 April 2005, the same date as the application of P2C *[EX3-254-257 & 421-425]*. The application form indicates that Mr Moazen, the director of Rezaco, is a British citizen.

194. Bleu Opale applied to open an FCIB account on an application form dated and signed 30 November 2005 *[EX4-278-282]*. The form named Mr Tahir Amin as the company's director and beneficial owner and gave his address in East London, UK. According to Bleu Opale's business plan it was an IT support company *[EX4-316-334]*. The French authorities have informed HMRC that Bleu Opale is a one person limited company that had been registered as a wholesaler of household equipment and had never submitted any VAT returns *[EX6-101]*.

195. Goodluck applied to open an FCIB account on an application form, dated 28 December 2005 and signed 12 January 2006 *[EX5-100-103]*. In an e-mail dated 25 January 2006, Goodluck informed FCIB that it was "currently trading in the

recruitment and employment services market and [was] expanding into the marketing, sales and promotions markets" *[EX5-127]*.

196. Bluesail applied to open an FCIB account on an application form, dated 21 March 2005 and signed 22 March 2005 *[EX4-172-176]*. The form named Stuart Bateman (who subsequently provided a reference as director of Pochard Sp z.o.o ("Pochard") for Transpacific's account application *[EX4-66]* and who had witnessed Transpacific's lease *[EX4-83-86]*) as Bluesail's director, and gave his address as being in Swansea *[EX4-175]*. At the time of Bluesail's application, Mr Bateman was 21 years of age *[EX4-175]*. Bluesail's VAT certificate showed a trade classification of "Other software consultancy and supply" *[EX4-199]*.

197. IPL applied to open an FCIB account on an application form dated and signed 19 August 2005 *[EX4-226-230]*. The form named Riaz Ahmed Ramzan as company director and primary contact. Mr Ramzan provided a letter from Stuart Bateman of Pochard in support of his application for IPL's account *[EX4-235]*. Mr Awan of P2C also provided a letter of reference for IPL *[EX4-236]*.

198. Orient applied to open an FCIB account on an application form, dated 10 July and signed 15 July 2005 *[EX3-347-350]*. Mr Najmi of Orient stated on the FCIB due diligence form that Orient was an importer and exporter of used cars *[EX3-368]* and in a manuscript addendum wrote: "Form completed and signed as going forward company may start trading telecoms and computers as well. Note – Mr Najmi is closely related to a number of existing FCIB customer in telecoms—(by family). These connections in his community are paramount" *[EX3-372]*.

199. Transpacific applied to open an FCIB account on an application form dated and signed 25 February 2006 *[EX4-47-50]*. The form named Azeem Ibrahim (also the director of Ionis) as director and primary contact of Transpacific and stated that the company was based in Anjouan in the Comoros Islands. The form indicated that the address of Mr Ibrahim was in Watford and that the postal address of Transpacific was in Swansea. James Mallaburn and Stuart Bateman were named in the form as third party referees *[EX4-59]*. Transpacific's auditor was named as Opinder Sawhney (Aleena's accountant) at an address in Wembley, London *[EX4-59]*, which was purportedly Aleena's address from 20 July 2005 *[EX3-200]*. Mr Ibrahim provided a letter from Stuart Bateman of Pochard, a Polish company, in support of his application for Transpacific's account *[EX4-66]*. Mr Azeem stated that Transpacific would be capitalised at $200,000 *[EX4-70]*, with its principal and registered offices in Comoros *[EX4-72]*. Mr Azeem also provided a lease between Transpacific and Mr Salman Shaikh of Habib Enterprises Ltd for a property in Swansea. The lease states that it was witnessed by Stuart Bateman and gives his address as being in Swansea *[EX4-83-86]*. James Mallaburn had referred Transpacific to FCIB *[EX4-48]*.

200. Ionis applied to open its FCIB account on an application form, dated 8 December 2004 and signed on 20 December 2004 *[EX4-3-6]*. The form named Azeem Ibrahim as the director of Ionis and stated that he was a British citizen with an address in Watford.

201. Zaagoug International Sarl ("Zaagoug") applied to open an FCIB account on an application form, dated 20 September 2005 and signed 25 December 2005 *[EX4-100-103]*. The form stated that Zaagoug was based in Tanger, Morocco and that its director, Mr Ali Zaagoug, was resident in Hofheim, Germany. In support of his application for an FCIB account Zaagoug provided a letter from Azeem Ibrahim of Ionis *[EX4-108]*. James Mallaburn had referred Zaagoug to FCIB *[EX4-101]*.

Findings in relation to circularity of funds

202. Appendix 6 to the HMRC skeleton contains a summary of evidence from the FCIB material that is said to show that the money associated with all six of the transactions to which this appeal relates effectively moved in a circle, completed on the same day that it commenced, which started and ended with a Moroccan company called Zaagoug. Each party to the money movements, based in various countries, made payments in pounds sterling.

203. Appendix 5 to the HMRC skeleton and the charts at *[EX5-75 & 77]* contain a summary of evidence from the FCIB material that is said to show that 2 of the 3 "loan" payments by Orient to Aleena also moved in a circle, also in the space of a day, through 5 FCIB accounts and back to Orient.

204. The evidence and analysis underlying these appendices is found particularly in the second and third witness statements of Mr Walton.

205. By way of example, in relation to Aleena's invoice 100003 (which was for 5800 Nokia 8800 mobile phones), a chain of payments through FCIB accounts can be seen from V5 to Rezaco, then from Rezaco to Aleena, then from Aleena to P2C, then from P2C to Easiblaster, then from Easiblaster to Bleu Opale. Each link in this chain consists of two payments. The annotations to the payments from V5 to Rezaco indicate that they are for "3000 NK8800" and "2800 NK8800" respectively. The annotations to the payments from Rezaco to Aleena indicate that they are for "part payment inv 100003" and "final payment inv 100003" respectively. The annotations to the payments from Aleena to P2C indicate that they are for "pp [presumably "part payment"] nokia stock" and "2800 units of nok8800 sim free" respectively. The annotations to the payments from P2C to Easiblaster indicate that they are for "3000 nokia 8800" and "2800 x nokia 8800 gsm handsets" respectively. The annotations to the payments from Easiblaster to Bleu Opale indicate that they are for "payment for nokia stock" and "payment for stock" respectively. From the material before it, and considering the relevant amounts of the payments in question in each case, the Tribunal is satisfied on a balance of probabilities that these payments are the payments for the deal chain in respect of Aleena's invoice 10003, one of the six transactions referred to in paragraphs 131-137 above. All of these payments occurred on 27 April 2006.

206. The evidence shows, however, that this chain of payments was part of a longer, circular chain of payments. Payments bearing similar annotations were then made from Bleu Opale to Ionis, then from Ionis to Zaagoug, then from Zaagoug to V5. All of these payments were also made on 27 April 2006.

207. Given that the chain is circular, and given that the time of day of each of the payments is not separately recorded, it is difficult to say exactly which of the companies was the beginning and end of the circle. However, the two payments from Zaagoug to V5 amounted to £2,830,168. The amounts reduce slightly in each of the successive payments from V5 to Rezaco, Rezaco to Aleena, Aleena to P2C and P2C to Easiblaster, such that the payments from P2C to Easiblaster amounted to £2,826,401.80. Thereafter, identical payments totalling £1,791,863 were made from Easiblaster to Bleu Opale, from Bleu Opale to Ionis, and from Ionis to Zaagoug. The amounts of the figures suggest that the payments began and ended with Zaagoug.

208. It is unnecessary to set out all of the details of all of the circular payments that have been identified. Having considered these appendices and the evidence on which they are based, the Tribunal is satisfied that the circularity of these payments has been established.

209. Furthermore, the evidence also shows chains of payments from Easiblaster to Questline, from Questline to Goodluck, from Goodluck to Redsea, and from Redsea to Zaagoug. This payment chain is consistent with the chain of trading in the alleged "dirty" chain. This suggests that in both the alleged "dirty" chain as well as in the alleged "clean" chain, the payments that went through the chain of trading began with and ended up with Zaagoug.

The Tribunal's conclusions

General

210. The Tribunal accepts the HMRC submission that the questions to be addressed by the Tribunal in determining this appeal are:

(1) whether there was a VAT loss;

(2) if so, was it occasioned by fraud;

(3) if so, whether the Appellant's transactions were connected with such a fraudulent VAT loss;

(4) if so, whether the Appellant knew, or should have known, of such a connection.

211. Before addressing each of these issues, the Tribunal makes two preliminary observations.

212. First, on behalf of the Appellant, a general submission was made that there is nothing unlawful about contra-trading as such, and that legitimate businesses engage in contra-trading for legitimate purposes, including with a view to managing their cash flow.

213. The Tribunal does not find it necessary to make any findings in respect of the extent to which contra-trading may in practice be engaged in by traders for legitimate reasons. For purposes of this appeal, the Tribunal is prepared to assume that there is

nothing unlawful as such in the practice of deliberately making imports from and exports to other EU Member States in roughly equal value in a given VAT period, such that the input tax repayment claim on the latter effectively cancels out the output tax liability on the former. In this decision, the Tribunal will for convenience refer to this practice as contra-trading, and emphasises that use of this term by the Tribunal in its discussion below is not intended in and of itself to imply the existence of any fraud.

214. However, that does not mean that the existence of contra-trading is necessarily irrelevant to the question whether or not the existence of fraud has been established. In determining whether the existence of fraud has been established, the Tribunal can take into account the combination of circumstances in the case as a whole, which may include circumstances that of themselves may seem legitimate when viewed in isolation. For instance, there is nothing intrinsically unlawful or even unusual about a trader making a payment to a supplier or receiving a payment from a customer. However, the circumstances and pattern of payments between traders in a particular case may nonetheless be evidence of fraud. The Tribunal recalls what was said in *Red 12* quoted at paragraph 112 above. Similarly, the circumstances of contra-trading, even if assumed not to be intrinsically unlawful, may in the particular circumstances of a case as a whole be a factor that contributes to a finding that the existence of fraud has been established. In its consideration of the circumstances as a whole the Tribunal can take into account background evidence of the kind referred to at paragraph 68 above (subject to the reservation at paragraph 64 above).

215. Secondly, the Tribunal notes that the HMRC case is that both the alleged "clean" chain and the alleged "dirty" chain were part of a single co-ordinated fraudulent scheme. This means that on the HMRC case, almost all of the significant evidence in this case is relevant to all four of the questions referred to in paragraph 210 above that the Tribunal is required to address. The Tribunal, when considering each of those issues, has accordingly done so having regard to all of the evidence in the case as a whole. However, in this decision it would serve little purpose to address the whole of the same body of evidence four times when addressing the four different issues in turn. The discussion below therefore identifies the main points in relation to each of the respective issues, but the Tribunal emphasises that its consideration of each issue was not limited to the points specifically identified.

Whether there was a tax loss

216. Goodluck has been issued with assessments totalling £18.8 million for undeclared output VAT on £107.5 million of invoices known to HMRC issued by Goodluck between 6 March 2005 and 25 April 2006. Absent a successful appeal by Goodluck against those assessments, Goodluck remained liable to pay the amounts assessed. Goodluck was wound up by order of the Companies Court on 24 January 2007, and has neither paid nor appealed against the assessments. The Tribunal is satisfied in the circumstances on a balance of probability that there has been a tax loss.

Whether the tax loss was occasioned by fraud

217. The fact that Goodluck defaulted on a VAT liability does not in and of itself establish that Goodluck acted with intent to defraud the Revenue, or that the default was part of a larger fraudulent scheme or that others in the same or a different trading chain were involved in such a larger fraudulent scheme.

218. In determining whether Goodluck's default was due to fraud, the Tribunal finds the following matters to be particularly pertinent.

219. The stated business of Goodluck was a labour provider. Its application for VAT registration, it gave no indication that did trade in, or had any intention of trading in, mobile phones or indeed in any other goods. On 13 March 2006, its director Mr Shahid in fact expressly told HMRC officers that he had no intention of trading mobile telephones, when the company was at the time doing just that *[EX7-172-174]*.

220. Goodluck did not declare the sales to which the VAT default related in any of its VAT returns, despite the fact that those sales totalled some £107.5 million on which VAT of some £18.8 million was due (paragraph 149 above). Rather, it was assessed by HMRC to output VAT on sales based on invoices that HMRC discovered had been issued by Goodluck. Goodluck disappeared without paying or appealing against these assessments.

221. The Tribunal agrees with the HMRC submission that these are not the actions of an honest business. On the basis of the above considerations alone, the Tribunal is satisfied on a balance of probabilities that Goodluck's default was due to fraud.

222. That conclusion is more than amply reinforced by the broader picture painted by the evidence in the case as a whole, as considered in further detail below.

223. Based on the evidence in the case as a whole, the Tribunal is satisfied in the circumstances on a balance of probability that the tax loss referred to in paragraph 216 above was occasioned by fraud.

Whether the Appellant's transactions were connected with the fraudulent tax loss

224. The Appellant's transactions material to this issue are the six sales of mobile telephones to Rezaco that occurred in February 2006 that were the subject of an input tax repayment claim in the Appellant's 02/06 VAT return. The HMRC case is that the deal chains of which these transactions formed part were part of a larger fraudulent scheme involving also the deal chains in which there was a VAT default by Goodluck. The HMRC case is that other traders involved in the deal chains of which the Appellant's transactions formed part were also parties to that larger fraudulent scheme.

225. The UK trader involved in both of these sets of deal chains was Easiblaster. In the deal chains involving Goodluck, Easiblaster was the "broker" (that is to say, the last UK trader in the chain, which sold the goods zero rated to a trader in another EU Member State and made an input tax repayment claim in the UK). In the deal chains

involving the Appellant, the Appellant was the "broker", and Easiblaster was the "acquirer" (that is to say, the trader which first imported the goods into the UK from a trader in another EU Member State, thereby generating a tax liability in the UK). For this reason, the two chains are referred to below respectively as the "Easiblaster broker chains" and the "Easiblaster acquisition chains".

226. In both the Easiblaster broker chains and Easiblaster acquisition chains, Easiblaster's respective sales/acquisitions were transacted in Easiblaster's 03/06 VAT period. As a result, its VAT return for that period both returned a VAT liability in respect of its purchases in the acquisition chains, and made a VAT repayment claim in respect of its sales in the broker chains. In that VAT return, the former and the latter virtually cancelled each other out (paragraphs 171 and 176 above): that is to say, Easiblaster in that VAT quarter was engaging in contra-trading (see paragraphs 213-214 above). However, VAT repayment claims were made by the Appellant, as well as Bluesail and IPL, who were brokers in the Easiblaster acquisition chains, and the total of these VAT repayment claims (paragraph 174 above) was very similar to the amount of VAT on which Goodluck defaulted in respect of its sales to Easiblaster (paragraph 150 above), and very similar to the amount of the VAT repayment claim made by Easiblaster in respect of Easiblaster's broker chains (paragraph 172 above), and very similar to the output tax liabilities in respect of Easiblaster's acquisition chains (paragraphs 171-176 above).

227. In determining whether Easiblaster's broker chains and Easiblaster's acquisition chains both formed part of a single fraudulent scheme, the Tribunal finds the following matters to be particularly pertinent.

228. Even assuming that contra-trading is not of itself unlawful (paragraph 213 above), the Tribunal can take into account (paragraph 214 above) that the circumstances of the two sets of deal chains as described above were typical of an MTIC fraud involving contra-trading: see paragraphs 68-69 above, and for instance *Mobilx* at [9] referring to *Blue Sphere Global Ltd v HM Revenue & Customs* [2009] EWHC 1150 (Ch) and *Olympia Technology Limited v HMRC* [2008] UKVAT V20570. The contra-trading had the practical effect in this case that it was the Appellant which made the VAT repayment claim and in respect of goods which had not been supplied by a missing trader. Other features of these transaction chains that can be considered typical of an MTIC fraud are for instance that series of transactions took place back-to-back, with traders able virtually immediately to sell the exact quantity of goods that they had just purchased, and with none of the goods in either set of chains being traced to a manufacturer, authorised distributor or retailer selling to end users. Another feature to be taken into account is that neither Aleena, nor Goodluck nor Bleu Opale disclosed to the tax authorities that they were trading in mobile phones or electronic goods.

229. The circular pattern of the chains of payments referred to in paragraphs 202-209 above also undermines the plausibility of the suggestion that all of these transactions were *bona fide* transactions between arm's length traders. The Tribunal accepts the HMRC submissions that the circularity of monies had no plausible commercial purpose to it and that this circularity suggests that the transaction chains and the

"loan" were not genuine commercial arrangements but were contrived and orchestrated.

230. The Tribunal further takes into account that there were numerous connections between the traders in both Easiblaster's broker chains and Easiblaster's acquisition chains. For instance, in Easiblaster's broker chains, Easiblaster's customer was Bleu Opale, while in Easiblaster's acquisition chains, Easiblaster's supplier was Bleu Opale. Again, the Tribunal accepts that there is nothing inherently unlawful in a UK trader simultaneously purchasing goods from and selling goods to the same trader in another EU Member State. However, the Tribunal considers that the number and kind of connections between the various traders in both sets of chains undermine the plausibility of the suggestion that all of these transactions were *bona fide* transactions between arm's length traders.

231. A case in point is the evidence relating to the FCIB bank accounts (paragraphs 191 to 201 above). All of the parties in Easiblaster's acquisition chains held accounts at the FCIB. The other parties in Easiblaster's broker chains also held accounts at FCIB (Questline and Goodluck). In other chains not involving the Appellant in which Easiblaster acted as acquirer, the brokers (P2C, Bluesail, and IPL) held accounts at FCIB. The company that apparently loaned monies to the Appellant, Orient, also held an account with FCIB as did the company that provided its insurance, Transpacific. Those behind Bluesail and Transpacific held further accounts in the names of Pochard and Ionis. Indeed, all of the companies involved in the circular chains of payments referred to in paragraphs 202-209 above had accounts at the FCIB. A man called James Mallaburn had referred a number of the companies to FCIB. Various of these traders provided letters of reference in support of one another's applications to open FCIB accounts or were otherwise linked.

232. Details of the evidence of various other links between these various companies is provided in Appendix 3 to the HMRC skeleton argument.

233. Particularly significant in this respect is the evidence of the Cricklewood documents, which were recovered from the home address of one of the directors of P2C. The Tribunal is satisfied that some of the Cricklewood documents, when considered together with other evidence in the case, relate to companies and/or transactions in both Easiblaster's broker chains (including Goodluck, Questline, Easiblaster (trading as Universal Supplies)) and Easiblaster's acquisition chains (including Bleu Opale, Easiblaster (trading as Universal Supplies) and P2C), as well as to other companies that appear in the circular payment chain.

234. Mr Awan has sought in an e-mail to explain why documents in relation to other businesses were found at the address of a director of P2C. On its consideration of the material as a whole, the Tribunal finds that there is no plausible explanation why P2C would have in its possession documents relating to Easiblaster's broker chains if these were unconnected to Easiblaster's acquisition chains, given that P2C, on the face of the transaction chains, was only involved in Easiblaster's acquisition chains. Those documents even include what appear to be manuscript notes as to specific tasks to be carried out by particular traders involved in Easiblaster's broker chains (paragraph

182 above). The contents of these documents suggest that the transaction chains in both Easiblaster's broker chains and Easiblaster's acquisition chains were all part of a single plan, and the fact that these documents were recovered from the home address of one of the directors of P2C suggests that P2C was at least one of those at the centre of the plan.

235. The Tribunal also takes into account the evidence of the insurance arrangements with Transpacific (paragraphs185-190 above). (It is recalled that the Tribunal has not considered the evidence relating to Transpacific that was the subject of the application by HMRC that was refused by the Tribunal at the outset of the hearing: see paragraph 20 above.) The Tribunal notes that despite being purportedly based in the Comoros and Gibraltar, Transpacific purported to lease a property in Swansea and its director lived in Watford. Transpacific submitted to FCIB what it claimed was marketing material from its website *[EX4-76-82]*. The telephone number given on the website was ++123 456 789 and the email address was misspelled as "claims@transpecificinsurance.com" *[EX4-79]*. The Cricklewood documents included what appears to be draft documentation of Transpacific, and the same misspelling in Transpacific's e-mail address can be seen in that documentation *[EX5-302]*. This suggests that those behind the organisation of Easiblaster's broker chains and Easiblaster's acquisition chains were also behind Transpacific, a conclusion reinforced by various other connections that appear between Transpacific and various of the companies involved in both sets of chains (see especially paragraphs 184 and 199 above).

236. In relation to the insurance arrangements, the Tribunal further notes the following. In a letter dated 31 August 2006, HMRC pointed out the potential requirement for additional documents to be submitted by Aleena to Transpacific *[EX1-185]*. Mr Rab then provided a letter from Transpacific purportedly dated 4 April 2006, that exempted Aleena from those additional documentation requirements *[EX2-3-4]*. In that letter Transpacific claimed to have "undertaken a credit and background check on the directors of Aleena Electronics Limited and have ascertained their sound financial background". However, at the date of that letter, 4 April 2006, Aleena was yet to pay for any of the goods in the transactions that are subject to this appeal and barely had any track record of completed trading.

237. On its consideration of the evidence, the Tribunal also accepts the HMRC submissions that:

(1) the length of the deal chains and the location of their participants shows that they lack any commercial rationale (see also paragraphs 70 and 76 above);

(2) the back to back nature of the trading in such lengthy deal chains is suggestive of contrivance;

(3) the lack of evidence of any manufacturer, retailer or end user within the deal chains suggests an absence of commercial function; and

(4) the circularity of mobile telephones from a French company to a French company passing through the UK is uncommercial and therefore suggestive of contrivance (see also paragraph 70 above).

238. Based on the evidence in the case as a whole, and particularly in the light of the matters above, the Tribunal is satisfied in the circumstances on a balance of probability that the Appellant's transactions were connected with the fraudulent tax loss referred to in paragraphs 216-223 above.

Whether the Appellant knew of should have known of a connection

(a) General

239. The Tribunal refers to paragraphs 106-114 above. The *Kittel* principle does not require it to be established that the Appellant knew that its transaction was connected to fraud. It is sufficient that the Appellant should have known that its transaction was connected to fraud. Furthermore, the *Kittel* principle does not require it to be established that the Appellant should have known the details of the fraud, or of the others involved, or of whether the Appellant was trading in a "dirty" chain or in a "clean" contra-trading chain. It is sufficient that the Appellant should have known that its deals were connected "to fraud". It is possible that this could be established by reason of the mere fact that the circumstances of the transactions were, from the point of view of the Appellant, simply so uncommercial and "too good to be true" that the Appellant should have realised that they could not possibly serve any legitimate purpose.

(b) Whether the Appellant should have known

240. In determining whether the Appellant should have known that its transactions were connected to fraud, the Tribunal finds the following matters to be particularly pertinent.

241. The Appellant had not undertaken any significant trade in its first four months of registration for VAT, and no trade in mobile telephones *[EX1-9]*. From virtually a standing start it made sales of £6,146,341.00 and reclaimed £1,032,255 in input tax *[EX2-367]*. The price at which the Appellant made these sales was a 4.2 % markup on the price at which the Appellant had purchased these goods from P2C, meaning that its gross profit on these sales (assuming the VAT repayment) was £247,766. Thus, from a virtual standing start, the Appellant made a profit of nearly £250,000 in its first quarter of significant trading. In fact, the six deals to which the present appeal relates were entered into by the Appellant in a two day period, 22 and 23 February 2006 meaning that the Appellant was able to make a gross profit of nearly £250,000 in just two days of trading, with no prior experience of the wholesale mobile telephone trade.

242. On the evidence, Mr Awan had introduced Mr Rab to the mobile telephone wholesaling business, acted as Aleena's supplier in each of the transactions in the guise of P2C but also as broker identified and negotiated with Aleena's customer in

his personal capacity. The Appellant was therefore required to do very little in order to make its profit of nearly £250,000, since P2C which was the Appellant's supplier also found a customer for the Appellant.

243. The relationship was said to be conducted under a "broker agreement". Under this broker agreement, in return for his services Mr Awan would receive a commission "up to" 15% of the gross profit made on any sale by Aleena that had been arranged by him. This made little commercial sense. Since Mr Awan of P2C found the Appellant's customer (Rezaco), there is no reason why P2C or Mr Awan could not simply have sold the goods directly to Rezaco, thereby cutting out the Appellant as the middle-person, such that P2C or Mr Awan would have kept the whole of the profit of the sale from P2C to Rezaco, rather than sharing it with the Appellant. Under the arrangement entered into, the Appellant in fact made a significantly bigger profit than P2C or Mr Awan.

244. Furthermore, under the broker agreement, no payment would be made by the Appellant for any transaction upon which it was not paid its VAT repayment claim for the export of the goods, and under the terms of the sales agreement and invoices in respect of the sale of the goods from P2C to the Appellant, title to the goods passed to the Appellant on delivery but the Appellant was not required to pay for them until 90 days after delivery. Under the terms of the sales agreement and invoices in respect of the sale of the goods from the Appellant to Rezaco, risk passed to Rezaco on delivery, yet title did not pass from the Appellant to Rezaco until the latter had paid for the goods. Under the terms of the transactions, there was thus little business risk for the Appellant.

245. Mr Awan's first letter dated 11 January 2006 offers stock to Mr Rab noting that "I have other buyers who are interested in purchasing this stock and am expecting a commitment from them at any time" *[EX1-92]*. Mr Awan's subsequent 27 January 2006 letter *[EX1-103]* suggests that he act as a broker to bring together Aleena and a customer for a set fee, stating that he had already spoken to EC traders who were "100% interested in the purchase of this stock". However, the "broker agreement" with the Appellant was not signed until 21 February 2006 *[EX1-112]*. There is no explanation why Mr Awan would wait some 7 weeks to sign an agreement with the Appellant, if he already had purchasers willing to buy the stock at the time of his initial letter.

246. In order to finance its role in this transaction, the Appellant was able to obtain a loan of up to £850,000 from Oriental. The Tribunal finds it utterly implausible that any legitimate company acting commercially and at arm's length would be willing to lend £850,000 to the Appellant for the purpose of enabling it to enter into the wholesale mobile phone trade, in circumstances where the Appellant was effectively a one-person company with no assets and no significant trading history and no prior experience of the wholesale mobile phone trade. The Tribunal so finds, irrespective of any personal acquaintance that Mr Rab may have had with Mr Najmi of Oriental. It is said that the loan was made on the basis of a personal guarantee by Mr Rab that he would use four properties he owned to secure repayment if necessary. However, no legal security over those properties was taken by Oriental.

247. The Tribunal finds that the circumstances described in the previous six paragraphs, as they would have appeared to the Appellant at the time that the transactions were entered into, were simply far too good to be possibly true.

248. Furthermore, on Mr Rab's own evidence, he was aware that he was trading in a sector in which there was a risk of MTIC fraud. Paragraph 8 of Mr Rab's witness statement states that Mr Rab had previously conducted research on MTIC fraud, and paragraphs 8-29 indicate that he was aware of the need to undertake due diligence on those with whom he dealt. His 23 January 2009 letter to Mr Awan sets out his worries with regards to MTIC fraud and the need to undertake "complete stringent due diligence" *[EX1-100-101]*. Despite this, he has produced no due diligence material in relation to his sole customer Rezaco. He claims in his witness statement that "Chris Haysoy" of Rezaco visited Aleena in order to discuss the deals and negotiate on price but, as HMRC submit, there is no independent documentation showing that a "Chris Haysoy" had any role in Rezaco. While Mr Rab did obtain certain documents from P2C by way of due diligence, the Tribunal considers that he could not have possibly been satisfied on the basis of these documents that the transactions he was entering into were legitimate and unconnected with MTIC fraud.

249. The Tribunal is satisfied that there were also certain other matters that would reasonably have triggered suspicions on the part of the Appellant at the time that the transactions were entered into. In particular, HMRC has pointed out certain inconsistencies and ambiguities in the documentation. For example:

(1) the "broker agreement" provides that the commission due to Mr Awan is to be "up to 15%" of the gross profit made by the Appellant meaning that the precise amount of the commission was uncertain;

(2) the "sales agreement" between P2C and the Appellant is dated 24 February 2006 *[EX1-223-227]*, while P2C's invoices to the Appellant were dated 21 February 2006 *[EX2-88, 129, 177 & 228]* and 23 February 2006 *[EX2-259 & 271]*, when normal commercial practice would be for the "sales agreement" to be signed first and then sales invoices issued pursuant to it;

(3) the "sales agreement" between P2C and the Appellant stated at §13.2 that "Title to and risk of loss of the products included in each shipment will pass to Buyer upon delivery to the carrier at the plant" *[EX1-226]*, which made no sense in the light of P2C's activities as there was no "plant".

250. The Tribunal agrees with the HMRC submission that in the circumstances, Mr Rab should have asked himself the kind of questions referred to in *Mobilx* at [72] and [83], namely:

> Why was the Appellant, a small company with no prior history of dealing in mobile phones, approached with offers to buy and sell very substantial quantities of such phones?
>
> How likely in ordinary commercial circumstances would it be for a company in the Appellant's position to be requested to supply large quantities of particular types of mobile phone and to be able to find

without difficulty a supplier able to provide exactly that type and quantity of phone?

Why was the Appellant's supplier not making supplies direct to the Rezaco, rather than selling to the Appellant who in turn would sell to Rezaco?

Why were various people encouraging the Appellant to become involved in these transactions? What benefit might they be deriving by persuading the Appellant to do so? Why should they be inviting the Appellant to join in when they could do so instead and take the profit for themselves?

251. The Tribunal also agrees with the HMRC submission that in the circumstances, if Mr Rab had asked himself these kinds of questions, the only answer that he could have come to would have been that the transaction was connected to some kind of fraud.

252. Based on the evidence in the case as a whole, and particularly in the light of the matters above, the Tribunal is satisfied in the circumstances on a balance of probability that the Appellant should have known that its transactions were connected with the fraudulent tax loss referred to in paragraphs 216-223 above.

(c) Whether the Appellant knew

253. The Tribunal's finding above that the Appellant "should have known" is sufficient to answer the fourth of the questions referred to in paragraph 210 above. However, for completeness, the Tribunal has also considered the question whether the evidence establishes that the Appellant actually *knew* that the transaction was connected to fraud.

254. In addressing this question, the Tribunal takes into account all of the matters referred to above. The Tribunal additionally finds the following matters to be particularly pertinent.

255. Mr Rab's witness statement indicates that within a month of obtaining a VAT registration number he had decided to start trading in mobile telephones *[WS1-281§6]*. However, Mr Rab did not inform HMRC that the Appellant was to change its activity to the wholesaling of mobile telephones.

256. In fact, in his witness statement Mr Rab states that he had approached several UK banks in an attempt to set up a business account for Aleena but had been told that they were not willing to set up an account for traders in the mobile market *[WS1-290§38]*. This would mean that as of 9 August 2005 when he received the FCIB application form he had already determined that Aleena would sell mobile telephones. It is noted that the Appellant was registered for VAT with effect from 3 August 2005, which is almost contemporaneous with his application to open an FCIB account.

257. On the FCIB Company History Questionnaire Mr Rab stated: "We are currently trading in air conditioning units and parts. We are also looking to trade/supply in computer parts" *[EX3-149]*. Contrary to what Mr Rab suggested in his witness

statement, in that questionnaire Mr Rab did not indicate that Aleena intended to trade in mobile phones, and Mr Rab has not provided any other indication that Aleena was interested in trading in computer parts. However, the Tribunal accepts the HMRC submission that mobile telephones and computer parts had in common that they were the most common goods used in the commission of MTIC frauds.

258. As HMRC have put it:

> The Tribunal is entitled to question whether a business who intended to trade in air conditioning equipment on Registration for VAT, could so radically change its business plan within a month, and then trade in such high large quantities of mobile telephones for such a short period.

259. The Tribunal considers that the evidence in fact suggests that it was the Appellant's intention at the very time that it applied for VAT registration to trade in computer parts and/or mobile phones.

260. On the FCIB "Form Regarding Expected Wire Transfer Activity" submitted with the other documents dated 23 September 2005, Mr Rab stated that at that time the most important countries of origin and destination for wire transfers to and from Aleena's FCIB account would be the UK and Dubai *[EX3-153]*. This contradicts the claim in Mr Rab's witness statement that he originally anticipated selling mobile phones into the Bangladesh market *[WS1-281-283§§5-12]*. The only wire transfers that Aleena received from Dubai were in fact the apparent loan payments from Orient. The loan agreement between Orient and Aleena is dated 16 January 2006, some 4 months after this form had been submitted to FCIB *[EX1-114-116]*. This suggests that Mr Rab must have known in September 2005 that he would be receiving funding from Dubai to fund the input tax deficit on the Aleena's transactions.

261. The loan agreement with Orient is dated 16 January 2006 *[EX1-114-116]*, some 5 weeks before the relevant transactions took place. HMRC point out that Mr Rab has not provided any documentary evidence of any correspondence or negotiation preceding the signing of the loan agreement, and that when asked to provide a correspondence address, date of birth and bank details for Mr Najmi, Mr Rab's response was that the information was private and confidential, that he had contacted Mr Najmi's brother as Mr Najmi was on holiday, and Mr Najmi's response would be forwarded when received *[EX1-200]*. HMRC inform the Tribunal that no such response has been provided to HMRC.

262. HMRC have submitted that aspects of the Appellant's own documentation suggest that they are not *bona fide* commercial documents. In particular, HMRC note that the Appellant's documentation simply stated the model type and that the stock was "Euro Spec". Mr Fletcher confirmed in his oral evidence [T.25.11.13.p.38.lns.18-24, pps.39-41, p.44 and pps.51-52] that:

(1) "Euro Spec" was not a terminology used by Nokia because there were several different software specifications for telephones sold in the EC;

(2) were that terminology to be used each party to the transaction would have to be familiar with what it was shorthand for, since of itself it has no specific meaning in the industry that is generally understood;

(3) it is not difficult to detail the specification for trading in mobile telephones adequately so as to avoid confusion between counterparties.

263. Other issues with the Appellant's documentation in HMRC's submission are that:

(1) in relation to the sales from the Appellant to Rezaco, the "terms and conditions for sale of goods by export" document is signed by Mr Rab for Aleena on 23 February 2006 and by Chris Hanson for Rezaco on 27 February 2006 *[EX1-228-232]* while the Appellant's sales invoices to Rezaco were all dated 22 or 23 February 2006 *[EX2-253]*; normal practice would be for the "sales agreement" to be signed first and then sales invoices issued pursuant to it;

(2) Aleena's sales invoices (eg *[EX2-253]*) used the "F.O.B." incoterm stating *"FOB Point – Central Europe"* which was a commercial nonsense, since this FOB incoterm requires a port or specific location to be named.

264. HMRC also submit that it is relevant that Mr Rab did not collect the IMEI numbers of the mobile phones that he bought and sold. Mr Rab informed the HMRC officers that visited him on 10 July 2006 that to do so was too expensive and there was not enough time to do so, that inspection reports were undertaken by a freight forwarder "as a matter of course", and he had personally seen and examined pallets of goods locked in a cage at Aquarius's premises to satisfy himself that the goods existed *[EX1-58-76]*. HMRC submit that typically there was a gap of 3 days between the shipping and allocation instructions and the shipping of the goods, which would have been enough time to record all of the IMEI numbers of the goods that it traded, and that the inspection reports from Aquarius were so basic as to be commercially useless, as they simply stated the number of units, type of telephone, type of charger, whether the goods were "Euro spec" the condition of the stock and the condition of the boxes of e.g. *[EX2-55-56]*. HMRC submit that without collecting the IMEI numbers, the Appellant could not know whether it was dealing in the same goods more than once; nor, if any purchaser queried the goods quality or quantity was there any means by which Aleena could demonstrate what they had supplied in order confirm or dispute any such claim. While failure of the Appellant to collect IMEI numbers is certainly not of itself conclusive, the Tribunal considers that this is a matter to which some weight can be given, having regard to paragraphs 46-47, 78, 120(12), 190 and 236 above.

265. The Tribunal also finds that the following matter should be taken into account. Having found that the two separate trading chains were part of a single fraudulent plan, the question arises as to whether in the circumstances it is inherently likely that the Appellant could have been merely an innocent party in the "clean" chain rather than one of the participants in the fraud. HMRC submit that there would have been four potentially disastrous outcomes for the fraudulent scheme if the fraudsters used an innocent company, who did not know from whom to purchase and to whom to sell:

(1) if the goods actually existed, the fraudsters might lose the capital item of the fraud by the mobile telephones ending up in legitimate hands because the unwitting trader sold to a legitimate end user;

(2) if the innocent in the position of broker received monies from a customer that was a participant in the fraud and was buying the goods using the fraudsters' capital, but that broker then purchased from a legitimate supplier, the monies that were meant to be circulated to fund further transactions would be lost;

(3) the fraudsters would lose time, since an innocent party might wish to negotiate the price, or hold the stock if it thought the price might rise, or renege on a deal, or reject stock, thereby stopping or delaying the transaction chain;

(4) the innocent party might discover that the transactions were connected with fraud and report the matter to the authorities.

HMRC argue that the fraudsters had no need to introduce the risks that would come with the use of an innocent party, as there would be companies that would quite willingly enter into transactions where they were being told from whom to purchase and to whom to sell.

266. The Tribunal is persuaded by the HMRC argument that it does appear that there would have been no sensible reason for fraudsters behind this scheme to have used an innocent third party as the broker in the "clean" contra-trading chain. While this of itself is not conclusive, it is also a matter that the Tribunal can take into account.

267. Based on the evidence in the case as a whole, and particularly in the light of the matters above, the Tribunal is satisfied in the circumstances on a balance of probability that the Appellant knew that its transactions were connected with the fraudulent tax loss referred to in paragraphs 216-223 above.

(d) Conclusion

268. The Tribunal's findings above lead to the conclusion that this appeal is to be dismissed.

269. The Tribunal indicated (paragraphs 16 and 115 above) that it has considered the evidence and arguments in the case as a whole, and that not every item of evidence or evidential point has been referred to expressly in this decision. For clarity, the Tribunal mentions two matters that it has *not* taken into account.

270. First, in their written closing submission, HMRC invited the Tribunal to draw adverse inferences from the failure of Mr Rab to give oral evidence. In particular, HMRC requested the Tribunal to draw the inference that Mr Rab has no answers that could stand up to scrutiny in relation to a long series of issues listed in the HMRC submissions in respect of which HMRC say they would have cross-examined him. HMRC relied on *Wisniewski v. Central Manchester Health Authority* [1998] PIQR 324, at p. 340; *Crawford v Financial Institutions Services Limited* [2005] UKPC 40 at

[7]; *Benham Limited v Kythira Investments Ltd* [2003] EWCA Civ 1794 at [30]; and *TC Coombs v IRC* [1991] 2 AC 283 at [300].

271. In the findings above, the Tribunal has reached the conclusions that it has without drawing any such adverse inferences from Mr Rab's failure to give oral evidence. Because of this, it is unnecessary to enter into a consideration of the principles established in the case law cited by HMRC, or of the potential application of those principles to the circumstances of this case.

272. Secondly, in reaching the conclusions above, the Tribunal has not taken into account the statement made by Mr Awan in relation to his disqualification under the Company Directors Disqualification Act 1996 (see paragraphs 20, 22 and 58 above). Nor has the Tribunal taken into account the evidence of the disqualification under the same Act of Mr Wildon and Mr Marsh *[EX6-208-210]*. In the circumstances, it is has not been necessary for the Tribunal to consider the alternative HMRC argument based on *Greener Solutions* (see paragraphs 20 and 104 above).

Conclusion

273. For the reasons above, this appeal is dismissed.

274. If HMRC wishes to pursue its application for costs, it may file with the Tribunal and serve on the Appellant a written application within 30 days of release of this decision, to which the Appellant may respond within 30 days of service by filing with the Tribunal and serving on HMRC a written response. The application will then be decided on the papers unless either party has in the application or response requested an oral hearing.

275. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 11 December 2014

ANNEX 1

The Tribunal's decision on the Appellant's application to decide the appeal in his favour without a hearing

1. This is an application by the Appellant that the Tribunal should decide the appeal in his favour substantively without a hearing on the basis that any hearing of the substantive appeal would be unfair, and that he would be denied his human right to a fair trial on the basis that he is unable to afford legal representation.

2. We note that a similar application was made some two years ago and was dealt with and decided by Judge Mosedale: *Aleena Electronics Ltd v Revenue & Customs* [2011] UKFTT 608 (TC). The matter that was before Judge Mosedale is referred to in her decision at [2], where she says:

> The Appellant made an application dated 18 July 2011 that the Tribunal should allow the appeal or direct that an amount of input tax be credited to the Appellant sufficient to allow it to represented in the appeal it brings against HMRC's decision to refuse to refund the input tax. It suggests a figure of £60,000.

3. The application made at that time was rejected by Judge Mosedale. In relation to the application that funds for legal representation be released by HMRC to the Appellant to allow legal representation to be funded, she found that the Tribunal did not have the power to make such a direction but that, even if it had that power, she would not have exercised it in the Appellant's favour on the merits of the case in any event. What is described as the Appellant's alternative case was dealt with by Judge Mosedale in that decision at [62]-[63]. She said:

> [62] The Appellant's alternative case was that if I did not grant an order for at least part repayment of the input tax, then I should rule that HMRC should not be able to rely on evidence of connection to fraud. This is, as Mr Young accepted, tantamount to saying I should allow the appeal. His grounds for this application was that I should allow the appeal because without representation the Appellant could not have a fair hearing.
>
> [63] I can see no good grounds whatsoever on which this application is made. I have entirely rejected Mr Young's case that a fair hearing cannot be had without representation. So why should the Appellant recover the input tax without answering the HMRC's case that its transactions were connected to fraud and it knew it? To make such an order would be a denial of justice and I refuse to make it.

4. It is said by Mr Young that the application he makes before us now is a different application to the one that was made before Judge Mosedale. That might be said to be the case to some degree, in that it seems that he now argues that the appeal should be allowed outright in the Appellant's favour on grounds of denial of fair trial rights, rather than that certain evidence should just be excluded, which was the way it was put before Judge Mosedale. However, there is a very significant overlap between

what was the substance of the application before Judge Mosedale and the substance of the application that is before us.

5. In relation to anything that was considered and decided by Judge Mosedale, we find that it is not open to this Tribunal simply to proceed as if Judge Mosedale's decision had never been given and to decide the matter entirely afresh. Even if it might be argued that Judge Mosedale's decision is not *res judicata* in the sense that the Tribunal now lacks any legal power to reopen that decision, we find that the Tribunal would not and should not do so unless there has been some compelling further development or some other compelling reason why the Tribunal should do so.

6. We are not persuaded that anything compelling or new has come since Judge Mosedale's decision. Nonetheless, this Tribunal has considered the present application to the extent that it might be said that it contains something that Judge Mosedale did not already consider and decide.

7. The current application is for the Tribunal to determine the appeal substantively in the Appellant's favour without a hearing, on the basis that any hearing would deny its right to a fair hearing. That is a bold submission, although the fact that a submission is bold is not, of itself, a reason for rejecting it.

8. Some distinction might be drawn between a case such as the present and, for instance, a case where the status quo is in favour of the party making an application of the present kind. An example is a criminal prosecution. The defendant in a criminal prosecution is presumed innocent until proven guilty. If the prosecution is prevented from proceeding on the ground that this would contravene the fair trial rights of the defendant, then that status quo is preserved: the defendant remains presumed innocent.

9. This situation is a different where the party making an application of the present kind is seeking to change the status quo rather than to preserve it. In this case, HMRC has issued a decision, and the Appellant is trying to change the status quo by appealing against that decision. The Appellant says that its challenge should be accepted without the matter even being heard, notwithstanding that the other party contests its appeal, simply on the grounds that any hearing would be a denial of its fair hearing rights. No authority was cited to us that fair hearing or fair trial rights could lead to such a result. The European Court of Human Rights did not go that far in *Steel and Morris* (*Steel and Morris v. the United Kingdom*, no. 68416/01, § 63, ECHR 2005-II (the "*McDonald's* case")). It was not said in the *McDonald's* case that the defamation action should have been decided substantively in favour of the defendants on the ground that any hearing would not be fair. What the *McDonald's* case said was that there was a breach of Convention rights through the applicants not being granted legal aid.

10. In looking at fair trial rights in a particular case, it is necessary to look at all of the circumstances of the case as a whole. The first question is whether the current proceedings are criminal, for purposes of Article 6 ECHR, or whether they are not. We accept that the concept of criminal, for purposes of Article 6 ECHR, is an

autonomous concept and does not depend on characterisation under national law. Nonetheless, we are not persuaded that the issues in the current appeal are criminal for purposes of Article 6. We were referred to Case C-285/11 *Bonik* [2012] ECR for the proposition that it would amount to a penalty to deny input tax in the case of a person who did not know and could not have known that the transaction was connected to fraud. We understand that to mean that if a provision of substantive law said that a person is not entitled to a refund of input tax even if they did not know and could not have known that fraud was involved, that that substantive law might amount to a penalty. But where a substantive law only provides that input tax will be denied where a person did know, or could have known, that fraud was involved, we find that that is not a substantively criminal provision for purposes of Article 6 ECHR and, therefore, proceedings relating to that provision also would not be criminal.

11. We further note that, in any event, even in relation to criminal provisions, Article 6(3)(c) ECHR provides that everyone charged with a criminal offence has the right:

> to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

12. Thus, Article 6(3)(c) requires an inquiry into sufficiency of means, and requires an inquiry into what the interests of justice require. We note that the *McDonald's* case raises similar considerations in a non-criminal context in a defamation proceeding.

13. Looking at the circumstances as a whole, we find, first of all, that not even the *McDonald's* case suggests that Article 6 ECHR might entitle a person to substantive judgment in their favour without a hearing. Article 6(3)(c) relates only to whether there is a right to be given legal aid. In the present case, as far as concerns the application to be given legal aid or to be given the means to pay for legal assistance, the matter was already heard and determined by Judge Mosedale. It would have been possible, and in our view would have been appropriate, rather than seeking to argue this matter before this Tribunal for one and a half days, for the Appellant to have applied to appeal to the Upper Tribunal against the decision of Judge Mosedale. We were told that that did not happen because the Appellant had insufficient means to bring such an appeal. However, this matter was argued for one and a half days before us and the Appellant did have legal representation in order to do that. We are not persuaded that it would have been unrealistic for Judge Mosedale's decision to have been appealed quite some time ago.

14. Secondly, there is a possibility of judicial review proceedings being brought against the HMRC decision to refuse to release some of the funds. On behalf of the Appellant, it has been argued that the bringing of judicial review proceedings would be unrealistic due to the cost and legal expertise required in order to do that. We nonetheless find that that avenue was legally open to the Appellant. Based on the evidence and submissions presented to us, we are not persuaded that that would have been a wholly unrealistic option; certainly not so unrealistic that it could be said that an Appellant has a human right to have substantive judgment in his favour without a hearing. Considering the actual nature of the proceedings in question here, we are not

persuaded from what we have heard that equality of arms means complete equality of resources, or that principles of equality of arms or fair trial rights preclude situations where an appellant is unrepresented in proceedings against a Government authority, even in a case that may, in some respects, be said to be large or complicated. We note that in the *McDonald's* case at [61], the European Court of Human Rights said:

> The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend *inter alia* upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively...

15. As to what is at stake, at [63] the European Court of Human Rights referred to certain earlier cases where the Court has found legal assistance to be necessary for a fair trial, where proceedings were determinative of important family rights and relationships. That is not the case here. Then the European Court of Human Rights went on to note that in the *McDonald's* case itself what was at stake was the defendants seeking to protect their right to freedom of expression, described as a right accorded considerable importance under the Convention. That is also not the case here. The Appellant is a company established for business purposes, and what this matter relates to is the company's tax liability in relation to business activities. We note that in the *McDonald's* case the European Court of Human Rights went on to consider the amount at stake in the dispute compared to the means of the applicants. It referred to the fact that damages were being claimed of up to £100,000 in the case of persons who earned £36,000 or £40,000. We do take into account the amount that is at stake in this appeal compared to the means of the company in question.

16. Then, moving on to the complexity of the proceedings, in the *McDonald's* case there was reference at [64] to an earlier case, *McVicar v. the United Kingdom*, no. 46311/99, ECHR 2002 ("*McVicar*"). The Court described the proceedings in the *McVicar* case as proceedings in which the applicant was required:

> … to prove the truth of a single, principal allegation, on the basis of witness and expert evidence, some of which was excluded as a result of his failure to comply with the rules of court. He had also to scrutinise evidence submitted on behalf of the plaintiff and to cross-examine the plaintiff's witnesses and experts, in the course of a trial which lasted just over two weeks.

17. The European Court of Human Rights distinguished the circumstances of the *McVicar* case from the circumstances of the *McDonald's* case, noting that in the *McDonald's* case the trial at first instance lasted 313 court days, that there were some 40,000 pages of documentary evidence, and that certain of the issues were held by the domestic courts to be too complicated for a jury properly to understand and assess. The Court said at [66] that there were some 100 days devoted to legal argument. We find that this appeal seems to be much nearer the example of the *McVicar* case than the example of the *McDonald's* case. At [66], the European Court noted that Mr McVicar was "a well-educated and experienced journalist, and that he was represented during the pre-trial and appeal stages by a solicitor specialising in

defamation law, from whom he could have sought advice on any aspects of the law or procedure of which he was unsure". The Tribunal notes that it does not have evidence that Mr Rab in this case is necessarily well-educated and experienced, but notes that he does run his own business (we are told that he has an estate agency), and through the Appellant company was involved in the business to which the current appeal relates. Again, the Tribunal therefore finds that the circumstances of this case as a whole are much closer to the *McVicar* example than to the *McDonald's* example.

18. As to lack of funds, again, The Tribunal has considered the evidence. We note that on the evidence we have heard, it appears that the Appellant company was, in fact, a vehicle for the business activities of one particular person. In those circumstances, we do consider that any consideration of availability of funds would have to take into account the resources and means of the individual for whose business activities that company was a vehicle. We did hear limited evidence about that.

19. Mr Smallwood gave evidence. We have considered that evidence. Mr Smallwood acknowledged that he was not in a position personally to have knowledge of certain matters. It does appear from the evidence that there is a suggestion that Mr Rab may own certain properties and have certain resources. The evidence about this is limited because the person who might have been in a clearer position to give evidence about that, Mr Rab, did not give evidence.

20. We take into account all other relevant circumstances of the case, including the fact that the Appellant company has had amounts of legal advice up to now, and has been represented for a period at the outset of this hearing. Taking all matters into account, we do not find that we are, here, in the same territory as in the *McDonald's* case. For those reasons, to the extent that we find anything in the current application that is different to that which was already decided and determined by Judge Mosedale, we find that the Appellant has not established any basis on which the application could be granted on the merits, even assuming—and perhaps it is unnecessary for the Tribunal to decide at the moment—whether it would even be possible for the Tribunal to order that an appeal be decided substantively in favour of an appellant simply on the basis that they do not have legal aid.

21. For those reasons, the Appellant's application is refused.

ANNEX 2

The Tribunal's decision on the Appellant's application to withdraw his witness statement

1. We have been told that it is common practice that where a witness withdraws, a witness statement it is no longer considered as being in evidence. We have also been referred to examples of where a tribunal has considered a witness statement, even though an appellant or other witness has withdrawn. We have not been drawn to any precedent relating to a witness statement of an appellant being kept in over the objections of the appellant who is no longer going to give evidence, or to a case of a witness statement of an appellant being withdrawn over the objections of HMRC, who want to keep the statement in, notwithstanding the witness is no longer giving evidence. It may be that this is a case of first impression. We certainly have not been referred to any directly relevant precedent.

2. We note that if we were not talking about a witness statement, but about a letter that the Appellant had written to HMRC at some point relevant to the matter, then even if the Appellant did not give evidence, HMRC would nonetheless be entitled to rely on that letter whether the Appellant objected or not. We do not see, in principle, that a witness statement is any different. It is a document signed by the Appellant in circumstances where the Appellant is aware of the duty to tell the truth, and in circumstances where the Appellant is aware that the document will be used in the Tribunal proceedings. If HMRC would still be entitled to rely on a letter from the Appellant, then we consider that HMRC should *a fortiori* continue to be able to rely on a witness statement of the Appellant. That, in our view, would be sufficient reasoning for concluding that the witness statement can remain in evidence in these proceedings.

3. Independently of that, we find there is also another consideration. The Tribunal has directed that witness statements can stand as evidence in chief. In principle, if HMRC did not want to cross-examine a witness, the witness would not need to attend. The witness statement would be the evidence of that witness, without the witness even attending to adopt the statement and confirm that it is correct. In this particular case, HMRC would be quite willing to cross-examine Mr Rab. The reason why HMRC cannot do so is because Mr Rab will not attend. However, he has already given his evidence in chief in writing. In the circumstances, in effect, what he is seeking to do is to withdraw evidence that he has already given.

4. In principle, we do not see that there is a difference between written evidence and oral evidence in that respect. Suppose that Mr Rab did attend before the Tribunal and began to give oral evidence and then said something in oral evidence that, on reflection, he thought was harmful to his case and said "I no longer wish to appear as a witness, please disregard everything I have said in the proceedings so far". We do not consider that an appellant would be entitled to do that. If we do not draw any distinction in principle between oral and written evidence in this respect, then Mr Rab should not be entitled to withdraw a witness statement that he has already given in the proceedings.

5. We do not consider that coming to that conclusion is unfair to Mr Rab or the Appellant. As we have said, whatever he said was put in writing, presumably on advice, in the knowledge that he had a duty to tell the truth and in the knowledge that what he said would be used in these Tribunal proceedings.