



TC06350

Appeal number: TC/2010/06699

VAT – MTIC fraud – case remitted from Upper Tribunal – whether appellant should have known that its transactions were connected to fraudulent evasion of VAT – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SYNECTIV LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE SARAH FALK
JOHN ROBINSON**

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 8 and 9 January 2018

Simon Farrell QC, instructed by JTK Associates LLP, for the Appellant

Christopher Kerr, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction and preliminary points

1. This decision relates to an appeal which was first heard by the First-tier
5 Tribunal (“FTT”) in July and October 2013 over a total of nine days (the “2013
hearing”). The appeal was against the denial by HMRC of a claim by the appellant,
Synectiv Limited (“Synectiv”), for a deduction of input VAT in respect of nine
transactions carried out in 2006 on the basis that Synectiv knew or should have known
that the transactions were connected to the fraudulent evasion of VAT. The FTT’s
10 decision, released in November 2013, concluded that whilst the relevant individual,
Mr Asif Chandoo, did not know that the transactions were connected with fraud, he
should have known that it was the only reasonable explanation, and accordingly
dismissed the appeal (the “2013 decision”).

2. In a decision released in March 2017 ([2017] UKUT 0099 (TCC)) the Upper
15 Tribunal allowed Synectiv’s appeal, essentially on the basis that the FTT’s decision
was insufficiently reasoned. The Upper Tribunal exercised its discretion to set aside
the FTT’s decision, but only to the extent that it related to the finding that Synectiv
should have known that the transactions in question were connected with the
fraudulent evasion of VAT, and remitted the case to the FTT. The effect of the Upper
20 Tribunal’s decision is to leave in place the FTT’s conclusion that Synectiv did not in
fact know that the transactions were connected with fraud. Accordingly that is no
longer an open issue (having been finally determined in Synectiv’s favour), and the
parties and this Tribunal have therefore proceeded on the basis that Synectiv did not
have any actual knowledge of the fraud.

3. The Upper Tribunal made a number of directions for the future management of
25 the case. These included that the case should be reconsidered by a new panel, and that
the parties should provide a document setting out agreed facts, details of facts not
agreed and the nature of the evidence to be provided. The parties subsequently agreed
that they would continue to rely on the witness statements and exhibits produced for
30 the 2013 hearing, and would also rely on the transcripts of oral evidence from that
hearing. In addition, HMRC chose to call one witness, Catherine Clark, who had
produced a short witness statement for the original hearing but had not been called to
give oral evidence. Ms Clark’s evidence was very limited and, as discussed below, did
not provide any real assistance to us.

4. We made the point at the hearing that, whilst the parties may have been happy
35 to agree a particular approach (and indeed notified the Tribunal accordingly when
they provided listing information), it would have been more helpful to the Tribunal to
request a case management hearing, or at least seek directions in a way that
highlighted the relevant issues, so that the appropriateness or otherwise of the
40 approach proposed by the parties could be properly considered by a judge in the light
of the Upper Tribunal decision, and more appropriate directions could be made which
would also have included reading days and an agreed reading list. There is particular
force in this point when attention is paid to the Upper Tribunal’s reasoning for not
remaking the decision itself, and instead remitting it. The Upper Tribunal specifically

referred at paragraph [48] to an important part of the evidence having been given orally, in particular by two individuals, Mr Chandoo (for Synectiv) and Gary Taylor (put forward as an expert witness by HMRC), and stated that it did not consider that “a proper evaluation of that evidence, or the submissions which are based on it, is possible without having heard the evidence”. In view of this comment we made it clear to the parties that, following the hearing, we might decide that we required additional oral evidence in order to reach our decision.

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5. We have now concluded that, whilst we would have preferred to hear oral evidence from these two individuals, such evidence was unlikely to assist us sufficiently to justify the inevitable further delay that would ensue in resolving this appeal, together with the additional costs that would be incurred, and that the overriding objective of dealing with cases fairly and justly is best served by reaching a conclusion based on the materials already before us.

Facts not in dispute

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6. The parties’ agreed statement of facts (the “agreed facts”) is set out in the Appendix to this decision¹. In brief summary, Synectiv was incorporated and registered for VAT in 1999. Its sole director is and was at the material times the brother of Asif Chandoo, Arif Chandoo. Asif Chandoo is, and again was at the material times, the company secretary. Where we refer to Mr Chandoo we are referring to Asif Chandoo.

7. Synectiv’s business at the relevant times was comprised principally of the sale of mobile phones on a retail and wholesale basis. Mr Chandoo’s (undisputed) evidence was that prior to the transactions in question Synectiv had acted as an authorised dealer for Siemens, and later for Alcatel and Samsung, although this was no longer the case by 2006, and that Synectiv had its own online web store under the name Foneplanet.com.

8. Former directors of Synectiv, together with Arif Chandoo, were arrested and charged in connection with alleged MTIC (Missing Trader Intra-Community) fraud in 2001 and 2002, as part of “Operation Venison”. The proceedings were stayed prior to trial in June 2005 on the basis that there had been an abuse of process, because evidence had been withheld which pointed to the fact that employees of the freight forwarder, Hawks, and others were directly involved in the fraud. Synectiv subsequently started using a different freight forwarder, Interken (based in the London area). It also started to check certain details of its suppliers and customers with what was then Customs and Excise. The experience of Operation Venison led to Arif Chandoo choosing to cease to be involved in the wholesale business, with Mr Chandoo taking over primary responsibility for that aspect.

9. Details of Synectiv’s relevant prior dealings with what became HMRC are contained in paragraphs 14 to 28 of the agreed facts. These included general warnings

¹ A few minor typographical errors and obvious slips have been corrected and most of the parties’ footnotes have been removed. Other additions are marked.

by HMRC about problems in the sector, including MTIC fraud, and procedures that Synectiv should follow, in particular in providing information to HMRC. The procedures included the provision of specified information about customers and suppliers, and the provision of additional information with VAT returns, including
 5 copy invoices, export documentation and bank statements. The agreed facts record that Synectiv supplied the information and documents requested in full between February 2002 and July 2006. They also record that, in relation to each of the disputed transactions, Synectiv contacted HMRC to verify the VAT numbers of its counterparties.

10 10. The nine disputed transactions were reflected in Synectiv’s monthly returns for 04/06 and 06/06. Six of the transactions were undertaken in the first period, April 2006, and three in the second period, June 2006. In each case Synectiv claimed recovery of input tax incurred on wholesale transactions under which Synectiv
 15 acquired mobile handsets from UK based suppliers and supplied them to entities in France and the Netherlands. The disputed input VAT for 04/06 is £788,900, and that for 06/06 £630,000. Synectiv does not dispute that each of the transactions gave rise to tax losses arising from fraudulent evasion by the entities listed in paragraph 34 and 39 of the agreed facts (being entities higher up the relevant supply chains), or that the transactions that Synectiv concluded were connected to the fraudulent evasion of
 20 VAT. However, it is also not disputed that Synectiv was not only not aware of the fraud, but in addition that there were no practical measures that it could have undertaken to establish the composition of the supply chains beyond its immediate counterparties (paragraphs 33 and 38).

11. Details of the individual transactions, including deal chains and funds flows, are
 25 set out in paragraphs 41 to 59 of the agreed facts (the deal labelling, A10, A11 etc., is HMRC’s). The counterparties’ names are defined in the agreed facts and the abbreviated defined terms for them are used below. Summary details of Synectiv’s acquisitions and sales as part of these chains are set out in the table below. For each transaction the purchase and sale by Synectiv was agreed by Mr Chandoo by
 30 telephone on the same day, with all the April transactions being agreed between 25 and 28 April and the June transactions on 7, 8 and 13 June. The only written documentation recording the terms of the transactions is the purchase orders and invoices described in the agreed facts. It is worth clarifying that the profits stated to be made by Synectiv, and summarised in the table below, assume that the disputed
 35 input tax is recoverable. The gross profit numbers are before freight and insurance costs, and the net profit figures are after deduction of those costs. In each case the phones were purchased and sold with 2 pin continental chargers.

Deal	Make/model	Number of units	Acquisition cost (excluding VAT) (£)	Sale price (£)	Mark up (%)	Gross profit (£)	Net profit (£)
A10	Nokia N90	4000	1,040,000	1,138,000	9.42	98,000	90,740

A11	Nokia N70	4000	860,000	938,000	9.07	78,000	72,220
A12	SE W810i	4000	1,000,000	1,090,000	9.00	90,000	83,000
A13	Nokia 9300i	2000	580,000	632,000	8.97	52,000	47,360
A14	Nokia N70	2000	430,000	469,000	9.06	39,000	35,010
A15	Nokia 9500	2000	598,000	655,000	9.53	57,000	52,506
J2	Nokia N91	3000	945,000	1,030,500	9.04	85,500	79,665
J3	Nokia N80	4000	1,200,000	1,308,000	9.00	108,000	99,400
J5	Nokia 8800	3000*	1,455,000	1,585,500*	8.97*	130,500*	121,663*

5 *In deal J5, Synectiv purchased 3000 Nokia 8800 units at £485 per unit (net of VAT) and added 164 handsets from its retail stock, selling all 3,164 at a price that equates to £528.50 per unit. Only the VAT in respect of the 3000 units is in dispute and, for comparison purposes, the starred figures above relate only to those 3000 units, although the full freight and insurance costs are deducted to arrive at the net profit. The total sale price for the 3,164 units was £1,672,174. The figures in the agreed facts include the sale price of the additional 164 units, without assuming any acquisition cost, which is somewhat misleading.

10 12. Synectiv's total profits from the nine transactions, net of freight and insurance charges (and again assuming that the VAT is recoverable), was in the region of £680,000².

15 13. It is not disputed that at the time each transaction was agreed the goods existed and were held in the UK in the custody of the same freight forwarder, Interken. Interken undertook, or arranged for, inspections of the goods at Synectiv's cost and also arranged for the goods to be shipped to one of the two warehouses of third-party logistics firms used in the transactions, AFI Logistique in Roissy (near Paris) (transactions A10, A11, A14, A15, J2 and J3) and JCT Logistics, Schipol (transactions A12, A13 and J5). Freight costs were borne by Synectiv, and Mr Chandoo also arranged insurance online, at a cost borne by Synectiv, in an amount
20 equal to Synectiv's cost of acquisition (net of VAT).

14. As is clear from the agreed facts, in each transaction the goods were shipped before Synectiv had received payment. The evidence indicates that payment was made by Synectiv's customer only once it had had the opportunity to undertake its

² Mr Kerr for HMRC referred to a figure of £770,000, but this appears to reflect an overstatement of the profit on deal J5, by including the sale proceeds of the additional 164 units without allowing for any cost. The revised figure stated above excludes any proceeds or profit from those additional units.

own inspection of the goods. Synectiv only paid its own supplier once it had received payment from its customer. In other words it was provided with credit by its supplier but did not provide credit to its customer. The net effect was that it was required to fund the VAT element of the purchase price, less the margin on its sale. It was not
5 disputed that the required funds were obtained from VAT repayments from previous periods. Synectiv received VAT repayments of approximately £780,000 on 25 April 2006 and £640,000 on 6 June 2006.

15. In each case the goods were shipped “on hold”, which Mr Chandoo understood to mean that they would continue to be held under the control of Synectiv, rather than
10 being released to its customer. The goods were only released to Synectiv’s customer following receipt of payment from it. The instruction to release to the customer was provided on the same day as payment, or in three cases (deals A12, J3 and J5) on the following day.

16. As the agreed facts show, a number of the arrangements took some time to
15 complete, the most significant delay being on the final deal, J5, where the deal terms were agreed on 13 June but the goods were only released to the customer a month later. There were also some short gaps between Synectiv receiving funds from its customer and making payment to its supplier. This was generally no more than one day, and the longest gaps (between 12 and 15 May 2006 for deals A11 and A13) were
20 over a weekend. Shipping generally occurred fairly promptly after the deal terms were agreed, although on deals A13, A14 and A15 there were noticeable delays between the instructions to ship being given and being carried out.

17. Some details of Synectiv’s counterparties, and its previous dealings with them in the period up to 31 March 2006, are set out at paragraphs 60 to 78 of the agreed
25 facts. Further details of previous dealings were included in an annex to the agreed facts (Annex A) which is not reproduced. Some points derived from Annex A have been added in footnote form to the relevant paragraphs of the version of the agreed facts appended to this decision. Annex B to the agreed facts, which is also not reproduced, contained a summary of wholesale deals completed by Synectiv in the 12
30 months to 31 March 2006. Although there was some confusion on this point at the hearing, it is relatively clear that Annex B covers all wholesale deals, whether with purchasers elsewhere in the EU, in the UK or outside the EU, where VAT was incurred on the acquisition. Approximately 100 transactions are shown. All of these transactions were “back to back” purchases and sales, although in one case 500 units
35 appear to have been added to the sale, and in nine cases slightly fewer units were sold compared to those purchased. We infer that the shortfall in those cases is accounted for by handsets being allocated for use in Synectiv’s retail business. Ignoring any adjustments for these differences, the aggregate purchase and sale prices were approximately £37 million and £39.6 million respectively (in each case net of VAT).
40 The volume of handsets traded in each deal varies, but was frequently between 1000 and 3000, and there are a number of examples of trades in 4000 or more units.

18. The agreed facts also includes, at paragraphs 29 and 30, an acknowledgement by HMRC of the existence of a wholesale secondary market in mobile phone handsets as a legitimate trading platform, and a very significant part of the various different

distribution channels by which a very significant number of handsets are supplied around the world. This secondary market arose to deal with over and under supply .

The relevant legal principles

19. The key applicable legal principles are derived from *Axel Kittel v Belgium; Belgium v Recolta Recycling* (C-439/04 and C-440/04) [2006] ECR I-6161 and the Court of Appeal decision in *Mobilx Ltd (in administration) v The Commissioners for HMRC* [2010] EWCA Civ 517, [2010] STC1436. There is no relevant distinction between domestic and Community law in this regard (*Mobilx* at [49]). The right to deduct must be refused:

10 “... 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
15 goods effected by a taxable person acting as such’ and ‘economic
activity’.” (*Kittel* at [59])

20. The only issue in dispute here is whether Synectiv “should have known” that it was participating in a transaction connected with fraudulent evasion of VAT. The meaning of this phrase has been considered in a number of cases, including by the Court of Appeal in *Mobilx* and more recently in *Davies & Dann Ltd v HMRC* [2016] EWCA Civ 142, [2016] STC 1236. In *Mobilx*, Moses LJ explained at [51] that the concept could be understood by reference to the earlier ECJ decision in *Optigen Ltd v HMRC* (C-354/03) [2006] STC 419, which referred to the absence of “means of knowledge”, and that the ECJ must have intended the phrase “knew or should have known” to have the same meaning as “knowing or having any means of knowing”. He went on to say the following:

30 “[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...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.”

21. It is accepted, however, that this is a high hurdle. The burden of proof is on HMRC (to the balance of probabilities). It is not enough to demonstrate that the trader should have known that he was running a risk that the transaction might be connected with fraud, or even that it was more likely than not that it was so connected: it must be shown that he should have known that he *was* taking part in such a transaction. Only that approach is consistent with the principle of legal certainty, under which a trader should be in a position to know before he enters into a transaction, and by reference to objective criteria, whether he will be entitled to deduct the VAT (paragraphs [55] to [58] in *Mobilx*). Moses LJ went on to explain the position as follows:

5 “[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
10 as a participant for the reasons explained in *Kittel*.

15 [60] The true principle to be derived from *Kittel* does not extend to
circumstances in which a taxable person should have known that by his
purchase it was more likely than not that his transaction was connected
with fraudulent evasion. But a trader may be regarded as a participant
where he should have known that the only reasonable explanation for
the circumstances in which his purchase took place was that it was a
transaction connected with such fraudulent evasion.”

22. Towards the end of the judgment Moses LJ also provides some guidance to
tribunals. Paragraph [82] contains a warning not to focus unduly on the question of
20 whether the trader has acted with due diligence, because that may deflect the tribunal
from the essential question of whether the trader “should have known”. Paragraph
[84] approves comments of Christopher Clarke J in *Red 12 Trading Ltd v HMRC*
[2010] STC 589 at [109] to [111] about the importance of considering individual
transactions in their context, including drawing inferences from a pattern of
25 transactions, and stating that 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”. Moses LJ also referred to questions the
tribunal had asked in that case, which he said were important questions which may
30 often need to be asked. Those questions, set out at paragraph [72], included:

- (1) why a company with comparatively little history of dealing mobile phones
was approached with offers to buy and sell very substantial quantities;
- (2) how likely it was in ordinary commercial circumstances that a company in
the trader’s position will be requested to supply large quantities of particular
35 types of phone and to be able to find without difficulty a supplier able to
provide exactly that type and quantity;
- (3) whether the supplier was already making supplies direct to other EC
countries (in which case the trader could have asked why the supplier was not
making supplies direct);
- 40 (4) why the trader was being encouraged to become involved in these
transactions, and what benefit might those doing so derive when they could
instead take the profit for themselves.

To these features could be added features referred to by Christopher Clarke J,
including whether there are a number of transactions with identical percentage mark
45 ups, made by a trader with virtually no capital as part of a huge turnover with no

leftover stock, and mirrored by numerous other chains in which the taxpayer has participated and in each of which there has been a defaulting trader.

23. Moses LJ then stated at [84] that such circumstantial knowledge “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”.

24. *Davis & Dann* related to a “grey market” trader in consumer goods who conducted a very large back to back deal in razor blades following unsolicited approaches made in quick succession by a supplier (with whom it had not previously dealt) and a Spanish customer, despite a specific warning from HMRC about razor blade deals. The facts were clearly extreme, including that the supplier was a wholesaler in drinks and that the goods were shipped to an entity in Calais whose business was the wholesale of wood, construction materials and sanitary equipment. The supplier was known not to be an authorised distributor, whereas the trader had previously only bought from authorised distributors. The sole issue was whether the trader should have known that the transactions were connected with the fraudulent evasion of VAT. The FTT dismissed the appeal on the basis that the only reasonable explanation was a connection with fraud. The taxpayer’s appeal was allowed by the Upper Tribunal but the FTT decision was reinstated by the Court of Appeal, with Arden LJ giving the only judgment. It is worth noting that it was common ground that what HMRC needed to show was that the only reasonable explanation for the transactions was that they were connected to a VAT fraud: paragraph [4].

25. Arden LJ’s judgment makes it clear that the tribunal must guard against over compartmentalisation of the factors, rather than the consideration of the totality of the evidence. This was the error into which the Upper Tribunal had fallen. In particular, there may be an explanation for an individual factor which means that knowledge does not meet the required standard. That factor then ceases to be probative but it is still relevant (paragraph [60]). The requirement to consider the evidence as a whole has been repeated in the more recent Court of Appeal decision in *CCA Distribution Ltd HMRC* [2017] EWCA Civ 1899 at [30], [31] and [46], where the importance of standing back and looking at all the circumstances was again emphasised. It is not the correct approach to consider individual pieces of evidence and determine whether each piece proves that the taxpayer “knew or should have known” on the balance of probabilities. That test must be applied to the totality of the evidence (paragraph [37]).

26. As already mentioned, *Davis & Dann* proceeded on the basis that the “should have known” test is equivalent to the “only reasonable explanation” formulation. However, there is Upper Tribunal authority, *AC Wholesale Limited v The Commissioners* [2017] UKUT 191 (TCC), confirming that this formulation is not an exhaustive description of the “should have known” test, but rather one way of showing that the test is satisfied. In addition, this case confirms that it is not necessary for HMRC devote time and resources to considering and identifying any other possible reasonable explanations and then putting forward evidence and argument to counter them even where the taxpayer has not sought to rely on such explanations (see in particular paragraphs [27] and [29]). Of course, any explanation actually put

forward by the taxpayer should be considered, and the Upper Tribunal acknowledged that if that occurs it “may be necessary” for HMRC to show that the only reasonable explanation was fraud (paragraph [30]).

27. It is also worth noting that in *Fonecomp v HMRC* [2015] EWCA Civ 39, [2015] STC 2254 Arden LJ also confirmed at [51] that the “should have known” test does not mean that the trader has to have the means of knowing how the fraud actually occurred, but simply that fraud has occurred or will occur at some point in a transaction to which its transaction is connected.

28. Mr Farrell, for Synectiv, also suggested that at the end of his judgment in *Mobilx Moses* LJ effectively equated the “should have known” test with turning a “blind eye”. Although this can clearly be used as a descriptor of some circumstances where the test is met by a trader who chooses to ignore clear indicators of fraud, Moses LJ was not restating the test in those terms. The reference was made at paragraph [85] in the context of comments made in HMRC’s VAT Notice 726 which used that phrase.

The evidence and submissions

29. The nature of the evidence before us is briefly referred to at paragraph [3] above. Although the documentary evidence available included the extensive documentation produced for the 2013 hearing, limited reference was made to this and we have not reviewed documentation to which we were not referred. No new witness statements were prepared for the hearing before us. We did read the principal relevant witness statements produced for the 2013 hearing, comprising those of three HMRC officers (Patricia Westwell, Roderick Stone and Gordon Smith), Ms Clark (then a lawyer working for Nokia), Mr Chandoo and Mr Taylor. We were informed that the evidence of other witnesses related to the fraudulent defaulters and banking evidence, which is not in dispute. We also read transcripts of evidence from the 2013 hearing so far as they relate to Mr Smith, Mr Chandoo and Mr Taylor (the other witnesses named above did not give oral evidence).

30. In addition to the parties’ skeleton arguments produced for this hearing, we read the relevant parts of the detailed opening and closing submissions produced for the 2013 hearing.

31. We should say something specific about the evidence of Mr Taylor and Ms Clark. Mr Farrell made a number of criticisms of Mr Taylor’s evidence, in particular about his standing as a purported expert and whether he was appropriately independent, and pointed out that the 2013 decision refers to the FTT having derived little assistance from his evidence. Mr Kerr, for HMRC, clarified that HMRC were continuing to rely on Mr Taylor’s evidence only for limited purposes, primarily relating to two exhibits to his evidence. The first was what Mr Taylor said was a price list that he had obtained from Nokia in the UK, which he described as its general price list as between it and authorised distributors, before the application of discounts. The

second was data produced by an organisation called GfK³ which contains information about trading volumes, obtained from retailers in most European countries together with the UAE. These exhibits are discussed further below.

32. At the date of her witness statement Ms Clark was working as a lawyer in the Nokia litigation team. Her witness statement contained limited information comparing prices charged for the seven models of Nokia phone involved in the transactions with wholesale prices charged by Nokia. It was clear from Ms Clark's oral evidence that she had obtained details of the wholesale prices from colleagues at Nokia and had no real recollection of the details, including of exactly how those prices were determined. Her evidence was that the prices charged by Nokia for five of the seven models were similar (which in oral evidence she said she thought meant very close) to the prices provided by HMRC, but that for the Nokia N90 the price HMRC provided of £260 was approximately 27% lower than Nokia's "net wholesale selling price" for the period in question, whereas for the Nokia 8800 black the price HMRC provided of £528.50 was approximately 27% higher than that the net wholesale selling price.

33. We found the evidence difficult to follow because it was quite unclear what prices had been provided by HMRC to Ms Clark, so we asked Mr Kerr to confirm the position with HMRC. Following that confirmation we understand that Ms Clark was generally provided with Synectiv's selling prices, the exceptions being the N90, where the price referred to reflects Synectiv's buying price, and the N91 where Ms Clark was erroneously provided with the price at which Synectiv's customer sold the goods, £344.50 (Synectiv's own sale price was equivalent to £343.50 per unit).

34. Ms Clark's witness statement also confirmed that in 2009 Nokia produced 432 million phones. In oral evidence she stated that she thought that a similar number were probably produced in 2005/2006, with around 5 to 10 new models a year.

Our approach

35. Given that the key questions that arise in this case are the inferences to be drawn from the facts, we have decided to take the approach of considering the bulk of the parties' submissions in conjunction with our findings of fact (so far as not covered above or in the agreed facts) and our analysis of the inferences to be drawn from those facts. Inevitably this must involve the consideration of individual features, and mindful of the importance of considering the totality of the evidence we have then sought to draw the different aspects together in an overall assessment (from paragraph [112] onwards). As part of that overall assessment have we commented further on those features that in our view are not clearly explained.

36. Mr Kerr put HMRC's case under a number of sub-headings describing what HMRC consider to be characteristics of the transactions that demonstrate that Synectiv should have known that the transactions were connected with fraudulent evasion of VAT. Although Mr Farrell did not adopt the same subheadings we have found it convenient to follow them.

³ GfK Retail and Technology UK Ltd.

Findings of fact and our assessment of the relevant circumstances

Benign trading environment

(a) HMRC's submissions

37. Mr Kerr submitted that the trading environment was so unrealistically benign that it was inconsistent with a genuine market: it was too good to be true. In all nine transactions Synectiv was able to match the available stock precisely from a single supplier to demand from a single customer. There was never a need to obtain stock from multiple sources or split stock from any supplier, or a risk of being left with excess stock. The transactions each took place in the space of a single day. The same freight forwarder was used in each case, and the goods were shipped to just two different holding warehouses of continental logistics firms. Synectiv added no value and did not even come into physical contact with the goods. The goods remained with Interken until they were shipped to warehouses chosen by the customers.

38. The fact that Synectiv's suppliers were repeatedly failing to identify the demand on the continent and the significantly higher prices available there, and that its customers were also repeatedly failing to identify the cheaper prices available further up the supply chain, was inconsistent with a genuine market. This was all the more remarkable given that supply and demand for the stock was being openly advertised on publicly accessible trading platforms, and given that each of Synectiv's counterparties held itself out as a global player. The implausibility was increased by Mr Chandoo's suggestion in oral evidence that his suppliers might have put 2 pin continental charges in to the phones to be able to push the stock to other markets.

39. Synectiv also did not need to finance the deals, only paying its supplier when it had been paid by customer in full, sometimes weeks after the deals had been concluded. In the case of the supplies by Owl (A14 and J2) this contradicted Owl's invoice, which required payment on receipt. Owl was apparently willing to waive this requirement.

40. Furthermore, Synectiv was permitted to ship the goods out of the country without having paid for them. No suppliers had retention of title clauses in their deal documents, and Mr Chandoo's understanding was that title transferred to Synectiv before it had made payment. In addition, all customers were content to pay for the goods in sterling, shouldering the risk of any exchange rate fluctuations.

41. The trust was all one-way: each supplier was prepared to release the goods without having been paid, and each of the customers was prepared to pay in full before the goods were released, but Synectiv would not give credit to its customers. The evidence indicated that all the credit arrangements with suppliers were agreed verbally. Only one of Synectiv's suppliers, Broadcast, even visited its premises, and that was because it was supplying the retail business. The publicity surrounding Operation Venison meant that it was implausible that Synectiv would be given credit in this way.

42. The net effect of the transactions was that Synectiv was able to make a considerable, and pretty consistent, profit on nine deals conducted almost effortlessly over four days in April and three days in June. Mr Chandoo's evidence was that transactions could be negotiated within an hour. The margin that Synectiv made on its
5 transactions was also significantly higher than the other wholesale deals Synectiv conducted in April and June 2006. In each of those other deals Synectiv was buying from one UK trader and selling to another UK trader, and the mark ups were considerably lower (under 2% in each case). Mr Taylor's evidence was that authorised distributors were making average profit margins of only 3% in 2006.
10 Whilst the need to finance the VAT on an export deal might explain the requirement for a higher mark up it did not explain why Synectiv's customers would be prepared to pay such a high price when the goods were available much more cheaply. In reality Synectiv also did not need to fund the VAT, since it was funded from VAT repayments that Synectiv had just received.

15 43. Mr Kerr pointed to what HMRC regarded as specific pricing anomalies in relation to two transactions:

- (a) in deal A13 Synectiv sold 2000 Nokia 9300i at £316 per unit on 27 April, a mark up of £26, whereas on 19 April it had sold the same model and number to a UK trader for £305.50, with a mark up of £5.50; and
- 20 (b) in deal J3 Synectiv sold 4000 Nokia N80 for £327 a unit on 8 June, a mark up of £27, whereas on 22 June it sold 2000 units of the same model to a UK trader for £295.50, a mark up of £5.50.

44. Although Synectiv employed a number of individuals, all of them apart from Mr Chandoo were essentially employed on the retail side. The retail business required
25 virtually all the infrastructure, despite accounting for only about 4% of total turnover. Mr Chandoo was doing the wholesale deals by himself, relying mainly on business contacts. The deals were apparently waiting to be done as soon as VAT repayments were received.

(b) Synectiv's submissions

30 45. As already mentioned, Mr Farrell did not follow the same sub-headings as Mr Kerr, and some of the submissions summarised below are potentially relevant not only to HMRC's claim that the trading environment was unrealistically benign but also to other aspects. Where Mr Farrell's submissions clearly relate to those other aspects we have addressed them there. We have also addressed some of his more
35 general submissions on the legal test we must apply in the section of the decision which considers the totality of the evidence.

46. Mr Farrell referred to the finding in the 2013 decision that Mr Chandoo, and therefore Synectiv, did not know that the transactions were connected to fraud. Synectiv was an innocent dupe. The FTT had found that Mr Chandoo's oral evidence,
40 given over three days, was full and frank. Synectiv had been operating since 1999 and had operated as an authorised distributor for Siemens, Alcatel and Samsung. It was a well established company with a turnover of over £41 million in the financial year to

March 2006, of which 96% was wholesale trade. Only 35% of the business was wholesale sales to EU customers, with 48% being wholesale sales outside the EU. (See paragraph 8 of the agreed facts.)

5 47. Mr Chandoo was plainly knowledgeable about the wholesale mobile phone industry, was aware of the prevalence of fraud and was taking the steps required by HMRC in advance of each transaction. He had met at least one representative of each counterparty in advance of the transactions, and had in most cases had significant prior dealings with them (see paragraph 60 onwards of the agreed facts). HMRC never provided a specific warning in relation to any of the transactions or
10 counterparties, or indeed any information that prior deals had been traced back to a tax loss, and had paid substantial VAT refunds (see paragraph 9 of the agreed facts).

15 48. The test was not simply whether the transactions were too good to be true, but whether the circumstances were such that Synectiv should have known that they were connected to fraud, or could have discovered this by taking reasonable steps. If the trading environment could reasonably appear as legitimate then the test was not met. HMRC relied on Mr Taylor's evidence to support their claim, but the 2013 decision concluded that this evidence should be given little weight. His evidence had been shown to be completely flawed, and neither independent nor impartial, but HMRC were still relying on it despite having chosen not to call Mr Taylor to give oral
20 evidence before us.

25 49. The feature that the transactions all took place in one day was not an indicator of fraud. It was accepted that Synectiv did not know about other trades in the deal chains beyond its transactions with its immediate counterparties. Back to back trading, which reduced the dealer's risks, was not unusual and is a feature of other commodity markets. Mr Chandoo's evidence was that supply and demand of mobile phones, and therefore prices, usually fluctuated daily on the grey market and this meant that transactions were normally documented within a single working day and, out of necessity, carried out on the basis of a rapid exchange of paperwork. Arbitrage dealers would not generally acquire stock on a speculative basis, but only when they
30 had identified a specific demand from a customer. This was both designed to reduce risk in view of the relatively small margins available and reflected a lack of capital. HMRC's assertions about always being able to source and supply the exact requirements of customers was a reflection of the fact that they were only considering transactions actually entered into.

35 50. Similarly, the fact that Synectiv did not add value to the goods was not unusual. This simply reflected the fact that Synectiv was operating in the international grey market and was connecting geographically distinct markets: that was the value it added, matching supply and demand across markets and introducing liquidity where the primary market had failed. Similarly, Synectiv's ability to match precisely
40 available supply to demand in another Member State merely reflected the nature of grey market trading and the fact that these were back to back deals. (In addition in one deal, J5, there was not a precise match because units were added from retail stock.)

51. The fact that Synectiv could only fund the transactions from VAT repayment claims was just a reflection of the VAT system. Synectiv would also not be aware of its counterparties' reasons for trading and would not inevitably consider that fraud was the only reasonable explanation for not being cut out of future deals (by its suppliers identifying the demand on the continent and its customers identify a cheaper source of supply).

52. It also made commercial sense that the goods were held in a warehouse, and that Synectiv did not take physical possession of them. The handsets were small and valuable, Synectiv had made a significant investment, and it made sense to conduct deals in secure warehouses.

53. Although the mark up achieved by Synectiv on the transactions was significantly greater than on its UK deals, that reflected the costs of export, the (VAT related) cash flow implications and the risk that the VAT might not be recovered, at least for an extended period. Synectiv was not aware of the mark ups obtained by others in the deal chains and did not have the means of discovering them. The mark ups were not so unusual that Synectiv ought to have known that its transactions were connected to a tax loss, and were comparable on those obtained on other export transactions which HMRC were not disputing.

54. Mr Chandoo had explained in evidence that the insistence on goods being released by its supplier before payment, which was made clear on its purchase orders, was a commercial decision to protect Synectiv. Title was not explicitly dealt with but the implication was clear that Synectiv was to be able to deal with the goods as owner.

55. In summary, Mr Farrell submitted that there was a realistic possibility that the nine disputed transactions were simply good profitable wholesale deals which followed the pattern that the business had been operating for approximately seven years. The facts were in sharp contrast to the extreme facts considered in *Davis & Dann*. Unlike that case there were no "stand out" features of these transactions that meant that Synectiv should have known of a connection with fraud.

30 *(c) Discussion and findings on benign trading environment submissions*

56. We agree with Mr Farrell that a number of the features relied upon by HMRC are capable of legitimate explanation. Back to back trading is indeed a common feature in commodity markets. Mr Chandoo's evidence that supply and demand, and prices, usually fluctuated daily requiring transactions to be documented within a single day, based on a rapid exchange of paperwork, was in our view reasonable, and we accept his evidence. It is also clearly correct that arbitrage dealers will not generally acquire stock on a speculative basis. They are not capitalised to do so and are not generally in the market to take risks of that nature, but rather to exploit price differentials. Similarly, it is a feature of back to back trading that value is not added to the goods themselves, because the aim is to derive profit from matching supply and demand across markets. We also agree that the fact that Synectiv managed to match supply and demand does not particularly stand out. It is obviously a feature of

(successfully achieved) back to back deals that this occurs, and furthermore Annex B demonstrates that Synectiv undertook a considerable number of back to back sales in the prior year, where supply also matched demand, and also where there was a single supplier and customer. Annex B is discussed further below.

5 57. It was also clear from Mr Chandoo's evidence that Synectiv had taken a commercial decision not to seek additional capital, for example by borrowing, to finance its business, and that it was for this reason that transactions were funded from the cash that was available in the form of VAT repayments. Synectiv's lack of physical contact with the goods is also understandable. It was clearly sensible for large quantities of small valuable goods to be held in a secure facility, and in each case Synectiv arranged and paid for a physical inspection which confirmed that the goods existed and were held in Interken's warehouse. In addition it was clear from the evidence that Synectiv trusted Interken. Mr Chandoo explained that following Operation Venison Synectiv were recommended Interken by a friend who had used its services in East Africa (where the Chandoo family originates from), and that from then on Synectiv insisted on only dealing in goods held by Interken rather than by other warehouses. This is a rational explanation of why in each of the disputed transactions the goods were held by Interken.

20 58. We also do not find it particularly surprising that the retail business required virtually all the infrastructure. It was clear from the evidence that at the relevant time Synectiv had a number of employees, and that of these only Mr Chandoo conducted the wholesale business despite it accounting for 96% of turnover. It is also clear that Synectiv kept its retail stock in its serviced offices, rather than in secure warehouses. Mr Chandoo's evidence was that there was no relationship between the sums invoiced and the human resources required to put a transaction together. We agree. A retail business clearly requires significant infrastructure and staff, even if only dealing with online sales. The relationship between staffing levels, turnover and profitability will vary between the different types of business activity. It is also not surprising that Synectiv kept the relatively small amount of retail stock it required for that business on its premises, so that it could be readily dispatched to retail customers, whereas wholesale stock was kept in secure warehouses.

35 59. We also agree with Mr Farrell that it is relevant in assessing the evidence that Synectiv had been operating for some years, and had conducted a significant amount of wholesale business, the great majority involving export. Mr Chandoo had been primarily responsible for the wholesale trading element since 2001. The evidence does make clear that he was knowledgeable about the wholesale mobile phone industry and was aware of the prevalence of fraud.

40 60. What is more surprising in our view is the apparent ease with which Synectiv managed to match a single supplier and customer for each transaction, potentially giving the impression that the transactions were waiting to be done when the VAT repayments came in, the pretty consistent mark up of around 9%, the fact that there were only three continental customers using just two continental warehouses, the willingness of those customers to pay in sterling, the failure of customers and

suppliers to cut Synectiv out of the supply chain and the “one-way trust” that they demonstrated in Synectiv.

61. As regards the mark up, Annex B to the agreed facts indicates that Synectiv was routinely making gross profits on export deals in the region of around 7 to 9% in the year to March 2006, with exports outside the EU tending to be at the lower end of that range and EU exports at the higher end. The margins on deals within the UK are much lower. Although HMRC had undertaken a sampling exercise which identified four of these other UK-UK transactions as tainted by fraud and produced some evidence to support this (and did the same in respect of five out of six of Synectiv’s UK-UK deals in April and June 2006), we did not understand HMRC to be seeking to impugn the majority of the transactions listed in Annex B, and in particular export transactions with different counterparties, including non-EU counterparties. Any such assertion would also not be backed up by evidence. Although Mr Kerr submitted that we should not assume either that any of the transactions in respect of which evidence is not available were either tainted by fraud or were not so tainted (that is, we should adopt what he described as a neutral view), we think this rather misses the point and that we cannot sensibly disregard their existence. It is important to bear in mind that it is accepted that Synectiv was an innocent party. In those circumstances the existence of these other unchallenged transactions seems to us to be a relevant part of the factual context in which we need to judge whether Synectiv should have known that the disputed transactions were connected with fraud.

62. As discussed at [17] above, all of the transactions shown in Annex B are back to back purchases and sales. Overall the information in Annex B provides strong support for Synectiv’s contention that it was not surprising that it could command the level of profit it did in the disputed transactions, and did so by back to back purchases and sales which did not “add value” to the goods beyond exporting them to a different market. However, despite the support that the information in Annex B provides to Synectiv’s case, we still find the consistency of the profit margins on the disputed transactions, and their scale, somewhat surprising. Mr Chandoo sought to explain the level of profit by reference not only to the opportunities available by exploiting market differences, but also by reference to the costs of export transactions, in the form of freight, insurance and VAT. However, freight and insurance were clearly relatively limited costs. VAT is more understandable, but only if it is assumed that there is a material risk that the VAT will not be refunded, or at least will not be refunded for substantial period. This point is of course somewhat of a two-edged sword for Synectiv, because it suggests that the trades were thought to be at risk of being challenged as illegitimate. (Another explanation that might have been given, but seems not to have been by Mr Chandoo, is that the margin needed to reflect the risk that the customer would default and that Synectiv would be left with stock in an inconvenient place.)

63. Annex B also demonstrates that Synectiv routinely undertook wholesale deals that matched a single supplier to a single counterparty. We would have preferred to be able to hear oral evidence from Mr Chandoo about the precise way in which the disputed transactions were put together, in order to form a view about whether an impression that this happened too easily, and that the transactions appeared to be

waiting for VAT repayments to come in, was really justified. However, having reviewed the transcripts we do not think that there are clear answers to this in respect of the individual transactions, and in particular there is no clear answer to the question of whether Mr Chandoo initiated the contacts or whether he was approached by his supplier and customer in a way that should have been regarded as suspicious. The comments that were made by Mr Chandoo on this subject in oral evidence appear to relate to his trading method in general rather than the particular transactions in dispute (which is not surprising given the passage of time and the extent of wholesale business Synectiv was doing). It is however clear that business was invariably conducted by phone calls.

64. The overall impression we obtained is that whilst Mr Chandoo regularly received calls from suppliers and customers offering and seeking stock, he also initiated calls, in particular to match supply and demand. Bearing in mind the volume of transactions that Synectiv undertook in the year to March 2006 we do not think it particularly surprising that Mr Chandoo was able quickly to identify opportunities, and implement transactions, following receipt of VAT repayments. He was clearly also only prepared to conduct export deals, which required working capital, when he had the resources available to do so. At other times he would conduct transactions that did not require those resources. Accordingly we do not consider that HMRC has established that Synectiv should have considered that the apparent ease with which the transactions were put together, together with their proximity to the VAT repayments, was particularly suspicious. Bearing in mind also that it would have been Synectiv rather than its counterparties that would have been aware of the precise timing of receipt of the VAT refunds, we consider it reasonable to infer that it was Synectiv rather than its counterparties who initiated a good proportion of the contacts that led to the transactions.

65. In addition, since Synectiv was only prepared to conduct business with suppliers and customers with whom it had some familiarity, the limited number of counterparties in the disputed transactions is not necessarily surprising. Their willingness to pay in sterling may be more so, but we had no specific evidence about the currencies in which legitimate grey market trading was carried on at the time. Annex B suggests that Synectiv's wholesale business was all conducted in sterling.

66. The failure of customers and suppliers to cut Synectiv out of the supply chain and the "one-way trust" that they demonstrated in Synectiv also demand further explanation. Mr Chandoo's explanation of Synectiv's insistence that the goods were released to it before payment was that there were problems in the industry with suppliers being paid for stock which did not then materialise. He did not consider that Synectiv was being provided with an unduly favourable deal in this respect, since it was a well established business in the sector and such businesses are often in a position to demand to receive goods on credit. He also said that Synectiv's insistence on goods being released prior to payment demonstrated to it that the supplier was financially strong. (As noted at [97] below, Mr Chandoo's evidence was that Synectiv would only deal with suppliers that already held the stock, which he considered indicated that they had title to it and therefore must be capitalised accordingly.)

67. Whilst it is obviously correct that well established businesses are often able to demand credit, it is clear that Operation Venison, which we understood received significant publicity, had a negative effect on Synectiv's business. There is no indication that counterparties undertook any real checks on Synectiv. There is also no indication that Synectiv was well capitalised, and indeed the fact that Mr Chandoo waited for VAT repayments before conducting export business suggests the reverse. Suppliers' willingness for the goods to be released to Synectiv, and exported, with no clear assurance of when payment would be made (and, in the case of Owl, contrary to the terms of its own invoices) is undoubtedly surprising. Whilst there may well have been a problem in the industry with stock being paid for which did not materialise, the opposite situation where stock is provided but not paid for must also have been an issue, as it is in any industry. Indeed this is supported by the steps Synectiv took to minimise its own exposure, by not releasing goods to its customer prior to payment.

68. The evidence does demonstrate that Synectiv's counterparties held themselves out as operating internationally. Top Telecoms described itself in the documentation provided to Synectiv as a "global distributor", Owl as specialising in selling new sim free phones to the "EEC and Middle East", TEC as selling on an "international level", Broadcast as a "worldwide distributor/exporter", GSM as working across Europe and worldwide and trading internationally, URTB as dealing in Europe and Evolution as having established a "global logistics network". Mr Chandoo had no real explanation for their failure to deal with each other directly, other than the fact that markets are not perfect and Synectiv was able to identify an opportunity by matching supply and demand. A potentially rational explanation might be that Synectiv alone had the working capital available to fund the VAT, and that was why it rather than its supplier was able to conduct the export transaction. However, this does not really make sense when considered alongside Mr Chandoo's view that Synectiv was dealing with suppliers who were financially strong because they had the stock and were able to provide credit.

Supply chains

(a) HMRC's submissions

69. Mr Kerr submitted that, as well as being unrealistically benign, the trading model did not make sense commercially. Synectiv knew that the goods must have been imported from outside the UK and were not intended for the UK market, being described as being of European specification with 2 pin chargers. It was not disputed that the goods were not manufactured in the UK and that the stock was new, so it must have been imported recently. Mr Chandoo stated in oral evidence that he presumed that the stock had been recently imported, and as mentioned above speculated that his suppliers might have added 2 pin chargers to be able to push the stock to non-UK markets. Synectiv should have asked itself why the goods were being traded through the UK market if the demand was on the continent. Synectiv should also have appreciated and queried the length of the supply chains, which must have totalled at least six: the manufacturer, an authorised distributor, Synectiv's supplier, Synectiv, Synectiv's customer (another wholesaler) and a retailer. Whilst such a long supply chain could occur as a result of market failure it was occurring here systematically.

With the exception of Top Telecoms and TEC, all the suppliers and customers used sterling accounts with the same offshore bank, the First International Curaçao Bank (“FCIB”) in the Dutch Antilles, and the same freight forwarder. The paperwork provided to Synectiv indicated that TEC had an account with FCIB as well. Both of the French customers also used the same French warehouse.

(b) Synectiv’s submissions

70. Mr Farrell submitted that there was no evidence that it was known at the time that the use of FCIB was irregular. Synectiv itself banked at Barclays, as did one of the suppliers, Top Telecoms. Another supplier, TEC, also in fact used a UK bank account for the transactions to which it was party. (These suppliers were used on four of the deals, A10, A11, A15 and J3: see the agreed facts.) In addition, in the context of an international grey market, Mr Chandoo did not see anything suspicious in dealing in goods designed for the European market with 2 pin chargers. The fact that Synectiv was not buying direct from an authorised distributor simply reflected the grey market at the time.

(c) Discussion and findings on supply chain submissions

71. Our assessment of Mr Chandoo’s evidence is that he did not consider it surprising that the stock was being supplied in the UK with 2 pin chargers. 2 pin sockets are much more widely used than 3 pin sockets, and the grey market operates internationally. His evidence was that English manuals were included and that charger swapping was a common occurrence. Nokia even designed its boxes so that the chargers could easily be swapped. None of this evidence was successfully challenged. Although the transcript indicates that Mr Chandoo also speculated that there might have been a charger swap by Synectiv’s supplier in order to satisfy Synectiv’s order, that particular explanation does not seem very realistic given the short period of time between the deals being concluded and goods being inspected on behalf of Synectiv. However, we do accept the thrust of his evidence that there would have been greater demand in the grey market overall for phones with 2 pin chargers and accordingly that suppliers in the grey market would seek to have phones with that specification available. But the explanation of why new phones were being imported into the UK, most likely with 2 pin sockets, and then exported again is much less clear. Whilst this might have happened in some cases, for example because the phones were imported to meet a demand in the UK that did not materialise, what was happening here appears, at least at first sight, to be systematic. We also agree that the use by the customers of just two warehouses, one in France and one in the Netherlands, appears to be surprisingly coincidental.

72. We found Mr Taylor’s evidence unconvincing on the question of the length of the supply chains. He indicated in re-examination that, where an authorised distributor wished to dump stock, a common counterparty would be a non-authorised distributor. That distributor would then supply either to retail or to another non-authorised distributor in a different country. However, the inclusion of any additional non-authorised distributor in the chain would in Mr Taylor’s view not perform a commercially useful function. Whilst we can see that this argument has logical force,

as discussed below in the context of volumes our overall impression was that Mr Taylor had limited understanding or experience of the particular segment of the market in which Synectiv was operating.

73. As regards the use of FCIB, we accept that at the time no particular concerns had been expressed about this bank. It was also clear that the known fraud problems in the industry were making it difficult for traders to open accounts with UK banks. However, the coincidence of all of its customers, and two out of four of its suppliers, using the same bank is relevant.

Pricing

10 *(a) Submissions*

74. HMRC's case was that Synectiv was buying and selling the goods in some of the deals at prices which were significantly higher than the market rates. Mr Taylor's evidence was that it would be a straightforward process to find out market prices, by making three or four phone calls to authorised distributors, and Mr Chandoo's evidence was that he kept an eye on retail prices. Mr Farrell submitted that Synectiv had adduced evidence countering the assertion that Nokia prices were uniform, and pointed out that Mr Taylor's evidence had not been found to be persuasive in 2013. Synectiv also did not have the means of securing the information relied on by Mr Taylor (or of finding out the prices paid elsewhere in the deal chains), and Mr Chandoo had given cogent reasons for price differentials. In particular, the selling prices were for export stock.

(b) Discussion and findings on pricing

75. Mr Taylor's witness statement exhibited a price list which Mr Taylor described as "almost the opening position of Nokia in terms of pricing, before the application of discounts", between Nokia and authorised distributors. It was clear that this was a price list for UK authorised distributors. There was no suggestion that this list would have been directly available to Synectiv. However, Mr Chandoo did confirm in evidence that he would have been aware of retail pricing, because he kept an eye on the retail side of the business (conducted in the same office in which he was located) in order to judge whether Synectiv was buying and selling at the correct price on the wholesale side. The retail business would give an indication of where the price, and market, was moving. It is also reasonably clear from Mr Chandoo's oral evidence that, at the relevant time, prices at which phones could be purchased in the wholesale market would have been freely available to Mr Chandoo on certain industry websites.

76. Mr Taylor's evidence was that authorised distributors would benefit from certain discounts from the list prices, totalling around 10%, and would also seek a margin, typically of 5 to 7%.

77. Mr Chandoo did not dispute Mr Taylor's figures but did dispute a straightforward application of them under which the list price is discounted by about 5% to give a figure at which the authorised distributor would sell, with that figure

being said to be the market price. Discounts and profit margins would not apply evenly in the way that this approach implied. In particular, Mr Chandoo pointed out that Mr Taylor's approach took no account of the fact that the prices at which authorised distributors sold stock would be affected by a number of factors, including whether they were holding excessive stock of a particular model or whether a model was in unanticipated high demand (a "forecast failure"). Differing discounts would be applied, both in different markets and across different models in respect of the same distributor. It was also clear from the evidence that distributors are authorised on a country by country basis, and it would not be possible for a UK authorised distributor to sell stock legitimately (or at least stock acquired in that capacity) directly to other territories. Levels of demand could well differ between different countries, so leading to grey market opportunities. These comments by Mr Chandoo appear to us to be reasonable, and to indicate a significant level of industry knowledge.

78. The evidence given by Ms Clark further complicates the position and is extremely difficult to reconcile with Mr Taylor's evidence. In our view it does not assist HMRC. Her evidence was that in the case of five out of the seven Nokia models traded Synectiv's selling price was very close to Nokia's own price. These models were the N70, 9300i, 9500, N91 and N80. In contrast, using Mr Taylor's methodology HMRC's case was that Synectiv was not only selling each of these models at a price in excess of the market rate, but in some cases also buying at a price in excess of the market rate.

79. The buying and selling prices for the Nokia 8800 (£485 and £528.50 per unit respectively, deal J5) were markedly higher than Nokia's list price of, according to Mr Taylor's evidence, £381 (with effect from 12 May 2006: the price before that was stated as £423), but Mr Chandoo provided what we consider was a reasonable explanation for this, namely that the product he was dealing in was a black version of the phone, which customers preferred to the silver version which was the only version supplied by Nokia to UK authorised distributors. The addition of 164 units from retail stock clearly indicated that Mr Chandoo thought the price obtainable very attractive. His evidence, which we accept, was that Synectiv had been holding back a number of the black model in the retail business in expectation that the price would rise. (Ms Clark's evidence that £528.50 was about 27% higher than the net wholesale selling price cannot be reconciled with Mr Taylor's evidence about the price in place for June 2006. Her evidence would indicate a Nokia price of about £416, closer to the previous price of £423. Ms Clark also suggested that she owned a black 8800, so she thought it was available in UK. However, she was unclear whether it was in fact the 8800SE, a separate version, so we have discounted her comments on this.)

80. In the case of the N90, where Ms Clark said that the price provided was approximately 27% lower than Nokia's net wholesale selling price, Ms Clark had erroneously been provided with Synectiv's buying price (£260 per unit) rather than its selling price of £284.50. That implies that Ms Clark had in mind a Nokia price of around £356, again different from the price on the list provided by Mr Taylor of £323. Furthermore, Mr Chandoo provided a reasonable explanation for the prices on the relevant deal (A10) being lower than Nokia's list price. That list price was stated as being in force from 30 May 2005. The N90 was an expensive model that did not

prove popular. By the time of Synectiv's transaction Nokia had already released a revised model, the N91, which was more popular (the same price list shows the N91 priced at £308 with effect from 22 March 2006). Nokia recognised this with a significant drop in the list price of the N90 relatively shortly afterwards, to £229 per unit with effect from 17 July 2006, a drop of over £100. We do not consider that the simple fact that Nokia had not revised its official price list by the time of deal A10 supports a conclusion that Synectiv must have been dealing below the market price at that date. Although Mr Taylor disputed Mr Chandoo's explanation that excess volumes were being dumped by authorised distributors we do not find that rejection convincing. It seems pretty clear to us that a model which was not selling well, and which had been on the market for a relatively lengthy period and had already been effectively superseded by a newer model, would suffer real downward pressure on pricing, and that there would be a risk of oversupply of stock. The reduction in Nokia's price in July 2006 appears to us simply to reflect that reality. We also do not accept Mr Taylor's suggestion that the goods could have been sold more profitably to an authorised distributor. There is no evidence that any authorised distributor was actually prepared to purchase additional N90 phones, whatever the prevailing list price was. In our view, therefore, HMRC has not established that Synectiv was buying and selling the N90 at below the market rate.

81. Part of HMRC's criticism of the pricing of the deals was based on comments from Mr Taylor that Synectiv's customer could have bought more cheaply by buying from the authorised distributor (a comment based on taking the Nokia list price and then discounting that by around 5%, as discussed above). However, this disregards the fact that UK authorised distributors would not have been permitted to sell to continental purchasers. Ms Clark did indicate in oral evidence that she thought that (aside from currency adjustments) Nokia price lists were generally consistent between different countries, but we had no documentary evidence of this and the weight we can give to Ms Clark's evidence is limited. She was clearly not familiar with the price list exhibited to Mr Taylor's report, appeared to have no direct experience of pricing and was trying to recall events from some years previously. In contrast, we think it was clear from Mr Chandoo's evidence, and it makes sense to us, that there could be differences in different territories, in particular due to differing discounts applied (both in cash form and in marketing support), over or under supply, different levels of demand and individual models not being available in some territories.

82. Of potentially greater assistance to HMRC are differences between the pricing of the disputed deals and other transactions in the same model entered into by Synectiv. In particular:

(a) Nokia 9300i: in deal A13 Synectiv sold 2000 Nokia 9300i at £316 per unit respectively on 27 April (having bought them at £290), whereas as mentioned in paragraph [43] above Synectiv sold 2000 of the same model at a lower price, £305.50, eight days earlier on 19 April (bought at £300 each). It also sold 1000 of the same phone to another UK customer on 12 June at £242.

(b) N91: in deal J2 Synectiv purchased this model at £315 per unit on 7 June, whereas on 13 June it bought five N91 handsets for its retail business at £292 each.

5 (c) N80: Synectiv sold 4000 N80 units for £327 a unit on 8 June, a mark up of £27 on its purchase price of £300, whereas as mentioned above it sold 2000 units of the same model to a UK trader on 22 June for £295.50 per unit. On 28 June it also bought 10 of these units for its retail business at £282 each.

10 (d) Nokia 8800: Synectiv purchased 12 units for the retail business at £430 each on 28 June, whereas in deal J5 Synectiv was buying at £485 and selling at £528.50.

83. Overall we do not find these price differences to be of significant assistance to HMRC. We accept Mr Chandoo's evidence that prices could fluctuate daily. They also certainly declined the longer that the model in question was on the market (as
15 illustrated, for example, by the marked reduction in price between the two UK deals in the N9300i). It is not that surprising that sale prices on sales to UK customers could be lower than the prices commanded on export trades: those trades would only be implemented by traders who had cash available to cover the VAT and achieve the higher margins that Annex B indicates were consistently available on export deals.
20 We infer that there was simply less competition for export deals because fewer traders were able to undertake them.

84. However, we do agree with HMRC that it might generally be expected that small quantities of goods purchased for a retail business would need to be purchased at a higher price per unit than large quantities of the same goods purchased wholesale.
25 That makes the prices at which Synectiv was able to purchase the N91, N80 and 8800 phones for its retail business somewhat surprising. Mr Chandoo explained this by reference to rapid market movements, noting that in each case the retail deal was done later than the wholesale transaction, consistent (he said) with the fact that prices of individual models invariably decline over time. In addition he suggested that suppliers
30 might have had limited left over stock of particular models that they wanted to offload. He also maintained that Synectiv's market position as a substantial purchaser in the wholesale market allowed it to purchase for retail without paying a higher price per unit to reflect the smaller volume. These points have some validity as potential explanations, but we are not entirely convinced by them. In each case the price paid
35 for the retail stock was noticeably lower, and the transaction happened within a short period of the disputed transaction.

Volumes

(a) Submissions

85. Mr Kerr submitted that the volumes of the handsets being sold by Synectiv were
40 implausibly high when compared with data provided by GfK of actual retail sales in Europe and the UAE over the corresponding period. Mr Farrell submitted that this disregarded business to business sales data, and that if volumes were relevant it would

be more sensible to look at the numbers manufactured. Even in respect of retail the figures were incomplete, not only in the percentage of retailers covered but also the geographic market. Mr Taylor's methodology was misconceived and also inappropriately focused on particular months in 2006.

5 (b) *Discussion and findings on volumes*

86. The data supplied by GfK contains actual monthly sale volumes for around 70% of retail sales for the geographic area covered, comprising most of Europe together with the UAE. According to Mr Taylor it was the standard source of data at the time, used by retailers, distributors and the regulator. It was not freely available and
10 Synectiv did not have it at the time (indeed Mr Chandoo was not aware of its existence). Synectiv did purchase some GfK data in connection with the original hearing, apparently at a cost of £3000. HMRC's position on this was that although Mr Chandoo would not have had access to the data his own evidence was that there were many sources of information available about the level of demand and how a product
15 was performing.

87. HMRC's case was that the GfK data was the most useful information available in order to determine the prevailing demand, because by definition mobile phones are manufactured for retail consumption, such that any legitimate market must ultimately exist only to satisfy retail demand. In contrast, information as to the number of phones
20 of a particular type that were produced was not generally available.

88. As already mentioned the hard data available to GfK covered about 70% of retail sales in the region covered. GfK extrapolated this to 100% by simple grossing up, to give an estimate of the total volume of handsets sold. The 70% would not include corporate sales. Mr Taylor also stated in evidence that around 70% of the total
25 market was attributable to manufacturers supplying mobile network operators directly, so that only about 30% by volume was being sold within the distribution community, including both authorised distributors and the grey market. The two 70% figures were said by Mr Taylor to be coincidental, although it seems likely to us that there would be at least a degree of correspondence.

30 89. By reference to the GfK data:

(a) N90: HMRC claimed that the volume sold by Synectiv was the equivalent of about 80% of the entire stock available to the distribution community in April 2006, and about 44% of the stock available in the combined months of April and May 2006. In Mr Taylor's view this would
35 require Synectiv to dominate the entire European market in what he described as a niche product.

(b) 9300i and 9500: the grossed up figures from GfK for April 2006 were 15,221 and 6,300 respectively. Trading 2000 of these was, according to Mr Taylor, implausible.

40 (c) 8800: the grossed up figure from GfK for June 2006 is 41,000. Mr Taylor again considered that trading 3000 in that month was implausible.

(d) N70: the total estimated retail sales were around 267,000, but Mr Taylor still thought that the appellant's share of 30% of the stock available to the distribution community (in two transactions totalling 6000 units) was implausible.

5 90. Specifically in relation to the N90, Mr Chandoo explained that the research and
development that would have been required for this model, and in particular its inbuilt
high-end camera, meant that it was unlikely that only a small number of phones
would have been manufactured. He believed that the 4000 units traded would have
been a very small proportion of the available number. Taking this evidence into
10 account, in our view a trade in 4000 handsets was not obviously improbable. Given
that the phone was not selling well (see [80] above) it makes sense to us that there
could be plenty of handsets available in the grey market. Retail sales for April and
May 2006 did not necessarily correlate with handsets available in the grey market at
that time. Mr Taylor's own evidence suggested that 50,000 handsets were handled by
15 distributors during 2006 as a whole.

91. More generally, we do not consider that the GfK evidence provides any
convincing support for HMRC's case. It was not suggested that Synectiv should have
identified the existence of, and obtained, the GfK data before deciding whether to
undertake the deals. Although it is clear that some sources of information were
20 available to Mr Chandoo, including free to access websites and trade press that would
give some indication of what was happening in the market, the evidence does not
establish that total trading volumes, as opposed to some indications of pricing and
demand levels, would have been available. The GfK figures also relate to retail sales,
and whilst we accept that a legitimate wholesale market must exist ultimately to
25 service the retail market, the data does not give any real indication of the volumes that
might have been expected from legitimate grey market trading in the months in
question, which would inevitably have involved longer chains of transactions than
straightforward sales by authorised distributors to retailers. In addition we think it is
relevant to take into account the transaction volumes shown in Annex B, which
30 demonstrate that Synectiv was regularly dealing in volumes of handsets comparable
to those it dealt with in the disputed transactions. As already discussed, we think that
those other transactions are part of the relevant factual context. In general, and despite
Mr Taylor apparently having some understanding of the grey market through work for
two clients who were also authorised distributors, our overall impression was that he
35 had limited understanding or experience of the particular segment of the market in
which Synectiv was operating, and therefore that his evidence about trading volumes
does not really assist us in determining whether the trades in question could
reasonably be regarded as legitimate.

Due diligence

40 (a) *Submissions*

92. Mr Kerr relied on the fact that Synectiv's counterparties had only provided very
limited information about themselves, and appeared to be relatively recently
established. The counterparties also appeared not to be concerned with making checks

on Synectiv's credentials. Mr Farrell's response was that it was wrong to focus on the level of checks that Synectiv undertook if they were not clearly means of knowing that there was a connection to fraud. In any event this was not a case where suppliers turned up out of the blue to offer a ridiculous number of phones. Synectiv had done
5 business with all the suppliers before, and was also making every effort to work with HMRC. Mr Farrell also submitted that Synectiv always asked HMRC not only to validate the VAT numbers of its suppliers and customers, but also of companies in the supply chain (we comment on this at [110] below). The inspection reports also evidenced the existence of the stock and its essential features. Whilst Synectiv could
10 always have done a bit more to check on its counterparties, it did what was reasonable in all the circumstances. If any further checks that Synectiv should reasonably have done would not have discovered the fraud then the failure to undertake them was not relevant.

(b) Discussion and findings on due diligence

15 93. The documentary evidence included undated letters of introduction from the counterparties, together with copies of corporate and VAT registration details and bank details. All these documents were required to be provided to HMRC as part of the agreed checks. No accounts or other financial information was provided by counterparties, and in most cases no identification documents in relation to the
20 individuals involved. It appears that Synectiv's in-house accountant prepared a file for each counterparty which included the information provided and, for UK counterparties, a printout from Companies House confirming basic details about the company, but again not including accounts.

25 94. As set out in the agreed facts Top Telecoms was incorporated in 2000, VAT registered in 2001 and changed its name to Top Telecoms around the same time. Owl was incorporated and VAT registered in 1998 and changed its name to Owl in 2001. TEC was incorporated and VAT registered in 2001. Broadcast was incorporated in 2003 and VAT registered in 2005. For this company Synectiv also obtained a copy of a passport from its contact. Evolution appears to have been incorporated and VAT
30 registered in May 2005, and again some passport details were provided. URTB was incorporated in 2002. The VAT information for URTB provides a date in October 2005, but it is unclear whether this was the first registration date. GSM was incorporated in 2002 and appears to have been VAT registered by October 2005 (again it is unclear whether this was the first registration date).

35 95. As a result of Operation Venison, dealings with HMRC were extensive. In addition to information provided to HMRC in respect of each transaction (see paragraph [9] above), details of all completed transactions were provided on a monthly basis. Although HMRC asserted that individual transactions were only
40 checked by Synectiv after the deal was done, in each case HMRC confirmed the VAT numbers before the deals completed by being released to the customer. In most cases the check also came through prior to shipping. Mr Chandoo's evidence was clear that Synectiv would not take or make payment until verification had been received from HMRC, and he also saw no point in seeking confirmation from HMRC before the deal was agreed with both counterparties. This makes sense to us. It is also clear that

at the time HMRC were not focusing their attention on Synectiv's affairs, because there were relatively more significant businesses who, unlike Synectiv, were regarded as uncooperative and as posing greater risk.

5 96. There was no evidence that the counterparties required financial information about Synectiv to satisfy themselves that it was viable and had financial substance. Mr Chandoo did not have any specific recollection but thought that Synectiv was rarely asked about this.

10 97. Mr Chandoo's explanation of Synectiv's failure to undertake significant due diligence on counterparties was that it was not providing credit, and was also only dealing with established traders where the individual involved was known to Synectiv and had experience in the sector, or (in the case of customers who were less well known) where Interken provided a verbal reference that stock had previously been supplied to the customer (and been paid for) without problems. Mr Chandoo had met at least one representative of each counterparty. Synectiv would also only deal with suppliers that already held the stock, which Mr Chandoo considered indicated that they had title to it and therefore must be capitalised accordingly. This is understandable although, as already discussed, it is difficult to reconcile with a rational explanation for why Synectiv's suppliers were not exporting themselves. It also does nothing to explain why the suppliers were prepared to trust Synectiv with the stock.

25 98. As noted above, details of prior dealings with Synectiv's counterparties in the year to 31 March 2006 were set out in Annex A to the agreed facts. They are summarised in the section of the agreed facts that deals with its counterparties (paragraphs 60 to 78). As can be seen, there were a significant number of transactions with Top Telecoms, TEC and Owl. There were six transactions with URTB and four with GSM, all in the first quarter of 2006. There was only one prior transaction with Broadcast and none with Evolution. In the case of the majority of the suppliers the volume of previous transactions might help explain why they were prepared to provide goods credit, but not if those earlier dealings were all on a similar basis.

30 There was no suggestion that they were on a different basis.

35 99. It is clear to us that a prudent businessman in the position of Mr Chandoo would have taken further steps to check, in particular, the credit worthiness of customers and Synectiv's position in relation to the third party warehouses in France and the Netherlands. Even though Synectiv was seeking to retain title until it was paid, it was still taking a risk that it would be left with unsold stock in an inconvenient location, or that there would be a problem with the warehouse. In view of the known fraud risk in the sector a prudent businessman might well also consider conducting further enquiries into the suppliers. However, the question of what a prudent businessman would have done is not itself determinative, at least where it would not have allowed the fraud to be discovered (see *HMRC v Livewire Telecom Ltd* [2009] EWHC 15 (Ch) at [88], as well as *Mobilx* at [82]). It is reasonably clear that Mr Chandoo assumed that Interken effectively had responsibility for the goods when they moved, and in any event he had arranged insurance. Although the amount insured reflected the cost rather than sale price of the goods, this was explained by Mr Chandoo in evidence as

a commercial decision to take some level of risk to minimise the cost of the premiums. We accept this.

100. There is more force in HMRC's point that Synectiv's suppliers appear to have made no real checks on it, despite advancing credit and permitting it to ship goods out of the country. We understood Mr Chandoo's explanation of this to be that Synectiv was a well established company in the industry, whose reputation was not harmed in this respect by Operation Venison. This is discussed further below as part of our overall assessment.

The deal documents

10 (a) *Submissions*

101. Mr Kerr submitted that the deal documents, which essentially comprised purchase orders and invoices, did not sufficiently describe the terms of the contract or sufficiently specify the goods. Any purchaser would want to specify additional detail beyond the make and model, in particular whether the phones were sim free (meaning not locked to a particular network), new or used, the type of charger, the software (at the time a disc was typically provided), the manual and the warranty position. Despite the lack of detail, not once in any of the transactions was there any issue with faulty, missing or incorrectly described stock. The documents also did not deal properly with risk and title.

102. Mr Farrell submitted that there may have been some defects, but the essential features were clear and ultimately both Synectiv and its customer could reject the stock (following inspection) if it did not meet their requirements.

(b) *Discussion and findings on deal documents*

103. As far as customers were concerned, the purchase orders placed by Evolution and URTB only specified the model and quantity. The three purchase orders from GSM, for deals A12, A13 and J5, also stated that the phones were sim free and specified that the goods were black and in the original packaging, and in the case of deal A13 that the goods were of European specification. Synectiv's own invoices to its customers all stated that the goods were of Central European specification with 2 pin chargers. Mr Chandoo stated in evidence that the reference to "Central European" was in fact industry terminology for, essentially, Western Europe. There was no express mention of whether the goods were unused or came with a warranty. Risk and title were not expressly covered. However, Synectiv's invoices stated that title was retained until payment in full and that payment was to be made following inspection, although there was no explicit mention of when payment was due. There was no mention of any returns policy.

104. As far as suppliers were concerned, neither Synectiv's purchase orders nor the suppliers' invoices explicitly stated whether the goods were new or used, and Synectiv's purchase orders did not specify whether the goods were sim free. In five transactions (A12, A13, A14, J2 and J5) the supplier's invoice only stated the model

and quantity. With the exception of Owl (where the invoices required payment on receipt of the invoice, with interest on late payments), there was no reference in suppliers' documents to when payment was to be made or credit terms. However, Synectiv's purchase orders did state that the stock had to be released to Synectiv prior to payment and made it clear that payment was subject to satisfactory inspection. Those purchase orders also all stated that the goods were to be of "Central Euro Specification" with 2 pin chargers, and some specified the provision of a warranty card.

105. Mr Chandoo's evidence was that details about payment, title and risk were agreed verbally on each transaction, overriding any inconsistent provisions in the documents (such as Owl's stated payment terms), and that any details of the specifications were also agreed in this way. It was clear from his oral evidence that his understanding (rightly or wrongly) was that Synectiv was on risk as soon as the goods were released to it by its supplier following the inspection Synectiv arranged, and that it remained on risk until its customer had inspected the goods and paid for them, so triggering the release of the goods to the customer. This position is broadly supported by Synectiv's purchase orders and the invoices it issued to customers (although there is an oddity in one deal, A11, where the goods seem to have been released to Synectiv prior to inspection.). It appears that at the time Mr Chandoo saw no need for any additional documentation.

106. It was also clear that, from Mr Chandoo's perspective, the inspection reports were highly significant. These did provide significantly more details about the goods than appear on the contractual documentation. We accept that the content of these reports, together with Mr Chandoo's knowledge of the models and their availability in the market (including that the quantities in question of what were relatively new models would not be available used as opposed to unused) was such that the specification of the goods was in practice established to the level required by Synectiv's customer. Mr Chandoo was also satisfied from the inspection reports that the goods were new. In addition, he gave unchallenged evidence that in each case the inspection report commissioned by Synectiv was sent to the customer prior to shipping, so minimising the risk that the customer would claim that the goods were not of the required specification. He distinguished Synectiv's retail business, where there was a clear need for a returns policy in relation to individual consumers, and wholesale business where he regarded the customer as fully on risk once it had accepted the goods following inspection.

107. It is clear that, from a legal perspective, the documentation falls far short of what a commercial lawyer might expect to see, and Synectiv was clearly taking risks that a more prudent business might not take, but we are not persuaded that this is a point that is of major significance in demonstrating whether it should have been aware of the connection with VAT fraud. Of greater significance is the risks that Synectiv's suppliers were apparently prepared to take in allowing it to ship the goods to a third party warehouse without payment or written terms of credit, and the risks its customers took in paying in full for goods before they had been released, without clear provisions governing risk and title.

The overall fraudulent scheme

108. Mr Kerr's skeleton argument relied on the wider deal chains and what HMRC had identified as circular fund flows intended to defraud HMRC of the VAT, claiming that Synectiv must have been subject to manipulation to such an extent by its
5 counterparties that it should have been obvious that the activity was not for genuine commercial purposes.

109. This point was in our view correctly not pursued at the hearing. It was accepted that Synectiv was neither aware of the deal chains (beyond its immediate counterparties) nor of any circular fund flows, and did not have the means of knowing
10 these things. HMRC accepted that this was not a case where Synectiv failed to take steps that were open to it and which would have uncovered the fraud.

Warnings

110. More relevantly in our view, HMRC also relied on the fact that Synectiv, and in particular both Mr Chandoo and his brother, were acutely aware of the risk of VAT
15 fraud. In addition to Operation Venison, Synectiv was warned more generally about the risks of MTIC fraud in the mobile phone sector in 2002 and again in 2003. Mr Chandoo accepted in evidence that he was aware of the existence of problems with missing and hijacked traders, carousel fraud and forged export documents, and was also aware of Notice 726 issued by Customs & Excise. (Notice 726 relates to the joint
20 and several liability measure introduced to try to counter MTIC fraud, and provides guidance about potential indicators of fraud and checks that might be carried out.) Mr Chandoo was also aware that although he was checking VAT numbers with HMRC, HMRC were not approving the transactions as such. Requests to HMRC in relation to individual transactions did ask HMRC to check the supply chains, which Mr Chandoo
25 claimed he thought that HMRC could do. However that seems to us to be a somewhat unrealistic request, and in any event not one that HMRC at any stage confirmed that they had addressed. (In fact, at the relevant time HMRC rarely sought to check supply chains "in real time", and in any event did not do so on behalf of traders.)

111. It is also important to note, however, that HMRC had at no stage provided a
30 specific warning in relation to any of the counterparties, or indeed any information that any prior deals that Synectiv had undertaken had been traced back to a tax loss. HMRC had also not queried any of the deal related information that Synectiv had provided. Most of the monthly VAT refunds received by Synectiv were not stated to be "without prejudice".

35 Our assessment of the totality of the evidence

112. HMRC's case is essentially that the transactions were only explicable with reference to VAT fraud. Whilst Mr Kerr did submit that this provided the only reasonable explanation for the transactions, he also submitted that based on *AC Wholesale* HMRC did not need to go that far. Synectiv should be regarded as having
40 the "means of knowing" there was fraud by taking the approach of stepping back and looking at all the circumstances. Not only were the transactions too good to be true for the reasons discussed, but Synectiv should have questioned why newly imported

goods were being traded out of the UK, why its relatively newly established counterparties could legitimately purchase millions of pounds of goods, were content to allow Synectiv to take the profits it did rather than cutting it of the deals, and were prepared to take the risks they did in dealing with Synectiv.

5 *Grey market trading: the appropriate comparator*

113. In order to assess whether transactions are “too good to be true”, some form of comparator is required. That is a key issue between the parties in this case. Effectively, Synectiv say that the transactions did not stand out in the grey market in which it was operating, whereas HMRC say that they should have done.

10 114. We did not find Mr Taylor’s evidence to be of significant assistance as a descriptor of legitimate grey market trading, and in fairness HMRC did not seek to rely on it in that regard. Instead Mr Kerr referred us to the following comments made by the Upper Tribunal in *S&I Electrical plc v HMRC* [2015] UKUT 0162 (TCC):

15 “64. In our judgment ... [Counsel for the appellant] goes too far in his submission that the FTT could not determine whether S&I should have known of the connection with fraud of the 79 transactions without evidence of the normal characteristics of legitimate trade in the grey mobile phone market. In accordance with the extract from Lord Reed’s judgment in *Healthcare at Home Ltd v Common Services Agency*⁴, the FTT’s task was to apply the impersonal standard of the reasonable businessman to the facts which it found, on the basis of the evidence which it heard, as to the circumstances in which S&I carried out the transactions in issue. Would the reasonable businessman have concluded that S&I ought to have known that the only reasonable explanation for the transactions was that they were connected with fraud?

20
25
30 65. It is true that the FTT was required to invest the reasonable man for these purposes with the characteristic of being a reasonable businessman with ordinary competence, but in our judgment a reasonable businessman with ordinary competence is not so egregious or specialist a variant of the anthropomorphic conception of justice that the FTT needed evidence of the normal characteristics of legitimate trade in the grey mobile phone market, or any other expert evidence, in order fairly and justly to apply the required impersonal standard.”

35 115. In contrast, Mr Farrell referred us to Mr Chandoo’s evidence and to a description of the mobile phone trade given by Moses J (as he then was) in *Teleos plc v HMRC* [2004] EWHC 1035 (Admin) at [80] to [83], which refers among other things to it having become similar to other commodity markets, to daily material fluctuations in price and demand in the grey market, typical deal volumes of at least
40 1000 unit and transactions being done within one day, with the goods being held in a secure warehouse.

⁴ [2014] 4 All ER 210

116. It is clear of course that we cannot rely on these comments by Moses J as evidence, but Mr Farrell submitted that we should still regard them as useful guidance. Mr Kerr submitted that in fact the comments were made long before Customs started conducting extended verification exercises which revealed fraud in the supply chains, and that Moses J was simply quoting unchallenged evidence from a grey market trader in a different context (the issue in that case being whether goods should have been zero rated in circumstances where they were never removed from the UK).

117. It is clear from the guidance in *S&I Electrical* that we should seek to apply the standard of a reasonable businessman. However, our approach must also be informed by the evidence available about what the typical features of grey market trading were at the time. If the disputed transactions did not stand out against that backdrop then that is clearly relevant in determining whether Synectiv should have known that they were connected with fraud. As already indicated we found Mr Taylor's evidence to be of limited assistance in determining the typical features of grey market trading in the mobile phone sector at the time. Mr Chandoo's evidence is however directly relevant. The same applies to other transactions undertaken by Synectiv. As already discussed, the transactions listed at Annex B to the agreed facts are a relevant – and we think significant – part of the factual context.

118. We would add to this the importance of avoiding the use of hindsight to determine what Synectiv should have known. We need to reach a conclusion on the facts as they existed at the time of the transactions. For example, it might be the case that with the benefit of hindsight an inference could be drawn that a substantial proportion of grey market trading in mobile phones at the relevant time was infected by fraud. But such an inference would be informed by what has emerged since then, including as a result of HMRC commencing extended verification of supply chains.

Features of the transactions: overall assessment

119. A significant proportion of the individual points raised by HMRC have in our view been addressed by the appellant in a way that satisfies us that they do not, either alone or in combination with the remainder of the evidence, support an inference that Synectiv should have known that the transactions were connected with fraud. The remaining features that in our view present greater difficulties for the appellant's case are the following:

- (1) The consistency and scale of the profit margin.
- (2) The failure of the suppliers and customers to cut Synectiv out of the transaction chain, especially in circumstances where Synectiv appeared to be proceeding on the basis that the suppliers must be well capitalised.
- (3) Risk: the marked contrast between the steps Synectiv took to limit its risk and the significant risk taken by the suppliers and, to some extent, customers, in (a) the terms of the transactions (in particular granting credit and shipping before payment), (b) the apparent lack of checks on Synectiv by counterparties, and (c) the deal documentation.

(4) The apparently systematic import and rapid export of phones with 2 pin chargers.

(5) “Coincidences” in the use of FCIB and only two continental warehouses.

(6) Pricing in comparison to purchases for the retail business.

5 (7) The impact of Operation Venison and other warnings received about the prevalence of fraud.

120. We have considered these factors carefully in conjunction with all the rest of the evidence. Whilst the factors listed above would have led a reasonable or prudent businessman to conclude that there was a significant risk of fraud, and possibly that
10 the connection with fraud was more likely than not, our overall assessment is that HMRC have not proved that Synectiv should have known that it *was* taking part in transactions connected with fraud.

121. We have already commented in some detail on each of the factors noted above. By way of additional comment:

15 (1) Whilst we have found the consistency, and to some extent the scale, of profit margin somewhat surprising, it does not particularly stand out in the context of the other transactions Synectiv had been doing, as shown in Annex B of the agreed facts. In addition, in considering Mr Chandoo’s oral evidence we have reached the conclusion that his approach to the transactions involved what
20 was, effectively, a target margin. For export transactions to the EU this target was around 9%, and once a margin of that order had been achieved he would agree the deal rather than seek to improve the pricing further. This explanation makes sense to us and is also consistent with the fact that the margins do show some variance.

25 (2) A prudent businessman would have questioned why Synectiv’s suppliers and customers, who were all stated to operate internationally, were not cutting Synectiv out of the chain, and in particular why Synectiv’s suppliers, which Mr Chandoo assumed to be well capitalised, were not undertaking more profitable export transactions themselves. Such a businessman may well also have queried
30 how each of the suppliers and customers (who, as HMRC maintained, were for the most part relatively recently established) had attracted the capital they needed. We suspect that at the time these features did not concern Mr Chandoo because his view was that Synectiv was well established, had good contacts, and was taking advantage of opportunities that others were not exploiting. He was
35 entering into transactions in a short space of time, taking steps which he considered minimised risk for Synectiv, but not really pausing to consider the position from the counterparties’ perspective.

(3) The same comment applies to the contrast between the parties in terms of approach to risk. Again, Mr Chandoo clearly did not stop to consider in detail
40 the fact that his counterparties appeared not to be protecting themselves sufficiently. His perspective was that Synectiv was well established and that its reputation in the industry in this respect had not been fundamentally affected by Operation Venison. He clearly considered that Synectiv was in a position to

require goods to be supplied on credit, and to arrange for their release to Synectiv prior to shipping. Whilst a prudent businessman would have questioned this it is clear from Annex B that Synectiv had undertaken a very significant number of transactions on a similar basis. The disputed transactions do not stand out in this respect. In our view this is significant. Mr Chandoo's perspective of the "norm" for grey market trading in the sector in which Synectiv was operating was inevitably informed by the context of the other transactions that Synectiv had undertaken.

(4) As explained above, the apparent systematic import and export of relatively recently manufactured phones does call for explanation, and in our view was not properly explained by Mr Chandoo. We have accepted that suppliers in the grey market would seek to have phones with 2 pin chargers available, reflecting the larger potential market. It is less easy to accept that the UK was being treated as a trading "hub" in which goods could be imported and then rapidly exported, apparently for no good reason. However, it is important to recognise that whilst the number of phones traded in these transactions was relatively significant, the number involved is not in fact material compared to the overall size of the market (see Ms Clark's estimate of the number of phones produced annually by Nokia, at paragraph [34] above). Against that background the import of the numbers of phones involved, followed by their export if and when a better market was found, appears less exceptional. And, again, the context of Synectiv's other transactions is relevant.

(5) The "coincidences" of FCIB and the two continental warehouses are somewhat surprising, but not to a significant extent. Synectiv was only prepared to use Interken in the UK and only traded with a limited number of counterparties, in some cases based on references from Interken. In that context it is not that surprising that a very limited number of warehouses were selected. No concerns had been raised about FCIB at the time that Synectiv should have been aware of, and Mr Chandoo would also have known that details of the banks used were being supplied to HMRC.

(6) As already explained, we found the prices at which Synectiv was able to purchase the N91, N80 and 8800 phones for its retail business, as compared to the prices on the disputed transactions, somewhat surprising, and we were not entirely convinced by Mr Chandoo's suggested explanations. In each case the price paid for the retail stock was noticeably lower, and the transaction happened within a short period of the disputed transaction. However, the prices of the N91 and N80 are not so markedly different from the purchases in the disputed transactions as to particularly stand out. (We do not think that the appropriate comparison is to the sale price on the disputed transactions, because from Synectiv's perspective the phones were being exported to a different market.) The same cannot be said of the Nokia 8800, but it is clear that it was perceived as a desirable phone which at least at one stage was commanding a premium price. Mr Chandoo explained in cross examination that he was taking the opportunity to purchase this model for the retail business whenever some units became available. It is quite possible that a model that traders were expecting to be in particular demand in fact proved to be less so within a

relatively short period, and that this could explain the apparent volatility. More generally however, without further evidence as to how the grey market price in any of these models was actually fluctuating in the period in question, we do not think that we can draw any significant support for HMRC's case from the price differentials.

(7) Whilst it is relevant that Synectiv was acutely aware of the risk of fraud in the sector as a result of Operation Venison and had received warnings from HMRC, this must be seen in the context of what Synectiv was doing to meet HMRC's requirements, which included the provision of a significant level of detail in relation to each transaction. At no stage was any specific warning given about any of the transactions that Synectiv had conducted, despite the generation of significant VAT refunds. Whilst Synectiv understood that it had not obtained any assurance from HMRC about any of its the transactions, the fact that HMRC never queried Synectiv's business model is of some relevance in determining whether Synectiv should have known that the disputed transactions, which do not appear to stand out from earlier transactions, were connected with fraud.

122. We have discussed at some length those features of the transactions that we consider provide the strongest support for HMRC's case. Before reaching a final conclusion it is important that we put these features together with other features of the transactions, so that our conclusion is based on all the evidence. We have considered many of these other features in our discussion, but it is worth highlighting a few. First, Synectiv had been trading in the sector for some time, and Mr Chandoo was obviously knowledgeable. The contacts he developed with the counterparties were developed in connection with Synectiv's trading operations. This was not a case of being contacted out of the blue by a supplier and customer. Secondly, the phones existed (as confirmed by the inspections arranged by Mr Chandoo) and were actually exported. Thirdly, the volume of units traded was in line with a significant number of earlier transactions that Synectiv had undertaken. Fourthly, the pricing was generally explicable (or at least not clearly questionable), and the profit margins were consistent with those that Synectiv had previously achieved. Fifthly, whilst the credit and other terms that Synectiv agreed with its counterparties do seem somewhat surprising, they must again be seen in the context of the significant number of export transactions that Synectiv had previously undertaken on a similar basis. As was made clear in *Davis & Dann* at [82], determining the normal course of business is important, but the tribunal must consider what is the normal course of the particular trader's business, which may be different from the normal course of business (or even of grey market trading) more generally. Finally, HMRC had at no stage given any specific warning to Synectiv about its wholesale business model or the trades it was conducting, despite significant disclosure to HMRC over a period of several years.

123. When all these features are put together, our conclusion is that HMRC have shown that a reasonable businessman would have concluded that there was a significant risk of fraud, but they have not proved that Synectiv should have known that it actually was taking part in transactions connected to the fraudulent evasion of VAT. Whilst a reasonable businessman would have questioned a number of the features of the disputed transactions, including in particular the failure to cut Synectiv

out of the supply chains and its counterparties' approach to risk, when viewed in the context of Synectiv's trading history the questionable features do not stand out sufficiently for HMRC to succeed.

Disposition

5 124. Accordingly, Synectiv's appeal against the denial of input tax credits in respect of periods 04/06 and 06/06 is allowed.

125. 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.

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**SARAH FALK
TRIBUNAL JUDGE**

RELEASE DATE: 23 FEBRUARY 2018

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APPENDIX: AGREED STATEMENT OF FACTS

The following facts are agreed between the Appellant and the Respondents, with the exception of any errors or omissions.

Introduction

- 5 1. Synectiv Limited ("Synectiv") appealed against the decision of HM Revenue
and Customs ("HMRC"), contained in a letter dated 16 February 2010, which denied
Synectiv's claim for deduction of £1,418,900 input tax. This sum comprised £788,900
incurred in relation to six transactions completed in the VAT accounting period
10 ending 30 April 2006 (04/06) and £630,000 incurred in relation to three transactions
undertaken in the VAT accounting period ending 30 June 2006 (06/06). In reaching
its decision, HMRC asserted that the nine transactions were connected to Missing
Trader Intra-Community ("MTIC") fraud, and that Synectiv knew of that connection.
Alternatively, HMRC contended that Synectiv should have known that the nine
transactions were connected to MTIC fraud.
- 15 2. Following an eight-day hearing in July 2013, written closing submissions and a
final hearing day on 1 October 2013, in a decision released on 22 November 2013, the
First-tier Tribunal ("FTT") concluded that although Synectiv did not know that the
transactions were connected to fraud, it should have known this ("constructive
knowledge").
- 20 3. Synectiv appealed to the Upper Tribunal ("UT") against the decision of FTT. In
allowing Synectiv's appeal, the UT set aside the decision of the FTT in relation to
constructive knowledge, and remitted this matter alone to a newly constituted FTT to
be considered afresh. Among other matters, the UT directed that the parties should
lodge with the FTT a document setting out the agreed facts.

25 **Synectiv - formation and trading activities**

4. Connective (UK) Limited was incorporated on 2 February 1999. On 24 March
1999, it changed its name to Synectiv. Its original director was Kamal Uddin, with
Suraiya Iqbal being the company secretary. Both resigned on 18 November 1999. Arif
Chandoo became a director and company secretary on 16 November 1999. Aqeel Ali
30 was appointed as a director on 16 November 1999 until his resignation on 27
December 2001. Arif Chandoo is the sole director of the company (and for the
avoidance of doubt held this position at the time of transactions in dispute), with his
brother, Asif Chandoo, appointed company secretary on 1 January 2002. At all
material times, the Chandoo brothers are equal shareholders, each owning 500
35 ordinary £1 shares in Synectiv. Asif Chandoo was principally responsible for the
completion of the disputed transactions.

5. In March 1999, an application was made to register Synectiv for VAT with
effect from 8 March 1999. The application form (VAT1), signed by Kamal Uddin on
5 March 1999, stated that:

i) The company intended to make taxable supplies with an estimated turnover of £100,000 in the next 12 months;

ii) There would not be any regular repayments of VAT;

5 iii) The main business activity of the company was the “wholesale and retail of consumer electronics”.

It was not clear from the form whether it was anticipated that there would be any sales or supplies from the European Union.

6. Synectiv was registered for VAT with effect from 8 March 1999. Other than its first VAT return which covered the period from VAT registration until 30 April 1999,
10 all subsequent returns have been made for calendar months, the last being the quarterly return for the period ended 31st March 2017.

7. In its first period of trading ending March 2000, the value of Synectiv's taxable supplies as disclosed on its VAT returns was £16,106,812. In the year ended 31 March 2001, its turnover rose to £36,167,479, increasing to £82,715,372 and
15 £105,882,031 in the years to 31 March 2002 and 2003 respectively, before falling to £16,093,811 in the year ended 31 March 2004. In the year to 31 March 2005, the value of its taxable supplies was £25,840,572. "Taxable supplies" include goods which have been exported and accordingly are zero rated i.e. chargeable to VAT at nil %).

20 8. In its financial accounts to 31 March 2006, Synectiv’s turnover was £41,913,746 analysed as follows (insofar as is material for the purposes of this matter):

Activity	Sales £(000)	Proportion of turnover
Wholesale sales outside EU	20,203	48%
Wholesales sales to EU customers	14,668	35%
Wholesale sales to UK customers	5,635	13%
Retail sales	1,312	3%
Airtime Commission	93	1%

The Appellant’s VAT returns show Synectiv’s turnover as £41,634,331.

25 9. Prior to the transactions which are the subject of this appeal, Synectiv received VAT repayments totalling £14.3m on account of its export sales (including goods despatched to other EU states):

Period to: £

31 March 2000	1,300,782
31 March 2001	2,354,170
31 March 2002	2,875,001
31 March 2003	96,781
31 March 2004	207,417
31 March 2005	1,958,369
31 March 2006	5,511,934
Total	£14,304,454

Repayments relating to the periods 04/04 - 06/04 inclusive, 11/04, 08/05, 01/06 and 02/06 were made "without prejudice to any further action which might be taken by Her Majesty's Revenue and Customs". No further action has been taken by HMRC in relation to these repayments.

- 5 10. In the year immediately prior to the accounting periods which are the subject of the appeal, Synectiv received VAT repayments of £5,511,934 on account of its export sales (including despatches to the other member states), analysed as follows:

Period	£
04/05	304,670
05/05	377,626
06/05	476,353
07/05	489,589
08/05	602,593
09/05	599,847
10/05	414,168
11/05	384,755
12/05	9,679
01/06	431,671
02/06	780,707

03/06 640,274

Total £5,511,934

Operation Venison

11. On 3 November 2001, former directors of Synectiv, Aqeel Ali and Kamal Uddin along with Amjad Baig, were arrested in connection with MTIC fraud. On 7 January 2002, all three were charged with conspiracy to cheat the revenue. On 5 February 2002, Arif Chandoo was arrested and charged with conspiring with Aqeel Ali and others to cheat the Revenue during the period between 16 November 1999 and 4 November 2001. Sandeep Golechha was also charged with the same offence in August 2002. As a result of these enquiries, Synectiv had general awareness of the prevalence of MTIC fraud in the sector.

12. Before the matter proceeded to trial, on 24 June 2005 the presiding judge, Mr Justice Crane stayed the proceedings finding that, as HMRC had repeatedly withheld vital evidence from the defendants, there had been an abuse of process.

13. The withheld evidence pointed to the fact that employees of the freight forwarder Hawks, together with others, were directly involved in the frauds which were the subject matter of the prosecutions under Operation Venison. Following Operation Venison, Synectiv started to use the freight forwarder Interken.

Contact with HMRC

14. On 21st January 2002, a HMRC Senior Investigation Officer wrote to Pannone and Partners regarding the Appellant's claim for VAT repayment of £677,707.83 and HMRC's decision to withhold the same. The letter informed the Appellant that:

- i) Since the arrest of Aqeel Ali, the Appellant's trading activities have been under investigation;
- ii) Evidence had been produced to show that the company had traded directly or indirectly with 'missing traders', who had failed to account for VAT paid to them;
- iii) The evidence of Aqeel Ali's conversation with others demonstrated that he had knowledge of the link to tax losses, although the Appellant's notification of his subsequent resignation was acknowledged;
- iv) It was noted that Asif Chandoo had been the usual signatory of the company's VAT returns;
- v) Any future trading by the company was a commercial decision and entirely a matter for the directors;
- vi) Future VAT returns would be subjected to verification by the Local VAT Office.

15. On 30th January 2002, Pannone and Partners, on behalf of the Appellant, wrote to the Appellant's local VAT office in Wembley referring to the 21st January 2002 letter stating that:

- 5 i) There was no objection from NIS to further trading and exporting. This was a commercial decision for the Appellant therefore the Appellant was to commence exporting as not to do so would force it out of business;
- ii) They had tried to contact the said VAT office on a number of occasions to discuss whether or not additional reassurances or supervision in respect of its exports were required, however, this was without success;
- 10 iii) In the absence of such discussion, it was proposed that the Appellant copy the VAT office in on each individual transaction.

On 31 January 2002, Synectiv's solicitors were advised by Wembley VAT office that the company should clear all new suppliers and customers through the Wembley VAT office, including European traders, and provide it with the deal sheets relating to
15 exports.

16. Between 4 May 2001 and 30 January 2002 Synectiv made 13 telephone calls to HMRC's National Advice Service ("NAS") to validate VAT numbers of prospective and actual counterparties.

17. Following the correspondence between HMRC and Synectiv's solicitors on 12
20 February 2002, Arif Chandoo telephoned HMRC's Wembley office regarding the procedure for clearing new suppliers. He was advised to fax details of transactions to the office, and if confirmation was required, this would be done by fax or letter depending on the urgency.

18. Thereafter two calls were made to the NAS to verify VAT numbers on 26
25 February and 25 March 2002.

19. On 4 April 2002 HMRC's Wembley office requested that Synectiv contact it to verify all suppliers and customers before trading with them for the first time and to provide copies of monthly sales and purchase lists by the 5th of each month. Synectiv were requested to supply an up-to-date list of VAT numbers of all of its customers
30 and suppliers, and the letter warned that:

- i) Confirmation of the validity of a VAT number was not to be regarded as an authorisation by HMRC for Synectiv to enter into any commercial transaction with any trader;
- ii) Synectiv could use the national VAT advice centre number for any general
35 VAT/Intrastat queries. It should not contact the Wembley VAT office to validate VAT numbers.

The list of the VAT numbers of Synectiv's trading parties was supplied to HMRC.

20. Between 5 April 2001 and 16 January 2003, Synectiv telephoned the NAS a further seven times to validate VAT numbers of various companies.

21. On 7 October 2002, HMRC wrote to Synectiv concerning the “ongoing problems with businesses in [Synectiv’s] trade sector” and requesting that VAT numbers be validated via HMRC’s Dorset office with effect from 1 October 2002.

22. On 14 April 2003, HMRC wrote to Synectiv as “a trader who deals in the buying and selling of mobile phones/CPUs/Memory and other similar goods from the European Community and/or from within the United Kingdom” to bring its attention to the Budget Notices CE14 – Extension of Security Powers, CE 15 – A New Joint and Several Liability Provisions and CE17 – Evidence for Input Deduction which had been published following the 2003 Budget. Copies of the Notices were enclosed with the letter.

23. On 28 July 2003, HMRC wrote to Synectiv explaining that HMRC were experiencing problems in Synectiv’s trade sector. It stated that:

i) Missing Trader Intra-Community (MTIC) VAT fraud constitutes one of the most costly current forms of VAT fraud within the EU. It is a serious problem for the UK and is Customs’ top VAT fraud priority;

ii) Amongst the commodities regularly involved are computer chips and mobile phones, and VAT loss from this type of fraud in the UK alone is between £1.7 and £2.6 billion per annum.

The letter informed Synectiv that it should, from 4 August 2003, verify the VAT status of new or potential customers/suppliers with HMRC’s Redhill office and provide the following information:

- i) The name of the new or potential customer/supplier;
- ii) Their VAT registration number;
- iii) Their contact numbers (including telephone number, fax number, e-mail address and mobile numbers if known);
- iv) The Directors and/or responsible members;
- v) Whether they were buying or selling goods;
- vi) The nature of the goods;
- vii) The quantities of the goods;
- viii) The value of the goods;
- ix) Their bank sort code and account number;

xi) A request to forward to the trader's local VAT office, on a monthly basis, a purchase and sales list with identifying VAT registration numbers against the suppliers/customers.

24. On 1 December 2005, HMRC wrote to Synectiv in the following terms:

5 i) The Appellant was a trader who submitted VAT returns in which it declared a VAT repayment due to it;

ii) HMRC was empowered to make checks to satisfy themselves that claims were legitimate and accurate;

10 iii) In order to assist HMRC to make reasonable enquiries into VAT repayment claims, it would be beneficial when Synectiv submitted VAT returns that it furnish copies of the following business records in support of its declared figures:

(a) Copies of a detailed VAT summary for the period;

(b) Copies of all export sales invoices;

(c) Copies of all purchase invoices relating to export sales;

15 (d) Copies of all credit notes;

(e) Copies of all banking remittance slips relating to these sales, purchases and credit notes;

(f) Copies of all bank statements for the period;

20 (g) Export documentation, including shipping documents, ferry tickets, release notes and airway bills;

(h) Export entry declarations forms for non-EU exports.

iv) The documentation requested would assist HMRC to verify who had legal title to the transacted goods, that the transaction had taken place and that the transaction related to the goods physically exported;

25 v) If Synectiv was trading in a commodity, it should be able to provide details regarding the traded goods such as serial numbers, part numbers, batch numbers, product details, quantity, price per unit, what market research it carried out, name of manufacturer, website address, contact name and name of the authorised distributor.

30 25. Synectiv supplied in full the information and documents requested by HMRC during the period February 2002 to July 2006, with HMRC officers visiting Synectiv's offices regularly to collect the material and make enquiries.

26. Given its contact with HMRC, Synectiv acknowledges that it was aware of the prevalence of MTIC fraud in the sector.

27. There is no evidence that since the implementation of the procedures agreed with HMRC officers in January 2002 until the decision letter issued in February 2010, Synectiv was ever notified by HMRC that any of its deals had been traced to tax losses.

5 28. Similarly - as far as it is aware - Synectiv has never been advised by HMRC that traders which had been allocated VAT numbers which Synectiv had previously sought to verify, had been deregistered.

Secondary market in mobile phone handsets

10 29. The Respondents acknowledge that the wholesale secondary market in mobile phone handsets and other electronic goods was, and is, a legitimate trading platform where genuine transactions take place. A very significant number of handsets are supplied around the world through various different distribution channels of which the secondary market is a very significant part. There is a primary market in which handsets are supplied by manufacturers to authorised distributors which service, for
15 example, retail chains.

30. The secondary market arose to deal with the over and under supply of, mainly, mobile phone handsets and to effectively redistribute them to wherever in the world there was a demand.

Input tax incurred in accounting periods 04/06 and 06/06⁵

20 31. In its 04/06 VAT accounting period, Synectiv incurred input tax on 15 transactions of which 6 are the subject of this appeal, with input tax allowed on the remaining 9 transactions comprising:

25 i) Three transactions relating to MP3 players (5 MP3 players in relation to one transaction and 10 MP3 players in relation to the other two transactions) transferred from Synectiv's retail business;

ii) Four wholesale transactions involving the sale of handsets to UK customers, i.e. buffer deals; and

iii) Two wholesale transactions where its customers were UK traders where the subject matter was game consoles (500 in the first transaction and 265 in the second).

30 32. The six wholesale transactions involving the sale of exported handsets on which Synectiv was denied input tax were⁶:

Deal	Synectiv's counterparties	Product	Units
A10	Top Telecoms Limited URTB Sarl	Nokia N90	4,000

⁵ Incorrectly read 04/04 and 06/04 in the original

⁶ Definitions added in this table.

	("Top Telecoms")	("URTB") ⁷		
A11	The Export Company (UK) Limited ("TEC")	URTB	Nokia N70	4,000
A12	Broadcast Limited ("Broadcast")	GSM Touch BV ("GSM Touch") ⁸	Sony Ericsson W810i	4,000
A13	Broadcast	GSM Touch	Nokia 9300i	2,000
A14	Owl Limited ("Owl")	URTB	Nokia N70	2,000
A15	Top Telecoms	URTB	Nokia 9500	2,000

33. The composition of these deal chains has been identified by HMRC as:

A10	A11	A12	A13	A14	A15
			Macdelta	Macdelta	
Computec	Colston	Colston	Colston	SS Enterprises	Computec
Zenith	Park	Daraj	Daraj	Park	Zenith
Regal	Excell	Excell	Excell	Maxwell ⁹ /Excell	Regal
JD Group	Tibuski	Xcel	Xcel	Xcel	JD Group
TEC	TEC	Futuristic	Fortwell	Grovner	TEC
Top Telecoms	Synectiv	Fortwell	Broadcast	Owl	Top Telecoms
Synectiv	URTB	Broadcast	Synectiv	Synectiv	Synectiv
URTB		Synectiv	GSM	URTB	URTB

⁷ Established and VAT registered in France

⁸ A company established and VAT registered in the Netherlands

⁹ According to some of the deal documents, Excell is the trader at this point in the supply chain. However, other deal documents indicate it was Maxwell. Both Maxwell and Excell raised purchase orders and invoices for the goods, and were also both parties to supplier declarations with regard to the purchase and sale of the goods. They both issued instructions purporting to release the goods too, and Xcel raised purchase orders in favour of both. However, Park only issued an invoice, and payment instructions, to Maxwell. Moreover, it instructed Interken to release the goods to Maxwell.

			Touch		
		GSM Touch			

It is acknowledged that Synectiv was neither aware, nor - if it had cause to do so - were there practical measures which it could have undertaken to establish the composition of the supply chains beyond its immediate counterparties.

- 5 34. The transactions in dispute have been traced by the Respondents to the following traders which defaulted on their obligations to account for output tax and were connected to the fraudulent evasion of VAT:

Deal	Identified defaulter
A10	Computec Solutions Limited
A11	Colston Associates Limited
A12	Colston Associates Limited
A13	Colston Associates Limited
A14	SS Enterprises Limited
A15	Computec Solutions Limited

- 10 35. Synectiv does not take issue with the evidence adduced by the Respondents to the effect that:

- i) the tax losses identified were due to fraudulent evasion; and
- ii) the transactions concluded by Synectiv were connected to the fraudulent evasion of VAT.

- 15 36. In its 06/06 VAT accounting period, Synectiv incurred input tax on seven transactions of which three are the subject of this appeal, with input tax allowed on the remaining transactions:

- i) One transaction relating to a MP3 player sold to a UK trader;
- ii) Two wholesale transactions involving the sale of handsets to UK customers;
- iii) One wholesale transaction concerning handsets exported to Dubai.

- 20 37. The three wholesale transactions which are the subject of this appeal are:

Deal	Counterparties		Product	Units
J2	Owl Limited	Evolution Sarl	Nokia N91	3,000
J3	The Export Company Limited	URTB Sarl	Nokia N80	4,000
J5	Broadcast Limited	GSM Touch BV	Nokia 8800	3,000

38. The composition of these deal chains has been identified by HMRC as:

J2	J3	J5
Udeil	Premisten	Universal
Novafone	Knightswood	Atlantic
Performance	FoneFingz	AW
HSB	Sundial	HSB
Owl	Microchoice	Xcel
Synectiv	Mana	Broadcast
Evolution ¹⁰	TEC	Synectiv
	Synectiv	GSM Touch
	URTB	

- 5 It is acknowledged that beyond its immediate counterparties, Synectiv was neither aware, nor - if it had cause to do so - were there practical measures which it should have undertaken to establish the composition of the supply chains.

¹⁰ Evolution Sarl, a company established and VAT registered in France.

39. The transactions in dispute were traced by the Respondents to the following traders which defaulted on their obligations to account for output tax and were connected to the fraudulent evasion of VAT:

Deal	Identified defaulter
J2	Udiel Solutions Limited
J3	Knightswood Limited
J5	Universal Appliances Limited

5 40. In relation to the above deals Synectiv does not take issue with the evidence adduced by the Respondents to the effect that:

- i) the tax losses identified were due to fraudulent evasion; and
- ii) the transactions concluded by Synectiv were connected to the fraudulent evasion of VAT.

10 **Details of transactions**

Deal A10

15 41. Synectiv sold 4,000 Nokia N90s to the value of £1,138,000 to a French company URTB Sarl (“URTB”). Synectiv acquired the phones from Top Telecoms Limited at a cost of £1,222,000 (inclusive of VAT of £182,000), with invoices issued by both Synectiv and its supplier dated 25 April 2006. The gross profit on the transaction was 9.42% (£98,000). The profit net of freight and insurance charges was £90,740.

42. The documents held by the Appellant show:

20 i) The purchase order issued by Synectiv to Top Telecoms on 25 April 2006 described the stock to be supplied i.e. Nokia N90, Central Euro specification, 2 pin chargers, 5 in a box, Full Euro warranty card i.e. the card to be completed by the final consumer and returned to the manufacturer to effect the manufacturer's warranty, to be delivered FOB London at Interken on 25/4/2006, with payment to be made by TT subject to satisfactory inspection. The sale was stated to be subject to the following conditions - among others:

25

- (a) Payment by Synectiv had to be refunded immediately if the goods were not released by Top Telecom on 25/4/2006;
- (b) The stock was "standard manufacturers' specification";
- (c) The product had to be released to Synectiv prior to payment;

(d) Payment was subject to an IMEI scan;

(e) No Customs markings on boxes.

Top Telecoms declared that it had verified with HMRC that its supplier's VAT registration number was valid;

5 ii) On 25 April, Top Telecoms issued a proforma invoice to supply 4000 Nokia N90 GSM phones, SIM Free, Central European specification, delivery at Interken subject to the requirement that the goods should be inspected before collection. In the same terms and on the same day, Top Telecom issued a VAT invoice addressed to Synectiv to the value of £1,222,000, inclusive of VAT £182,000.

10 iii) Again on 25 April, Synectiv issued a proforma invoice addressed to David Suarez at URTB to the effect that URTB had agreed to purchase 4000 Nokia N90 handsets, Central European specification with 2 pin chargers and each box to contain 5 handsets. Synectiv agreed to deliver the product to AFI Logistique on 26 April. URTB was required to make payment electronically after inspection of the good, with
15 title to them to pass to URTB after Synectiv had been paid in full. In the same terms and on the same day, Synectiv issued an invoice to URTB for £1,138,000, bearing URTB's VAT number;

iv) On 25 April, Synectiv sent faxes to the Redhill VAT office requesting that
20 HMRC firstly, validate the VAT numbers of Top Telecoms and URTB and secondly, to validate all the companies in the supply chain of this stock. The faxes set out the details of the product transacted, the agreed consideration, place of delivery and details of its counterparties i.e. their addresses, directors and contact telephone and fax numbers. On 26 & 27 April, HMRC confirmed the number allocated to URTB and Top Telecoms respectively, subject to the rider: "This confirmation is not to be
25 regarded as an authorisation by this Department for you to enter into commercial transactions with this trader and any input tax claims may be subject to subsequent verification."

v) Interken was instructed to inspect the stock with the inspection undertaken by NK Ltd as Interken's agent. The inspection report issued on 28 April disclosed:

- 30
- 100% inspection was undertaken;
 - There was no sign of inner box packaging marks or tampering;
 - Inner box security seals were stated to be original;
 - 2 pin charger;
 - the language of the handsets was English, French, German, Portuguese, Spanish
35 and Italian;
 - English manual;

- No network;
- Colour of handsets: pearl black;
- Origin: Finland.

5 A copy of the report was forwarded to URTB. Interken's charge for the inspection of these handsets and those relating to deal A11 was £1,200 as reflected on its invoice dated 3 May 2006¹¹;

vi) On 28 April 2006 Synectiv instructed Interken to "ship on hold" the goods to AFI Logistique, Roissy¹²;

10 vii) The goods were shipped by Interken on 28 April 2006, and received by AFI on 29 April;

viii) The transit of the goods was insured for £1,040,000 (representing the cost of the goods, net of VAT) through the insurance brokers Abbot & Bramell Ltd under a policy underwritten by Winterthur Swiss Insurance Company. The premium for this cover was £3,120 debited to the company's credit card¹³;

15 ix) On 8 May 2006 URTB made two payments totalling £1,138,000 (gross of charges) from a FCIB account into Synectiv's account with Barclays Bank, with Synectiv on the same day making payments totalling £1,222,000 into Top Telecoms' Barclays Bank account.

20 x) Following settlement of the sums due to it, the goods were released by Synectiv to URTB on 8 May 2006.

43. The flow of funds in relation to this deal has been have been identified as:

25 i) TEC paid JD for the 4000 Nokia N90 on the 8 May. The funds then moved up the supply chain on the same day, through the accounts of JD, Regal, Zenith (in fact an account in the name of Zenith Electronics, registered in the Netherlands, not the UK trader Zenith Sports Limited), and Computec; each trader using the funds received to make the onward payment, less its respective profit margin. Computec paid the funds, minus its margin, to Megatec Sarl, based in France ("Megatec");

30 ii) Funds then passed in sequence through the accounts of UAB Linis, based in Lithuania ("UAB"), Mortop Global Limited, based in Israel ("Mortop") and Amex FHU based in Poland ("Amex") to URTB, again on 8 May, with each trader retaining a margin;

¹¹ Tribunal note: it was not disputed at the hearing that this charge, and other inspection fees charged by Interken, were paid by Synectiv.

¹² Tribunal note: France.

¹³ Tribunal note: this (and similar references below) is understood to refer to Synectiv's credit card. It was not disputed that Synectiv bore the cost of insurance in each case.

iii) URTB used these monies to pay Synectiv. The monies had been transmitted from TEC through the accounts of nine other traders to Synectiv in about 90 minutes;

iv) Upon receipt of these monies, the Synectiv paid its supplier Top Telecoms, together with the output tax charged, payment being made into a Barclays account.

5 These payments also took place on 8th May;

v) On the same day, Top Telecoms made a payment of £430,650 to TEC from its FCIB account, apparently in part payment for the first 2000 units. On 11th May, it made a further payment to TEC of £535,000, apparently in part payment for the remaining 2000.

10 Details of the flow of funds were secured by HMRC on the release of the data by the Dutch and French authorities. Other than payments made to, and by Synectiv it had no knowledge of this evidence nor could it have secured had it cause to make further enquiries.

Deal A11

15 44. On 25 April URTB agreed to purchase 4,000 Nokia N70s from Synectiv for £938,000; Synectiv having acquired the stock from The Export Company Limited ("TEC") for £1,010,500 (inclusive of VAT of £150,500). The gross profit on the transaction was 9.07% (£78,000). The profit net of freight and insurance charges was £72,220. The deal documents substantially reflect those detailed in paragraph 42, with
20 the following differences:

i) Description of product to be supplied by Synectiv: 4,000 Nokia N70, Central Euro Spec, 2 pin chargers, boxes of 5 handsets. The date of URTB's purchase order to Synectiv, and Synectiv's invoice to URTB was 25th April 2006;

25 ii) Delivery terms and passing of title - Synectiv: CIF France, AFI Logistique; title to pass on payment in full by URTB;

iii) Description of product to be supplied by TEC: 4,000 Nokia N70, Central European, SIM free, boxed. Date of Synectiv's purchase order to TEC and TEC's invoice to Synectiv was 25th April;

30 iv) Synectiv's purchase order and the rest of the deal documents are silent as to the presence of a warranty and its terms;

v) On 25 April Synectiv requested HMRC to verify the VAT numbers of its counterparties, with HMRC confirming them on the following day. On 25th April TEC instructed Interken to release the goods to Synectiv;

35 vi) On 28 April the stock was inspected by NK, with its report disclosing the colour of the handsets to be silver black;

vii) On 28 April Synectiv instructed Interken to ship the stock on hold to AFI Logistique, Roissy for delivery on 29 April;

viii) On 28 April the goods were removed from the UK;

ix) The goods were insured at cost, net of VAT for £860,000 with the premiums of £2,580 debited to the company's credit card;

5 x) Payment of £938,000 by URTB was credited to Synectiv's Barclays Bank account on 12 May 2006;

xi) Two equal payments totalling £1,010,500 were made by Synectiv on 15 May 2006 into TEC's Clydesdale Bank account;

xii) Synectiv instructed Interken to release the stock to URTB on 12 May 2006.

45. The flow of funds in relation to this deal has been have been identified as:

10 i) UAB made a payment of £948,000 to Mortop on the 12 May in respect of 4000 Nokia N70;

ii) On the same day, Mortop made a payment to Amex of £2,255,000 with a payment narrative of "invoices 11/5";

iii) Amex then paid £940,000 to URTB for "4,000 Nokia n70";

15 iv) On 12 May 2006, URTB paid £938,000 into Synectiv's Barclays Bank account. It took under one hour for the monies to be transmitted from the account of UAB, through Mortop, Amex and URTB, into the account of Synectiv;

20 v) On 15 May, Synectiv paid TEC for the goods, plus the output tax, in two instalments of £505,250, from its Barclays account to a Clydesdale bank account in the name of TEC;

vi) The next day, TEC paid Tibuski for the goods from its FCIB account, and Tibuski paid Excell;

25 vii) Excell, however, did not make a payment to its supplier Park but, on Park's written instructions, paid Macdelta £997,250, inclusive of a deposit of £148,650, bypassing Park's supplier Colston.

viii) Macdelta paid £984,700 to UAB on 16 May, retaining £12,550. The monies took about one hour to pass through the accounts from TEC to UAB on 16th May.

Deal A12

30 46. On 26 April 2006 Synectiv agreed to sell 4,000 Sony Ericsson W810is to a Dutch company GSM Touch BV ("GSM") at a gross profit of £90,000 (9%). The profit net of freight charges and insurance was £83,800. It purchased the stock on the same day from Broadcast Limited for £1,175,000 (inclusive of VAT of £175,000). The deal documents substantially reflect those detailed in paragraph 42, with the following differences:

- i) Description of product to be supplied by Synectiv: 4,000 Sony Ericson W80i, Central Euro Spec, 2 pin chargers, Satin Black;
- ii) Delivery terms and passing of title - Synectiv: CIF Schiphol, JCT Logistics; title to pass on payment in full by GSM;
- 5 iii) Synectiv's purchase order and the rest of the deal documents are silent as to the presence of a warranty and its terms;
- iv) On 26 April Synectiv requested HMRC to verify the VAT numbers of its counterparties, with HMRC confirming them on 28 April:
- v) On 26 April the stock was inspected by NK, with its report disclosing the colour of the handsets to be satin black and the phone languages to be English, French, Arabic and Persian, with the origin of the phones stated as Malaysia. On 11 May 2006 Interken invoiced Synectiv £600 for the inspection;
- 10 vi) On 26 April Synectiv instructed Interken to ship the stock on hold to JCT Logistics, Schiphol¹⁴ for delivery on 27 April;
- 15 vii) the goods left the UK on 26 April 2006;
- viii) the goods were insured at cost, net of VAT for £1 million, with the premiums of £3,000 debited to the company's credit card;
- ix) Payment of £1,090,000 by GSM was credited to Synectiv's Barclays Bank account on 16 May 2006.
- 20 x) On 17 May Synectiv made two payments into Broadcast's FCIB Account in settlement of the sum due to it;
- xi) On 16 May Synectiv released the stock to GSM
47. The flow of funds in relation to this deal has been have been identified as:
- i) On 15 May 2006, Macdelta made a payment of £1.1 million to Brandsite Market SI ("Brandsite"). This payment related to 4,000 Sony Ericsson W810i. Brandsite paid GSM £1,098,000 within minutes;
- 25 ii) On 16 May, GSM paid the Appellant the sum invoiced for the goods from the funds received from Brandsite, making a margin of £8,000;
- iii) On 17 May, Synectiv made two payments totalling £1,225,337 into the FCIB account of Broadcast, with the second payment of £344,087 including £50,337 relating to the supply by Broadcast of a consignment of iPods. The funds can then be traced through the accounts of Broadcast, Fortwell, Futuristic, and Xcel into the
- 30

¹⁴ Tribunal note: Netherlands.

account of Excell. These payments all took place in succession on the 17th of May, with each trader, save for Fortwell, deducting a margin;

5 iv) On 17 May, Excell did not make a payment to its supplier Daraj, but instead paid £1,154,350, i.e. less a commission to Macdelta. The monies were transferred from Broadcast, through four other traders before entering the account of Macdelta, in just over an hour;

10 v) Colston had issued written instructions that payment was to be made directly to Macdelta, save for a small commission of £3,730 to be paid to it. Similar instructions were passed on by Daraj to Excell. In addition, Daraj instructed Excell to pay £171,750 as a "deposit" to Macdelta. The "deposit" represented VAT payable (£172,725) on the supply by Daraj to Excell, less the VAT chargeable on the VAT inclusive commission of £5,375 (VAT £940.63) due to Daraj.

Deal A13

15 48. GSM agreed to purchase 2,000 Nokia 9300is from Synectiv on 27 April 2006. Synectiv, which made a gross profit of £52,000 (8.97%) on the transaction, had acquired the product from Broadcast for the VAT inclusive sum of £681,500 on the same day. The profit net of freight and insurance was £47,360. The deal documents substantially reflect those detailed in paragraph 42, with the following differences:

20 i) Description of product to be supplied by Synectiv: 2,000 Nokia 9300i, Central Euro Spec, 2 pin chargers, boxes of 5 units;

ii) Delivery terms and passing of title - Synectiv: CIF Schiphol, JCT Logistics; title to pass on payment in full by GSM;

iii) On 28 April Synectiv requested HMRC to verify the VAT numbers of its counterparties, with HMRC confirming them on the same day;

25 iv) On 2 May the stock was inspected by NK, with its report disclosing the colour of the handsets to be grey and the phone languages to be English and Dutch. Interken invoiced Synectiv £300 on 3 May for its inspection services;

v) On 26 April Synectiv instructed Interken to ship the stock on hold to JCT Logistics, Schiphol for delivery on 29 April;

30 vi) the goods left the UK on 4 May 2006;

vii) the goods were insured at cost, net of VAT for £580,000, with the premium of £1,740 debited to the company's credit card;

viii) Payment of £632,000 by GSM was credited to Synectiv's Barclays Bank account on 12 May 2006.

35 ix) On 15 May Synectiv paid £681,500 into Broadcast's FCIB Account;

x) On 12 May Synectiv instructed Interken to release the stock to GSM.

49. The flow of funds in relation to this deal has been have been identified as:

5 i) On 11 May 2006, Macdelta made a payment of £637,000 to a UK trader Fluid Trading in relation to 2000 Nokia 9300i. On the same day, Fluid transferred all but £1,000 of the funds to GSM within 12 minutes;

ii) On 12 May 2006, GSM paid Synectiv £632,000 in settlement of its supply;

10 iii) On 15 May, Synectiv paid its supplier, Broadcast; making the payment from its Barclays account into the FCIB account of Broadcast. The funds were traced up the supply line through the accounts of Broadcast, Fortwell, and Xcel into the account of Excell, all the payments made within 45 minutes on 15 May;

iv) Excell did not make a payment to its supplier, Daraj, but instead on 15 May within minutes of receipt paid £672,300 to Macdelta.

Deal A14

15 50. Synectiv agreed to sell 2,000 Nokia N70s to URTB on 27 April 2006 making a gross profit of £39,000 (9.06%). The profit net of freight and insurance costs was £35,010. It acquired the goods from Owl Limited (“Owl”) at a cost of £505,250, inclusive of VAT under an invoice dated 28 April 2006. The deal documents substantially reflect those detailed in paragraph 45¹⁵, with the following differences:

20 i) Description of product to be supplied by Synectiv: 2,000 Nokia N70, Central Euro Spec, 2 pin chargers, boxes of 5 units;

ii) Delivery terms and passing of title - Synectiv: CIF France, AFI Logistique; title to pass on payment in full by URTB;

25 iii) Owl's invoice dated 28 April 2006 stated that payment was due on receipt of invoice, with Synectiv's purchase order addressed to Bobby Sharma of Owl requiring that the stock be released to Synectiv prior to payment and further that if goods were not released on 27 April 2006, money must be refunded immediately;

iv) Synectiv's purchase order and the rest of the deal documents are silent as to the presence of a warranty and its terms;

30 v) On 27 April Synectiv requested HMRC to verify the VAT numbers of its counterparties, with HMRC confirming them on the following day:

vi) On 2 May the stock was inspected by NK, with its report disclosing the colour of the handsets to be silver black. On 11 May Interken invoiced Synectiv for the inspection services;

¹⁵ Tribunal note: this should refer to paragraph 42.

vii) On 28 April Synectiv instructed Interken to ship the stock on hold to AFI Logistique, Roissy for delivery on 29 April;

viii) the goods left the UK on - it appears - 5 May 2006;

5 ix) the goods were insured at cost, net of VAT for £430,000, with the premium of £1,290 debited to the company's credit card;

x) Payment of £469,000 by URTB was credited to Synectiv's Barclays Bank account on 9 May 2006.

xi) On 10 May Synectiv transferred £505,250 to Owl's FCIB Account;

xii) On 9 May Synectiv released the stock to URTB.

10 51. The flow of funds in relation to this deal has been have been identified as:

i) URTB paid into Synectiv's Barclays Bank account the invoiced amount on 9 May 2006;

ii) On 10 May 2006, the Appellant paid its supplier Owl.

15 iii) On 9 May, Owl paid Grovner £488,200 and the balance due of £10,000 was paid on 10 May 2006;

iv) the funds were then be traced through the accounts of Grovner and Xcel and into the account of Excell, all on 12th May;

20 v) Excell did not pay Park its supplier, but instead paid £491,575 directly to Macdelta, retaining £2,512.50. The monies reached the account of Macdelta within 33 minutes of leaving the account of Grovner.

25 vi) Macdelta had issued a written instruction to SS, the acquiring trader at the beginning of the UK supply chain, to pay £418,300 to Macdelta's FCIB account. Both SS and Park issued payment instructions to pay to Macdelta directly £73,275 (described as a "deposit" to secure the stock) and £491,575. The "deposit" substantially reflects the output tax which SS should have remitted to the Revenue.

Deal A15

30 52. On 28 April 2006 Synectiv sold 2,000 Nokia 9500s to URTB at a gross profit of £57,000 or 9.53%. The profit net of freight and insurance costs was £52,506. It had purchased the phones from Top Telecoms for £702,650, inclusive of VAT of £104,650) on the same day. The deal documents substantially reflect those detailed in paragraph 45¹⁶, with the following differences:

¹⁶ See previous footnote.

- 5 i) Description of product to be supplied to Synectiv by Top Telecoms as per its proforma invoice: 2,000 Nokia 9500, GSM phone, Sim free, Central Euro Spec, with Synectiv's purchase order substantially reflecting these details, with the exception of references to GSM phone and Sim free and, in addition, requiring 2 pin chargers and full Euro warranty card;
- ii) Delivery terms and passing of title to URTB: CIF France, AFI Logistique; title to pass on payment in full by URTB;
- iii) On 28 April Synectiv requested HMRC to verify the VAT numbers of its counterparties, with HMRC confirming them on the same day:
- 10 iv) On 28 April Synectiv instructed Interken to ship the stock on hold to AFI Logistique, Roissy for delivery on 29 April;
- v) On 16 May 2006 Interken invoiced Synectiv £300 for its inspection services;
- vi) the goods left the UK on 5 May 2006;
- 15 vii) the goods were insured at cost, net of VAT, for £598,000, with the premium of £1,794 debited to the company's credit card;
- viii) Payment of £655,000 by URTB was credited to Synectiv's Barclays Bank account on 10 May 2006.
- ix) On 10 May Synectiv transferred £702,650 to Top Telecoms' Barclays Bank account;
- 20 x) On 10 May Synectiv instructed Interken to release the stock to URTB
53. The flow of funds in relation to this deal has been have been identified as:
- i) On 9 May 2006, TEC paid the invoiced amount to JD. The funds then passed up the supply chain, on the same day, through the accounts of Regal, Zenith and Computec, each party paying the invoiced amount;
- 25 ii) Computec then paid £695,012.50 to Megatek on 9 May, retaining £1,762.50. On the same day, the funds moved through the accounts of UAB, Mortop, and Amex to URTB. Each party retained a small commission, save for UAB Linis which retained over £30,000. The monies passed from the account of TEC, through the accounts of eight traders and into the account of URTB in the space of just over 1 ¾ hours;
- 30 iii) On 10 May, URTB transferred £655,000 to Synectiv's Barclays Bank account, with Synectiv making a payment of £702,650 on the same day into Top Telecoms Barclays Bank Account;
- iv) There is no available evidence to show any onward payment by Top Telecoms.

Deal J2

54. On 7 June 2006 Synectiv sold 3,000 Nokia N91s to French company Evolution Sarl ("Evolution") making a gross profit of £85,500 or 9.04%. The profit net of freight and insurance costs was £79,665. This was Synectiv's first transaction with Evolution having acquired the phones from Owl at a cost of £1,110,375, inclusive of VAT of £165,375 on the same day. The deal documents substantially reflect those detailed in paragraph 42, with the following differences:

- i) Description of product to be supplied by Synectiv: 3,000 Nokia N91, Central Euro Spec, 2 pin chargers, boxes of 5 units;
- ii) Delivery terms and passing of title - Synectiv: CIF France, AFI Logistique, goods to be delivered on 8 June 2006; title to pass on payment in full by Evolution;
- iii) Owl's invoice dated 7 June 2006 stated that payment was due on receipt of invoice, with Synectiv's purchase order addressed to Bobby Sharma of Owl requiring that the stock to be released to Synectiv on 7 June or money must be refunded immediately. It further stated that stock must be released to Synectiv prior to payment;
- iv) Synectiv's purchase order and the rest of the deal documents are silent as to the presence of a warranty and its terms;
- v) On 7 June Synectiv requested HMRC to verify the VAT numbers of its counterparties, with HMRC confirming them on the following day;
- vi) On 7 June the stock was inspected by NK, with its report disclosing the colour of the handsets to be country variant;
- vii) On 7 June Synectiv instructed Interken to ship the stock on hold to AFI Logistique, Roissy;
- viii) the goods left the UK on 7 June;
- ix) the goods were insured at cost, net of VAT for £945,000, with the premium of £2,835 debited to the company's credit card;
- x) Payment of £1,030,500 by Evolution was credited to Synectiv's Barclays Bank account on 12 June.
- xi) On 12 and 13 June Synectiv transferred £1,110,375 to Owl's FCIB Account;
- xii) On 12 June Synectiv instructed Interken to release the stock to Evolution

55. The flow of funds in relation to this deal has been have been identified as:

- i) On 9th June 2006, Owl paid the invoiced amount to HSB, and HSB in turn paid Performance;

ii) Performance did not pay its supplier, but instead on 9 June transferred £1,087,950 to the FCIB account of Macdelta on the basis of a payment instruction issued by Novafone to Performance to the effect that £1,087,950 be paid to Macdelta, and £3,918.75 to Novafone. The payment instruction issued by Novafone essentially mirrored one issued by Udeil to Novafone to pay £1,087,950 (including a deposit of £162,000) to Macdelta and £2,685 to Udeil;

iii) On 9 June Macdelta transferred £1,050,000 (the payment narrative being "(M) N8800-2500 MK-7-6" which on the face of it differs from the product which was the subject of this deal) into the account of Maktrim, based in Poland. On the same day, Markin transferred £1,045,500 to Dantec (again the payment narrative refers to "2500 8800"), based in Spain. The funds moved from Owl, through the intermediary accounts, to Dantec in less than 1½ hours.

iv) On 12 June Dantac transferred £1,033,500 to Evolution, ostensibly as payment for the 3,000 Nokia N91 which were the subject of this deal. Within 15 minutes, Evolution transferred the invoiced amount (£1,030,500) to Synectiv;

v) On 12 and 13 June 2006, the Appellant settled its liability to its supplier Owl.

Deal J3

56. On 8 June 2006 URTB agreed to purchase 4,000 Nokia N80s from Synectiv at a cost of £1,308,000. The stock was acquired from TEC on the same day at a cost of £1.2 million, plus VAT of £210,000. The gross profit earned on the deal was £108,000 (9%). The profit net of freight and insurance costs was £99,400. The deal documents substantially reflect those detailed in paragraph 45¹⁷, with the following differences:

i) Description of product to be supplied by Synectiv: 4,000 Nokia N80, Central Euro Spec, 2 pin chargers, boxes of 5 units;

ii) Delivery terms and passing of title - Synectiv: CIF France, AFI Logistique; title to pass on payment in full by URTB;

iii) Synectiv's purchase order and the rest of the deal documents are silent as to the presence of a warranty and its terms;

iv) On 8 June Synectiv requested HMRC to verify the VAT numbers of its counterparties, with HMRC confirming them on the following day:

v) On 12 June the stock was inspected by NK, with its report disclosing the colour of the handsets to be country variant;

vi) On 9 June Synectiv instructed Interken to ship the stock on hold to AFI Logistique, Roissy, with the goods to be delivered on 13 June;

¹⁷ See previous footnote.

- vii) the goods left the UK on 12 June;
- viii) the goods were insured at cost, net of VAT for £1.2 million, with the premium of £3,600 debited to the company's credit card;
- ix) Payment of £1,308,000 by URTB was credited to Synectiv's Barclays Bank account on 12 June.
- x) On 12 and 13 June Synectiv made two payments of £705,000 to TEC's Clydesdale Bank account;
- xi) On 13 June Synectiv instructed Interken to release the goods to URTB.

57. The flow of funds in relation to this deal has been have been identified as:

- i) On 9 June 2006, UAB made a payment of £1.318 million to Mortop, with a payment narrative "4000xN80". Mortop in turn transferred £1.325 million to Amex, with Amex making an onward transfer of £1.312 million to URTB, with the payment narrative in respect of both of these transfers not referring to identifiable supplies, but limited to "invoice";
- ii) On 12 June, URTB paid Synectiv £1,308,000 for the invoiced goods from the monies received from Amex, with the FCIB payment narrative not identifying the stock transacted;
- iii) On 12 and 13 June, Synectiv made two payments of £705,000 to TEC's Clydesdale Bank account in full settlement of its liability;
- iv) The funds then passed up the supply chain on 14 June through the accounts of TEC, Mana, Microchoice (the total payments by Microchoice to Sundial disclose a shortfall of £800.50 on the invoiced goods) and Sundial;
- v) Sundial, on the basis of a payment instruction relayed to it by its supplier Fonefingz, on 14 June made three payments totalling £1,384,720 to Intertech, rather than its supplier, which in turn paid £1,389,720 to UAB. The monies passed through these accounts from TEC on 14th June in the space of 2 hours.
- vi) Premisten, the Estonian supplier to the defaulter Knightswood, had issued written instructions to "all parties concerned" that payments of £1,384,720 and £16,115 should be made to Intertech and Interdev Information Systems respectively; the aggregate of these payments represent £1,192,200 charged on Premisten's invoice addressed to Knightswood, plus VAT. These instructions were passed onto Sundial, via Fonefinz.

Deal J5

- 58. On 13 June 2006 GSM agreed to purchase from Synectiv 3,164 Nokia 8800s at £528.50 per handset. The consignment was made up of 3,000 units that Synectiv had acquired from Broadcast on 13 June 2006 at a price of £485.00 per unit (net of VAT),

with the addition of 164 handsets from Synectiv's its retail stock. It is only the VAT incurred of £254,625 on the acquisition of stock from Broadcast which is in dispute. The profit net of freight and insurance costs was £208,337¹⁸. The deal documents substantially reflect those detailed in paragraph 42, with the following differences:

- 5 i) Description of product to be supplied by Synectiv: 3,164 Nokia 8800 Black, Central Euro Spec, 2 pin chargers, boxes of 4 units;
- ii) Delivery terms and passing of title - Synectiv: CIF Schiphol, JCT Logistics; title to pass on payment in full by GSM;
- iii) Synectiv's purchase order and the rest of the deal documents are silent as to the
10 presence of a warranty and its terms;
- iv) On 13 June Synectiv requested HMRC to verify the VAT numbers of its counterparties, with HMRC confirming them on the following day:
- v) On 14 June the stock was inspected by NK, with its report confirming that the handsets were black and originated from Germany;
- 15 vi) On 14 June Synectiv instructed Interken to ship the stock on hold to JCT Logistics;
- vii) the goods were removed from the UK on 15 June;
- viii) the goods were insured at cost, net of VAT for £1,534,540, with the premium of £4,603.62 debited to the company's credit card;
- 20 ix) Two payments totalling of £1,672,174 by GSM were credited to Synectiv's Barclays Bank account on 12 July;
- x) On 13 and 14 July Synectiv made two payments of £854,812.50 to Broadcast's FCIB account;
- xi) On 13 July Synectiv instructed Interken to release the goods to GSM.
- 25 59. The flow of funds in relation to this deal has been have been identified as follows:
- i) On 12 July 2006, Amex paid Brandside £1,689,576 for "3,164 Nokia black" handsets. On the same day, Brandsite transferred £1,687,994 to GSM. GSM on the
30 same day made two payments to Synectiv in full settlement of the invoiced amount due;

¹⁸ Tribunal note: This figure is misleading. It assumes no cost for the 164 units added from retail. Based on the price per unit the gross margin on 3000 units was £130,500.

ii) On 13 and 14 July 2006, the Appellant paid Broadcast. The funds in relation to the 3,000 handsets supplied by Broadcast then passed up the supply chain on 13 and 14 July, through the accounts of Broadcast, Xcel, HSB and AW Associates;

5 iii) AW Associates, however, instead of paying its supplier Atlantic, on 13 and 14 July made two payments totalling £1,696,200 to Amex on the basis of a payment instruction issued by Atlantic to pay £1,696,200 to Macdelta (not Amex) and £3,731.25 to Atlantic. These instructions included the VAT element which was described as a “deposit”. The monies passed along the chain in two tranches; one on the 13th and one on the 14th. However each tranche passed from Broadcast to the
10 account of Amex in about 30 minutes.

Synectiv's counterparties

60. Synectiv's suppliers in relation to the disputed transactions were Top Telecoms Ltd, The Export Company Ltd, Owl Ltd and Broadcast Ltd.

Top Telecoms

15 61. Top Telecoms was Synectiv’s supplier in deals A10 and A15. Documents supplied by Synectiv to the Tribunal which appear to have come from Top Telecoms disclose:

20 i) It was incorporated in March 2000 under the name Class Communication Limited and on 15th May 2001 changed its name to Top Telecoms Limited. It registered for VAT on 7 August 2001;

ii) Details of its Barclays Bank account;

iii) The business card of Top Telecoms Limited's director, Hussain Awad;

iv) A fax dated 8th October 2002 from Etienne Louw of Top Telecoms to a then employee of Synectiv, Paul Burgess, stated that:

25 *Top Telecoms Ltd is a global distributor of all major global brand mobile phones like Nokia, Ericsson, Siemens and Motorola. The Company was established in 2000 and with a combined experience of over 10 years in the mobile phone industry we are well poised to meet our customers requirements and provide a reliable service, second to none, in a fast moving and dynamic*
30 *industry.*

62. Prior to the accounting period 04/06, Synectiv has established (the information prior to 04/05 is incomplete) that it purchased over 30,300 handsets from Top Telecoms Limited at a cost of £4.1m (VAT £718,419) where the gross margin of

exported deals varied from 7.01 - 9.62%. The input tax incurred on these deals was not withheld by HMRC and they are summarised in Annex A¹⁹.

The Export Company Limited

5 63. The Export Company Limited ("TEC") was Synectiv's supplier in deals A11 and J3. Documents supplied to the Tribunal by Synectiv appearing to come from TEC disclose: it had been incorporated on 5 February 2001; it was VAT registered with effect from 1 August 2001 and banked with both Clydesdale Bank and FICB. The letter of introduction in the name of TEC appears to have been sent by fax in January 2006 and is undated and unsigned.

10 64. Prior to the accounting period 04/06, Synectiv purchased (the information prior to 04/05 is incomplete) over 52,800 handsets from TEC at a cost of £12m (VAT £2,111,619), where the gross margin of exported deals varied from 5.76 - 9.15% - see Annex A²⁰. The input tax incurred on these deals was not withheld by HMRC.

Owl Limited

15 65. Owl was Synectiv's supplier in deals A14 and J2. The letter of introduction in the name of Owl was apparently faxed in January 2006 and is undated. Documents supplied by Synectiv to the Tribunal appearing to come from Owl disclose:

- i) It was incorporated in November 1998 under the name 1st HRC and changed its name to Owl in January 2001;
- 20 ii) It was registered for VAT with effect from 5 July 1998;
- iii) Details of its bank accounts with Rabobank Netherlands and FCIB in the Netherlands Antilles.

25 66. Prior to the accounting period 04/06 (details of the deals completed prior to then are incomplete), Synectiv purchased over 23,200 handsets from Owl at a cost of nearly £5.7m (VAT £933,528), where the gross margin of exported deals varied from 6.92 - 9.09% - see Annex A²¹. The input tax incurred on these deals was not withheld by HMRC.

Broadcast Ltd

¹⁹ Tribunal note: based on the information in Annex A, the first transaction with Top Telecoms was in September 2004 and there were 13 transactions under which Top Telecoms made supplies of a total of 30,324 units to Synectiv in the period to 31 March 2006, together with one further transaction which appears to have been unwound. The aggregate cost, net of VAT, was £4,105,250.

²⁰ Tribunal note: based on the information in Annex A, 52,300 units were supplied by TEC to Synectiv in the period from June 2005 to 31 March 2006, in a total of 24 transactions. The aggregate cost, net of VAT, was £11,859,250.

²¹ Tribunal note: based on the information in Annex A, 23,200 units were supplied by Owl in the period from April 2005 to 31 March 2006, in a total of 17 transactions. The aggregate cost, net of VAT, was £5,677,300.

67. Broadcast Limited was Synectiv's supplier in deals A12, A13 and J5. Documents supplied to the Tribunal by Synectiv appearing to come from Broadcast include an undated and unsigned letter of introduction stating that it was "a worldwide distributor/exporter of mobile phones of all leading brands." The documents bear a
5 fax transmission date of 28 February 2006 and disclose:

- i) Broadcast was incorporated in March 2003;
- ii) It was registered for VAT with effect from 19 October 2005;
- iii) Its bankers were Natwest, Habib Allied International Bank and FCIB;
- iv) Broadcast's director was Akmal Atta Mian, a Dutch national;
- 10 v) It occupied serviced offices supplied by Regus (UK) Limited.

68. Synectiv did not obtain additional documentary evidence beyond that set out in paragraph 70, for example, trade references, copies of Broadcast's financial statements, etc.

69. Prior to the accounting period 04/06, at the end of February 2006 Synectiv
15 purchased 2,000 Nokia 8800 handsets from Broadcast at a cost of £900,000 (VAT £157,500) - see Annex A²². The input tax incurred on the deal was not withheld by HMRC.

70. Synectiv's customers in relation to the disputed transactions were URTB Sarl, GSM Touch BV and Evolution Sarl.

20 *URTB Sarl*

71. URTB was Synectiv's customer in deals A10, A11, A14, A15 and J3. The letter of introduction in the name of URTB was undated and unsigned and appeared to come from Mr Meyer Uzan a director commercial of URTB. The documents supplied by Synectiv to the Tribunal with a fax transmission date of 23 January 2006 along
25 with the name David Suarez, include:

- i) URTB's certificate of registration which showed that it was established in February 2002, with David Suarez listed as the general manager and its activities including the import and export of telecommunication equipment;
- ii) URTB's TVA certificate;
- 30 iii) Information of its bank account with FCIB;
- iv) A copy of David Suarez's identity card;

²² Tribunal note: this was the only transaction Synectiv undertook with Broadcast prior to the disputed transactions.

v) A statement that stock was to be delivered to Roissy Airport

72. The company documents provided were in French.

73. Prior to the disputed transactions, it sold 11,900 handsets to URTB in the period January to March 2006 to a value of £3.4 million a margin of 8.91 - 9.07%.²³

5 74. A report received by HMRC from the French Authorities advised that URTB achieved a turnover in excess of £286 million in the period November 2005 to April 2006, it was deregistered in 28 May 2008 and it failed to declare intra-community acquisitions including the supplies it had received from Synectiv. There is no evidence that Synectiv would have been aware of this information.

10 *GSM Touch BV*

75. GSM was Synectiv's customer in deals A12, A13 and J5. Documents provided by Synectiv to the Tribunal appearing to come from GSM bearing a fax transmission date of 7 November 2005 to Synectiv include an unsigned and undated letter of introduction, and the following:

15 i) An English translation of an extract from the trade register of the Chamber of Commerce and Industries for Utrecht disclosed that GSM had been incorporated in August 2002, its place of business was Mijdrecht and the director was Bernardus Willy Braams;

20 ii) A statement of GSM's tax status which showed that it was VAT registered in the Netherlands on 11th October 2005 and its trade classification was the wholesale of, amongst others, electronic instruments

iii) Details of its FCIB bank account number and Swift code.81. A report received by HMRC from the Dutch authorities advised that GSM:

25 iv) The company was managed by Bernardus Willy Braams who did not have any experience in international trade. He worked in the catering industry and with car tyres. He learned the trade from Hassib Atta Mian. The company was incorporated by Akmal Atta Mian, the father of H.A. Mian (the director of Broadcast, Synectiv's supplier in deals A13 and J5). Akmal Atta Mian owned a residence in the UK;

30 v) GSM financed the purchase of stock with sales (credit) which means it can only pay its supplier if its customer has also paid;

vi) In the period October 2005 to September 2006 GSM traded in 490,000 handsets with revenue of £127 million and a gross profit of £1 million.

There is no evidence that Synectiv was aware of this information.

²³ Tribunal note: based on the information in Annex A, Synectiv supplied 11,900 units to URTB in January and March 2006, in a total of six transactions. The aggregate sale price was £3,359,350.

76. Prior to the disputed transactions, it sold 18,370 handsets to GSM in February 2006 to a value of £3.99 million a margin of 9 - 9.14%.²⁴

²⁴ Tribunal note: based on the information in Annex A, Synectiv supplied these units in a total of four deals in February and March 2006. The aggregate sale price was £3,990,670.

Evolution Sarl

77. Evolution was Synectiv's customer in deal J2²⁵. Undated documents supplied by Synectiv to the Tribunal and appearing to come from Evolution include an undated and unsigned letter of introduction and the following:

- 5 i) an extract from the Commerce register which disclosed that the company had been incorporated in May 2005; the listed directors were Alfred Warner, a British national whom resided in Coventry and Sebastien Fortin, a French national;
- ii) a copy of its TVA certificate which disclosed that it had been registered with effect from 12 May 2005;
- 10 iii) details of its bank accounts at RaboBank, FCIB and BNP Paribas;
- iv) evidence of identification of Alfred Warner and Sebastian Fortin.

78. The French Authorities reported to HMRC that Evolution was unable to provide any evidence of sales, failed to report the acquisition from Synectiv and was deregistered on 3 September 2007 due to an absence of economic activity.

15 Synectiv was not aware of this information.

FCIB

79. Although Synectiv did not have an FCIB account and its payments to Top Telecoms and The Export Company were made to Barclays Bank and Clydesbank respectively, the other counterparties in the disputed deals completed their
20 transactions with Synectiv through FCIB. At the time, FCIB was a bank regulated by the Dutch authorities.

Gross margins

80. The gross margin on Synectiv's transactions varied:

- 25 i) In relation to the transactions which are the subject of this appeal where Synectiv was the exporter ("broker"), Synectiv's gross margin varied between 8.97% (deals A13 & J5) and 9.53% (deal A15). These margins substantially reflect those achieved on handsets exported to the EU in the 12 months preceding the accounting periods which are the subject of this appeal - see Annex B²⁶;
- 30 ii) In respect of Synectiv's transactions with other UK traders, Synectiv's margin on handsets varied between 0.68% (deal A8) and 1.90% (deal J6).

²⁵ Tribunal note: J2 was Synectiv's first transaction with Evolution.

²⁶ Tribunal note: Annex B is not confined to exports to the EU.