



**TC01741**

**Appeal number LON/2007/0771**

*VAT – Input tax – Whether Appellant knew or should have known its transactions were connected to the fraudulent evasion of VAT – Yes – Mobilx v HMRC applied – Appeal dismissed*

**FIRST-TIER TRIBUNAL**

**TAX**

**BAYS REVERT LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JOHN BROOKS (TRIBUNAL JUDGE)  
GILL HUNTER (MEMBER)**

**Sitting in public at the Royal Courts of Justice, London WC2 on 12 – 21 September 2011 and 45 Bedford Square, London WC1 on 11 November 2011**

**Hammad Baig, instructed by M&R Tax Advisers, for the Appellant**

**Christopher Foulkes, instructed by the Howes Percival LLP, for the Respondents**



## DECISION

### Introduction

1. This is an appeal, by Bays Revert Limited (“BRL”), against a decision of HM Revenue and Customs (“HMRC”), contained in a letter dated 19 March 2007, that BRL was not entitled to claim input tax of:

(1) £157,062.00, in respect of two transactions in the VAT period ending 31 March 2006; and

(2) £181,084.31 in respect of two transactions in the VAT period ending 30 June 2006.

The claims for input tax were denied by HMRC on the basis that the transactions to which they related were part of a missing trader intra-community (“MTIC”) fraud and connected to the fraudulent evasion of VAT and that BRL knew or should have known that they were so connected.

2. BRL was represented by Mr Hammad Baig and Mr Christopher Foulkes appeared for HMRC.

### Law

3. It was common ground that the relevant law was that applied by the European Court of Justice (“ECJ”) in *Axel Kittel v Belgium; Belgium v Recolta Recycling* (C-439/04 and C-440/04) [2006] ECR I – 6161 (“*Kittel*”) as considered by the Court of Appeal in the conjoined appeals of *Mobilx Ltd (in Administration) v HMRC; HMRC v Blue Sphere Global Ltd (“BSG”); Calltel Telecom Ltd and another v HMRC* [2010] STC 1436 (“*Mobilx*”).

4. Moses LJ, giving the judgment of the Court of Appeal in *Mobilx*, said at [59 -60]:

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

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

5. The questions asked by the Tribunal to determine this issue in the *BSG* appeal which were approved by the Court of Appeal in *Mobilx*, at [69], were:

(1) Was there a tax loss?

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

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

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

10 It is clear that in answering these questions the Tribunal is entitled to rely on inferences drawn from the primary facts (see *Mobile Export 365 v HMRC* [2007] EWHC 1737 (Ch) at [20(4)]).

6. With regard to the burden of proof Moses LJ said, at [81], “

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

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

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

## 25 **Issue**

7. In accordance with Directions issued by the Tribunal (Judge Wallace) on 19 April 2011 it was confirmed on behalf of BRL, in a letter dated 4 May 2011 from M&R Tax Advisers and also by Mr Baig at the commencement of the hearing, that the only issue in dispute in this appeal was whether BRL knew or should have known its transactions were connected with a fraudulent evasion of VAT.

## **Evidence**

8. We were provided with witness statements from the following HMRC officers:

35 (1) Stephen Paling, who accompanied the lead officer (Peter Stubbs who had retired from HMRC in 2010 and who did not give evidence) on a pre-registration visit of BRL and supported him in the extended verification process of the input tax claims by BRL.

(2) Steven Munroe-Birt, a member of HMRC's Technical and Co-ordination Team advising officers on technical and procedural issues and reviewing

evidence relating to transactions which HMRC believe to be connected to MTIC fraud. He was the VAT control officer for Trio Technologies Limited.

- 5 (3) Roderick Stone, who gave generic evidence which has been used in many MTIC proceedings consisting of an overview of the history of HMRC's policies and some of the commercial practices relevant to this and similar cases.

All three witnesses gave sworn evidence which was subject to cross examination.

9. In addition to the oral evidence of these officers the unchallenged statements of the following witnesses were admitted in evidence:

10 (1) Vivien Parsons, an officer of HMRC working with the MTIC Team in Salford, whose evidence concerned RS Sales Agency Limited ("RS Sales");

(2) Terence Mendes, an officer based in HMRC's Redhill office who was allocated responsibility for F X Drona Limited ("FX Drona");

15 (3) Peter Birchfield, an officer of HMRC also based at the Redhill office, who was responsible for the analysis of data obtained from the First Curacao International Bank ("FCIB") for the purposes of HMRC's civil investigations into MTIC fraud;

(4) Huw Griffiths, an officer of HMRC based in Birmingham, whose evidence was in relation to CHP Distribution Ltd ("CHPDL");

20 (5) Michael Phipps, an officer of HMRC, whose statement also concerns CHPDL;

(6) John Fletcher, a Principal Advisor in KPMG LLP, whose statement deals with generic evidence about the mobile phone industry and the wholesale "grey market" for mobile phones;

25 (7) Mark Jarrold and Clive White, Criminal Investigators within the Criminal Investigation Directorate Branch of HMRC; and

(8) David Young, of HMRC, who supported Mr Birchfield with the analysis of FCIB accounts

10. Mr Barry Doyle, the Managing Director of BRL, gave evidence on its behalf.

30 11. We were also provided with detailed documentary evidence which, including the witness statements, was contained in 14 ring binders.

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

## **Facts**

### *Trio Technologies Limited ("Trio")*

35 13. Trio applied for VAT registration on 6 August 2002 with its intended business being the supply of "computer components to an end user marketplace". Its taxable supplies in the first 12 months trading were estimated to be in excess of £2 million.

14. Its application for VAT registration had been signed by Stephen Toone, who with Mr Doyle and Roger Erry was a director and equal shareholder of Trio. Mrs Barbara Toone was the Company Secretary.

5 15. Mr Toone, a longstanding friend of Mr Doyle, had, prior to the formation of Trio, run a recruitment business which was struggling financially.

16. Mr Erry (who was then 25 and younger than Mr Doyle and Mr Toone, then 41 and 38 respectively), had been employed by Keybeam Technology Limited (formerly Slimline Computers). He was to provide the business contacts and experience to enable Trio to buy stock in bulk on the grey market to sell in the UK. Keybeam  
10 Technology Limited had rendered nil VAT returns for most of 2001 and the first six months of 2002. In the VAT quarter ended on 30 September 2002 it had declared net purchases from and sales to UK registered VAT businesses of approximately £85 million. The director of Keybeam Technologies had also operated Slimline  
15 Computers as a sole trader. There had been little activity in this business until the VAT quarter ending 28 February 2002 when it declared a turnover of £11 million. This increased in the next quarter (which ended 31 May 2002) to £109 million and was followed by a period of no sales activity. It was ascertained following a VAT visit that the purchases had been made exclusively from missing traders.

17. In addition to his involvement with Trio Mr Doyle was, in 2002 and still is,  
20 engaged as an independent contractor by the Department of the Environment, Food and Rural Affairs (“DEFRA”) where he developed computer software for the national cattle tracing system used to combat diseases such as bovine spongiform encephalopathy (BSE) and foot and mouth.

18. On 4 October 2002 Mr Munroe-Birt (of HMRC) made an unannounced pre-  
25 registration visit to Trio’s principal place of business. He met with Mr and Mrs Toone who suggested that he return when Mr Erry was present saying that the business was his (Mr Erry’s) idea.

19. Mr Munroe-Birt returned on 16 October 2002 when, in addition to Mr Toone, Mr  
30 Doyle and Mr Erry were present. In the Audit Report following the visits Mr Munroe-Birt noted that Trio was to trade:

in the wholesale of computer chips with Mr Erry using business connections established when working for Keybeam Technologies (formerly Slimline Computers)”.

These businesses are described on the report as “known MTIC”.

35 20. Although Mr Munroe-Birt does not accept, as Mr Doyle alleges, that he warned Mr Doyle that there was nothing that could be done to ensure that Trio would not deal with a supply chain involving an MTIC trader no matter what steps were taken, the Audit Report records that Mr Munroe-Birt

40 ... attempted to dissuade the directors from getting involved [with this type of trade] from an ethical and moral standpoint.”

Mr Munroe-Birt concluded the Audit Report:

Given the choice I would like to be able to say no to this application to register but I feel we may have no choice but to issue a VAT number.

21. Trio was registered for VAT with effect from 9 December 2002.
- 5 22. By this time Mr Erry had ceased to have any involvement with Trio but had left some trade magazines with names of “contacts” highlighted with Mr Toone. Despite their lack of experience in Trio’s proposed business activity Mr Doyle and Mr Toone nonetheless decided to “give it a go”.
- 10 23. Trio’s declared sales in its first seven months of trading totalled £200. This was followed by three months of declared business activity, a month of no business activity followed by further activity in the final two months of the year. During that year Trio bought and sold goods to UK VAT registered companies.
- 15 24. On 27 October 2003 Mr Munroe-Birt received a telephone call from Mr Doyle in which Mr Doyle advised that Trio were going to start export transactions although he was unable to say what would be exported or to which country. Mr Munroe-Birt informed Mr Doyle that any VAT repayment claims would have to be verified by HMRC before payment could be made. There then followed a discussion between Mr Doyle and Mr Munroe-Birt of various legal matters relating to the combatting of MTIC fraud.
- 20 25. Trio was able to commence an export trade due to the receipt of a loan of £100,000 from Ace Corrugated Ltd, an Irish registered company run by Mr Doyle’s brother. The loan was confirmed in a letter from Trio to Ace Corrugated Ltd dated 20 November 2003 in which it was stated that “the sole purpose of the loan is to enable Trio to trade internationally.”
- 25 26. Mr Doyle telephoned Mr Munroe-Birt again, on 9 December 2003, to explain that Trio had withdrawn from a proposed transaction involving the purchase of computer memory products from Katian Limited and an associated export as he had “smelt a rat” with the deal.
- 30 27. On 15 September 2004 Mr Munroe-Birt was informed by Mr Toone that Trio wanted to withdraw its 07/04 repayment claim of £39,521.96 after an inspection by HMRC at Heathrow had raised questions regarding the valuation of the goods which had been purchased from Katian Limited.
- 35 28. Mr Munroe-Birt also made enquiries into Trio’s 08/04 voluntary disclosure claim of £39,442.25 relating to the export of 1,200 Lexar memory cards to Dubai. When he visited Lexar Mr Munroe-Birt was told that the product concerned was an American specification which was only sold in the American market and so far as Lexar was aware no such goods had been brought into the UK or Europe and Lexar have never been contacted by any companies in Dubai wishing to purchase any of their products. Only 59 memory cards had been sold by Lexar in Europe all of which were sold in  
40 Germany and all 59 were to a European specification.

29. Further investigation revealed that the 08/04 transaction originated with a UK missing trader. Trio was unable to provide sufficient evidence of export and no Customs export declaration had been made by Trio. Export zero-rating was refused and a VAT assessment of £34,869 was raised and offset against the 08/04 repayment claim. Trio, which had purchased the Lexar memory cards from Katian Limited, did not appeal against this assessment.

30. Mr Munroe-Birt met with Mr Doyle and Mr Toone again on 21 September 2005 to discuss irregularities surrounding the 05/05 repayment claim by Trio which had arisen as a result of a transaction in which Trio had purchased 1,500 Nokia 6630 mobile phones from Katian Limited and sold to an Italian company, Roma Import Export Limited. Investigations by HMRC revealed that a vehicle said to have transported the goods had left the UK empty and that the freight forwarder had provided Trio with incorrect information. After receiving alternative evidence from Trio, in a letter dated 20 December 2005 HMRC wrote to Trio stating that:

... based on the conflicting evidence now available, it is not possible to determine with any certainty whether the goods did leave the UK as indicated, on this occasion, it has been decided that you will be given the benefit of the doubt, and zero-rating will be allowed.

31. During the 21 September 2005 meeting Mr Munroe-Birt was told that it was intended to change the business activity of Trio to a recruitment consultancy and that in view of the problems experienced and difficulties in obtaining VAT repayments it would not continue trading in mobile phones.

32. Trio wrote to HMRC on 6 January 2006 requesting that its VAT returns be changed from a monthly to a quarterly basis. On 10 May 2006 in a letter from its accountants Trio applied for the cancellation of its VAT registration.

33. Although as at 31 July 2003 Mr Doyle, Mr Toone and Mr Erry each held 1,000 ordinary £1 shares in Trio. On 7 August 2003 Mr Erry transferred 350 shares to Mr Doyle and 350 to Mr Toone with each holding 1,350 shares and Mr Erry 300 shares. Mr Erry disposed of his remaining shares in Trio on 29 January 2005 transferring 150 to shares to Mr Doyle and 150 to Mr Toone.

#### *Bays Revert Limited ("BRL")*

34. BRL is a limited company which was incorporated on 15 March 2004.

35. Mr Doyle and his wife, Sheila, are the directors of BRL and Mr Doyle is also the company secretary. The shareholders are Mr Doyle who holds 50 of the 100 ordinary £1 shares and Mr Toone who also holds 50 ordinary £1 shares.

36. Throughout 2006 BRL operated, as its principal place of business, from serviced offices at 1100 Parkway, Solent Business Park, Whitely, Fareham. This was changed, following a written request by Mr Doyle, to his home address in Chobham Surrey.

37. The financial position of BRL was secured by the investment of £60,000 by Mr Doyle and transfer of the £100,000 loan from Ace Corrugated Limited from Trio to BRL. This was confirmed in a letter, written on behalf of BRL, by Mr Doyle to his brother on 5 April 2004 to formulate

5                                   the agreement between Ace Corrugated Ltd and Bays Revert Ltd regarding the loan of £100,000 sterling from Ace Corrugated Ltd to Bays Revert Ltd.

The letter continues,

10                                   ... the purpose of the loan is to enable Bays Revert to commence trading in the UK market as soon as is practically possible.

38. In its VAT application for VAT registration (form VAT 1), dated 13 September 2005, the proposed business activity of BRL is stated as “computer software sales and telecom sales”. BRL declared on the VAT 1 that it estimated the value of taxable supplies in the next 12 months to be £250,000; that it did not anticipate supplies to or  
15 from other European Union Member States; or expect to receive regular repayments of VAT. In answer to the question whether any of its directors were involved in running any other business, the VAT 1, which was signed by Mr Doyle as a director of BRL, referred to Trio.

39. In reply to a letter, dated 28 September 2005, from HMRC requesting further  
20 information in relation to the VAT 1 BRL’s accountant wrote, on 4 October 2005, indicating that BRL was currently securing an agreement to sell data encryption software and required VAT registration before it could make purchases. The letter continued stating that the current trade was consultancy services and that this and the proposed trade did not involve the sale of computer components explaining that:

25                                   Sales will be of a wholesale nature to retailers with no direct sale to the public being expected at this stage. The company does not sell mobile phones, mobile phone components or contract air time and has no plans to do so at present.

40. On 9 November 2005 Mr Doyle sent HMRC the following documents by fax:

30                                   (1) a copy of a confidentiality agreement from Katian Limited signed by Mr Doyle. This is in the form of a letter, signed by the director of Katian Limited, Damian Maginn, which states that:

35                                   We require that you sign the following confidentiality agreement prior to us accepting your order for software in view of the fact that your point of delivery for the said product will be the premises of the manufacturer of the said goods.

Kindly return to agreement duly signed whereupon an invoice for the goods together with the address of the point of delivery will be given to you.

40                                   The terms of the ‘Reciprocal Non-Circumvention and Non-Disclosure Agreement’ followed.

(2) A further letter from Katian Limited, signed by Mr Maginn and dated 1 November 2005, thanking Mr Doyle for his enquiry and stating:

I am sure we will be able to do business together in the future but unfortunately not until you have a valid VAT number.

5 41. A pre-registration VAT was made to BRL by HMRC officers Peter Stubbs and Stephen Paling on 7 December 2005 where they met with Mr Doyle. MTIC fraud in relation to the proposed trade, Joint and Several Liability and the need for BRL to verify VAT numbers through HMRC's Redhill office was explained to Mr Doyle during this visit.

10 42. Mr Doyle explained that he already had an understanding of the risk of VAT not being paid in transactions as a result of his experience with Trio and having read HMRC Notice 726 at some point in 2003. He said that he would give contact details of potential trading partners to his lawyer in order to verify the transaction chain although the effectiveness of doing so was questioned by Mr Stubbs. Mr Doyle also  
15 explained that BRL would only be dealing with people or companies that he had known for some time mentioning an Italian company, Roma Import Export, as a potential customer. He also referred to Damian Maginn of Katian Limited (subsequently Katian UK Limited) who he had got to know through Trio.

20 43. Mr Doyle explained that he and Mr Maginn had met after Mr Toone had contacted him (Mr Maginn) through advertisements placed by Katian Limited in trade magazines and on trade websites. When Mr Doyle discovered that they both came from the same part of Ireland, Mr Maginn's parents used to live a mile from where Mr Doyle's parents lived, they became "good friends" who were in regular contact with each other.

25 44. Although a copy of the incorporation documents and VAT registration documents of Katian Limited were provided to BRL no independent checks were made as Mr Doyle did not consider these to be necessary as he "trusted" Mr Maginn. In relation to business matters Mr Doyle appears to have accepted everything he was told by Mr Maginn without question. On 5 April 2004 BRL lent Katian Limited £50,000. Mr  
30 Doyle explained that BRL was not doing anything at the time. This loan was repaid in 2005 before BRL commenced trading.

45. On 15 December 2005 HMRC wrote to BRL to confirm it would be registered for VAT with effect from 1 January 2006.

35 46. By a letter, dated 21 December 2005, BRL requested that HMRC change its VAT return periods from quarterly to monthly. The letter explained that Mr Doyle had been busy visiting customers in France, Spain and Ireland in respect of software supplies. However, in his evidence Mr Doyle confirmed that he had not been to France or Spain. The request for monthly returns was refused by HMRC in a letter dated 23 January 2006. In a fax to HMRC, dated 27 January 2006, Mr Doyle wrote that BRL is  
40 "extremely disappointed" with the rejection of his request and referred to his good record with HMRC although there is no mention of Trio in the fax.

47. HMRC responded on 4 April 2006 explaining that the grant of monthly returns is a concession and not a right.

48. In a separate letter, also dated 4 April 2006, it was explained to BRL that HMRC were still experiencing problems with businesses offering commodities regularly involved in MTIC fraud. The letter, which enclosed a copy of HMRC's Notice 726 "Joint and Several Liability", advised that requests for verification of the VAT status of new or potential customers and suppliers should be faxed to HMRC's Redhill office together with the following information:

- (1) The name of the new or potential customer/supplier.
- 10 (2) Their VAT registration number.
- (3) Their contact numbers (including telephone number, fax number, e-mail address and mobile numbers if known).
- (4) Copies of any supporting documentation (ie VAT certificate, letter of introduction, certificate of incorporation etc.).
- 15 (5) The Directors and/or responsible members.
- (6) Whether they are buying or selling goods.
- (7) The nature of the goods.
- (8) The quantities of the goods.
- (9) The value of the goods.
- 20 (10) Their bank sort code and account number.
- (11) A request to forward, on a monthly basis, a purchase and sales listing with identifying VAT Registration Numbers against the suppliers/customers to the traders your local VAT office.

The letter warned that although HMRC may validate VAT registration details:

25 ... it does not serve to guarantee the status of suppliers and purchasers. Nor does it absolve traders from undertaking their own enquiries in relation to proposed transactions. It has always remained a trader's own commercial decision whether to participate in transactions or not and transactions may still fall to be verified for VAT purposes.

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

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

would expect you to make a judgement on the integrity of your supply chain.

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

10 50. However, by the time it had received this letter and the copy of Notice 726 BRL had already commenced its trade in mobile phones undertaking a transaction (Deal 1) for the supply of 2,000 Nokia 7380 phones to a French trader La Parisienne du Commerce (“LPDC”) on 29 March 2006. On 31 March 2006 BRL entered into a second transaction (Deal 2) to supply 1,250 Nokia 9500 mobile phones to another French trader France Affaires International (“France Affaires”).

51. Its first VAT return, for the period 03/06, contained a repayment claim for £160,482.36 of which £157,062.00 related to Deals 1 and 2.

15 52. On 16 June 2006 BRL conducted two further transactions; the first (Deal 3) was for 3,750 Sony Ericsson W810i mobile phones and the second (Deal 4) for 1,400 Nokia 9500 mobile phones to a Belgian trader 2Trade BVBA (“2Trade”).

53. These transactions were included in the 06/06 VAT return which contained repayment claim for £182,066.08 of which £181, 084.31 related to Deals 3 and 4.

#### *Deal 1*

20 54. On 29 March 2006 BRL sold 2,000 Nokia 7380 mobile phones to LPDC. Other than refer to the make and model of the mobile phones the purchase order was silent as to all other specifications eg colour and software language.

25 55. An inspection of these phones for BRL, on 29 March 2006, by A1 Inspections at the freight forwarders, AFI Logistics (UK) Limited (“AFI”), recorded that these were “2 pin” phones and therefore these were not suitable for use in the UK.

30 56. BRL had purchased these phones from Katian UK Limited which had acquired them from Kingswood Trading Services Limited (“Kingswood”). Kingswood’s supplier was AR Communications & Electronics Limited (“AR”) which had been supplied by Lone Enterprises (UK) Limited (“Lone Enterprises”). It had acquired the phones from Hillgrove Trading Limited (“Hillgrove”) which had in turn been supplied by CHPDL. CHPDL, which had brought the phones into the UK, had acquired them from Destonia General Trading Limited (“Destonia”) a company registered in Cyprus.

35 57. On 4 April 2006 the following funds were transferred through the FCIB accounts of the following parties in the order shown below with the sequence being completed in just under three hours:

- (1) £520,000 from Mobile Direct (a Pakistan business) to Kima Estates SRO (“Kima”) (a Czech Trader).

- (2) £520,000 from Kima to K Corp APS (a Danish Trader);
- (3) £518,000 from K Corp to LPDC;
- (4) £515,000 from LPDC to BRL.
- 5 (5) £1,054,562.50 from BRL to Katian UK Limited (also included payment for Deal 2 below);
- (6) £585,150 from Katian UK Limited to Kingswood;
- (7) £582,212.50 from Kingswood to AR;
- (8) £580,450 from AR to Lone Enterprises;
- (9) £579,275 from Lone Enterprises to Hillgrove;
- 10 (10) £578,687.50 from Hillgrove to CHP;
- (11) £578,100 CHP to Destonia;
- (12) £574,575 Destonia to Gulf Phones which shares the address of Mobile Direct in Pakistan and which are operated by a father and son.

*Deal 2*

- 15 58. On 31 March 2006 BRL sold 1,250 Nokia 9500 mobile phones to France Affaires.
  
- 59. As had been the case with Deal 1, the purchase order contained a minimal amount of details concerning the goods although, as with the previous Deal, Mr Doyle said that further specifications were obtained from the customer during telephone
- 20 conversations. An inspection of this order, undertaken by A1 Inspections at the freight forwarders, AFI, showed that these phones had been manufactured in Finland, that they were “2 pin” and therefore not suitable for use in the UK. Also, although the phones were purchased by a French company their software languages did not include French.
  
- 25 60. BRL had purchased the phones from Katian UK Limited. Its supplier was Kingswood which had acquired the phones from Mobile Heaven (Europe) Limited (“Mobile Heaven”). Mobile Heaven had bought the phones from IT Players Limited (“IT”) which had been supplied by Deep End Trading Limited (“DETL”) whose supplier was FX Drona Limited (“FX Drona”).
  
- 30 61. On 4 April 2006 the funds were transferred through the FCIB accounts in the following order, travelling through the 11 accounts in a little over two hours:
  - (1) £416,562.50 Mobile Direct to Kima
  - (2) £416,562.50 Kima to D Jensen (of Sweden);
  - (3) £415,000 Jensen to France Affaires;
  - 35 (4) £413,437.50 France Affaires to BRL;

- (5) £1,054,562.50 BRL to Katian UK Limited (also included payment for Deal 1 above)
- (6) £460,453.13 Katian UK Limited to Kingswood
- (7) £456,781.25 Kingswood to Mobile Heaven
- 5 (8) £455,312.50 Mobile Heaven to IT
- (9) £454,945.31 IT to DETL
- (10) £454,578 DETL to Joseph Kanadas the beneficial owner of FX Drona.
- (11) £452,081.25 Joseph Kanadas to Gulf Phones

62. In addition to the above, a payment of £70,000 was made by Mobile Direct to S & S International (“S&S”), a company based in Dubai, on 4 April 2006. This was then paid, on 4 April 2006, by S&S to BRL.

63. Without the £70,000 from S&S BRL would not have been able to finance its part in Deal 2. In the narrative to BRL’s FCIB bank statement the £70,000 is described as a “loan”. However, this information, together with the record of the receipt of the £70,000 and the “running book balance” was redacted in the copy the bank statement provided to HMRC by BRL. Mr Doyle’s explanation of the source of the £70,000 and the redacted the bank statement is considered below (from paragraph 95 onwards).

### *Deal 3*

64. On 16 June 2006 BRL sold 3,750 Sony Ericsson W810i to 2Trade. BRL’s participation in this Deal and Deal 4 came about as a result of an introduction to 2Trade by Katian UK Limited so that BRL could complete orders received from 2Trade that Katian UK limited had been unable to fulfil because of insufficient funds.

65. As with the previous Deals, BRL’s supplier was Katian UK Limited. The supply chain for these phones has been traced to RS Sales via Katian UK Limited, Kingswood, Mobile Heaven, Highbeam Limited (“Highbeam”).

66. The following movement of funds has been traced through FCIB accounts in relation to this deal:

- (1) £662,062.50 Wordcall LDA (Portuguese trader) to Tierra Invest (Polish company)
- 30 (2) £661,062.50 Tierra Invest to Global Mobile Leasing (“Global”) a German trader.
- (3) £659,250 Global to 2Trade
- (4) £625,250 and £31,000 2Trade to BRL
- (5) £741,351.56 BRL to Katian UK Limited
- 35 (6) £727,031.25 Katian UK Limited to Kingswood
- (7) £720,421.88 Kingswood to Mobile Heaven

(8) £716,0515.63 Mobile Heaven to Highbeam

(9) £713,812.50 Highbeam to RS Sales

(10) £711,609.38 RS Sales to Wordcall LDA

5 These transactions all took place on 21 June 2006 with the funds travelling through all 10 accounts in three hours and 15 minutes. The payment instructions from Wordcall LDA, Tierra Invest and RS Sales were all made using the same computer IP address.

#### *Deal 4*

10 67. BRL also sold 1,400 Nokia 9500 mobile phones to 2Trade on 16 June 2006. As with Deal 3, its participation in the transaction came about as a result of an introduction to 2Trade by Katian UK Limited which had been unable to fulfil an order from 2Trade due to an insufficiency of funds.

15 68. The supply chain of the goods was identical to Deal 3 with the phones being supplied to BRL by Katian UK Limited which had acquired them from Kingswood. Kingswood had purchased the phones from Mobile Heaven which in turn had acquired them from Highbeam which had been supplied by RS Sales.

69. The following flow of monies, all of which took place in a little over two and a half hours on 21 June 2006, has been traced through FCIB accounts:

(1) £422,800 Wordcall LDA to Tierra Invest

(2) £422,450 Tierra Invest to Global

20 (3) £421,750 Global to 2Trade

(4) £420,000 2Trade to BRL

(5) £474,500 BRL to Katian UK Limited

(6) £465,535 Katian UK Limited to Kingswood

(7) £460,600 Kingswood to Mobile Heaven

25 (8) £458,955 Mobile Heaven to Highbeam

(9) £458,132.50 Highbeam to RS Sales

(10) £457,310 RS Sales to Wordcall LDA

70. As with Deal 3, the payment instructions to the FCIB from Wordcall, Tierra Invest and RS Sales were all made using the same computer IP address.

30 71. It is accepted that that CHPDL (Deal 1), FX Drona (Deal 2) and RS Sales (Deals 3 and 4) are defaulting missing traders. The participation of these traders in the four Deals has resulted in an overall loss of tax of £328,434.

### *Subsequent Events*

72. Following the completion of Deals 3 and 4 in June 2006, Mr Stubbs informed Mr Doyle in a telephone conversation that he had identified a discrepancy with the IMEI numbers that BRL had provided in relation to Deal 4. BRL wrote to HMRC on 8 August enclosing a hard copy of the correct IMEI scan and a copy of a letter from Ontime Logistics (Kent) Ltd (“Ontime”), the freight forwarder that had been used for this Deal. This explained that the “error had occurred through electronic files being mixed up.”

73. In letters dated 22 and 23 August 2006 HMRC wrote to notify BRL that all four Deals had been traced to defaulting traders. Mr Doyle’s response to these letters, dated 28 September 2006, explains that, following a meeting with BRL’s supplier, (Mr Maginn of Katian UK Limited):

... we were assured that all necessary checks had been carried out in relation to our transactions. In fact, it was shown to us that extensive due diligence was carried out by them on all parties in the transactions.

74. On 6 October 2006 Mr Stubbs sent a further letter to BRL noting that it had traded in goods which had been reported to the police as stolen; traded in goods which had been reported to the network providers as lost or stolen; exported goods from the UK that had previously been exported from the UK by another trader; and exported goods from the UK that had subsequently been exported from the UK by another trader, in some instances on more than one occasion.

75. Mr Doyle responded on behalf of BRL on 23 October 2006. The letter explained that he had “spoken at length to Damian Maginn” of Katian UK Limited with regard to this matter and stated that both BRL and Katian UK Limited “have carried out extensive due diligence that has been well within the published guidelines in VAT Notice 726.” The letter continues:

We have our own computer system in place that checks IMEI numbers against a database of previously exported numbers and we can categorically state that we have never re-exported any individual handset, nor has it ever been indicated to us that VAT would go unpaid in any supply chain in which we are involved.

### *Due Diligence*

76. Having read VAT Notice 726, Mr Doyle requested verification of the VAT status of BRL’s new or potential customers and suppliers from HMRC’s Redhill office. When requesting such verification in respect of the individual Deals BRL provided HMRC with further information. This included the make, model and number of mobile phones, the sale and purchase price, the VAT details of the supplier and purchaser and details of the freight forwarder where the stock was held. Copies of documents including IMEI scans were also forwarded to HMRC.

77. The reply from HMRC to such a request would confirm that the VAT details provided to them were “valid at this time” and continue:

This confirmation is not to be regarded as an authorisation by this Department [ie HMRC] for you to enter into commercial transactions with this/these traders and any input tax claims you make may be subject to subsequent verification.

5 78. The verification request in respect of Deal 1 was sent to HMRC by BRL on 29 March 2006, the day the transactions took place. Similarly the verification request for Deal 2 was sent on the day of the Deal, 31 March 2006. In both cases HMRC's reply was received by BRL after completion of the Deals. This was also the case in relation to Deals 3 and 4 with the reply from HMRC being dated 19 June 2006, three days  
10 after the Deals had taken place.

79. As Mr Doyle "trusted" Damian Maginn he did not consider independent checks, such as credit references, on Katian UK Limited to be necessary. However, a trade reference for Katian UK Limited was obtained from Kingswood on 29 March 2006 (the day Deal 1 took place) and Mr Doyle spoke to Mr Ian Tuppen, a director of  
15 Kingswood but did not ask him about any VAT problems that had been encountered.

80. With regard to BRL's customers, LPDC and France Affaires (Deals 1 and 2), Mr Doyle did not undertake any credit checks. He explained that as goods were only released on receipt of payment these were unnecessary as, although the goods had been shipped from the UK, the cost of their repatriation was an acceptable risk.  
20 However, Mr Doyle said that he visited both companies in the summer of 2005 and although he said that he had examined the accounts of the companies he had not made notes or taken copies.

81. Mr Doyle did not visit 2Trade, BRL's customer in Deals 3 and 4, himself but relied on and accepted the assurances of Mr Maginn who told Mr Doyle that he had  
25 visited 2Trade although no documentary evidence of the visit was provided.

82. No independent checks were made of the freight forwarders. Although Mr Doyle had had meetings with AFI Logistics (Deals 1 and 2) he had not taken any notes. With regard to Ontime (Deals 3 and 4) Mr Doyle relied on Mr Maginn's assurance that "they were fine".

### 30 **Discussion**

83. Given the involvement of many of the same participants in the same order together with the circularity of funds in the Deals described above, each of which took place over a single day, it would seem highly improbable that these were commercial transactions between unconnected parties. Indeed the evidence leads us to conclude  
35 that there was a contrived scheme for the fraudulent evasion of VAT with each of the Deals having been pre-arranged.

84. As it is accepted that BRL's transactions were connected to this fraudulent evasion it is necessary to determine whether it, through Mr Doyle, knew or should have known that this was the case. In doing so it must be emphasised that it is the  
40 knowledge of BRL and not that of HMRC, or the response or action taken in relation to a defaulting trader by HMRC, that is relevant.

85. We found Mr Doyle to be an intelligent man who, given his background and experience, certainly cannot be regarded as naïve. It is with this in mind that we consider his evidence in the light of our findings of fact, in particular that regarding Trio, the reasons for the formation of BRL, the receipt of £70,000 from S&S and the redacted bank statement.

86. There can be no doubt that Mr Doyle was aware of the nature and prevalence of MTIC fraud in the type of business with which BRL was involved. He had not only read Notice 726 but had been warned by Mr Munroe-Birt when at Trio of its existence and of the extremely high risk of transactions being affected by MTIC fraud. Moreover, Mr Doyle had discussed various legal matters relating to the combatting of MTIC fraud with Mr Munroe-Birt.

87. Turning to Trio, this was described by Mr Doyle as the “baby” of his friend, Mr Toone and that he, Mr Doyle, had become involved as a favour to Mr Toone as Mr and Mrs Toone and not Mr Doyle were to be responsible for the management of its business. This was to trade in the “grey market” selling mobile phones and CPUs by taking advantage of the experience and contacts of Roger Erry, an acquaintance of Mr Toone, who claimed to have knowledge of customers and suppliers and the proposed trade sector.

88. In his evidence Mr Doyle said that he “accepted Mr Erry’s word” without question that he could provide Trio with the necessary contacts for its business to succeed. Mr Doyle told us he was not aware of Mr Erry’s background and although he had previously “seen him around the village” as Mr Erry was “very keen and smooth and convinced me” Mr Doyle did not make any real enquiry into his background.

89. Mr Erry did not live up to Mr Doyle’s expectations and promptly “disappeared” leaving Mr Toone in “the lurch” with some contacts, trade magazines and website details. As he said it was not costing him “a lot of money” and he wanted to help Mr Toone “get back on his feet” Mr Doyle and Mr Toone decided “give it a go” and proceed with Trio’s proposed business venture.

90. Although Mr Doyle said that he had little involvement with Trio, leaving this to Mr Toone, in his evidence he frequently referred to “my deal” when asked about Trio’s transactions and was the person who most frequently contacted HMRC. Also, it was Mr Doyle, and not Mr Toone, who became “good friends” and who dealt with Mr Maginn even though it was Mr Toone who had made the initial contact and note that Mr Maginn’s company, Katian UK Limited, was the sole supplier of BRL.

91. Mr Doyle explained that he had established BRL with Mr Toone to exclude Mr Erry, a director and shareholder of Trio, from the profits of computer software that he was developing to streamline the due diligence of traders. This software, which he subsequently named TradePal, was, he said, created to enable traders to compare serial numbers and mobile phone IMEI numbers to a database maintained by BRL from which it would be possible to ascertain if the goods had previously been traded. Mr Doyle said that he began writing the TradePal software in late 2005/early 2006.

92. However, there was no reference by BRL to TradePal, by name or otherwise, in its dealings with HMRC until Mr Doyle's letter of 23 October 2006 to Mr Stubbs (see paragraph 75, above). Although Mr Doyle asserted that TradePal or at least its concept had been discussed at the pre-registration visit to BRL in December 2005 Mr Paling and Mr Stubbs have no record of any such reference being made. Mr Paling, who gave evidence, could not remember the subject having been raised and said that if it had been it would have noted. He did recall some discussion about software at this meeting, which had been recorded by Mr Stubbs, but said that this was in relation to the encryption software that was to be sold by BRL. This was something to which BRL's accountant had referred, without any mention of TradePal in the letter to HMRC of 4 October 2005 (see paragraph 39, above).

93. In his evidence Mr Doyle said that after becoming aware of HMRC's NEMESIS database of IMEI numbers in 2006 he asked Mr Stubbs for access to it for use with TradePal. However, Mr Doyle was unable to say when he asked for access to the database other than "sometime in 2006" and when asked to be more specific could only say "mid, early 2006, don't know." In any event he says that this was refused by Mr Stubbs. HMRC have no record of any such request being made and Mr Paling confirmed in his evidence that he would have expected Mr Stubbs to have noted such a request.

94. Mr Doyle also said that he sought details of an IMEI database from the British Approvals Board for Telecommunications ("BABT"), an organisation that acts as agents for the GSM Association of mobile phone operators in all matters regarding IMEI numbers allocations. Despite Mr Doyle's assertions to the contrary, copies of emails indicate that BABT responded immediately his request, which was made on 14 November 2006, stating that although it had the information sought by BRL it could not be released due to its confidential nature.

95. Even before there had been an attempt to obtain a database of IMEI numbers Mr Toone had, according to Mr Doyle, been active in marketing the concept of TradePal to potential customers. One such customer was United King Trading ("UKT") a Dubai based business that had been contacted by Mr Toone in December 2005 and had expressed an interest in becoming a distributor for TradePal.

96. A meeting between Mr Doyle and a Mr Joe Thompson of UKT was arranged by Mr Toone. This took place in a London hotel, although Mr Doyle was unable to recall which hotel. There was a further meeting at the same hotel in January 2006 and in February 2006 Mr Doyle and Mr Thompson met again, this time at an unspecified Heathrow hotel. On each occasion Mr Doyle met Mr Thompson he understood that Mr Thompson was in the UK "on business" but could not provide any further details of what this business may have been. Mr Doyle said that he did not take any notes of the meetings.

97. An 'Exclusive Software Distribution Agreement' (the "Agreement") dated 20 February 2006 was signed by Mr Doyle and Mr Thompson who signed the Agreement as a director of UKT (it is interesting to note that Mr Thompson was not recorded as director of UKT on its application to open an FCIB account).

5 98. No due diligence was carried out on UKT before the Agreement was signed by Mr Doyle who explained that it was “fine by me” having previously dealt with the company. This referred to the unsuccessful transaction in which UKT had been a customer of Trio involving semi-conductors (see paragraph 27, above) supplied to Trio by Katian Limited, a company of which Damian Maginn was a director.

99. Under the terms of the Agreement BRL appointed UKT as the authorised Distributer of TradePal “worldwide excluding the United Kingdom, Republic of Ireland, Spain and France.” Mr Doyle was unable to explain why BRL had retained the distribution rights for these four countries.

10 100. Payments under the Agreement were to be made in two instalments of £70,000 within the first 90 days after the provision of the software then available. This became due by 31 March 2006. The second instalment became due following the provision of the IMEI database. However, this was never paid as BRL was unable to fulfil this part of the Agreement.

15 101. Mr Doyle said that as the £70,000 remained outstanding on 31 March 2006 he chased for the payment to be made as without it BRL would not have been able to participate in Deal 2. He was therefore relieved when on 4 April 2006 £70,000 was transferred into BRL’s FCIB account. Although it is not stated on the FCIB bank statement that the payment of £70,000 was from S&S and not UKT, the money is  
20 clearly described as a “loan”. This information together with details of the “running book balance” was redacted by Mr Doyle on the copy of the bank statement that he provided to HMRC (see paragraph 63, above).

25 102. The explanations given and submissions made in relation to the receipt of the £70,000 and redacted bank statement are in our view just not credible given the information on the bank statement.

30 103. First it is said that it was the payment by UKT under the Agreement that had been chased by Mr Doyle. He had no reason to believe it was made by S&S and he had redacted the bank statement as a matter of course as he considered the information to be irrelevant, even though this prevented identification of the amount received, the narrative and the fact that the transfer was necessary for BRL to be able to participate in the Deals.

104. Secondly, it was argued that Mr Doyle’s suspicion would have been raised if there had been any reference to a “loan” on the statement. Although there was such a reference Mr Doyle does not appear to have had any reaction to it.

35 105. Finally it was submitted that if the redacted part of the statement had referred to both S&S and a loan it was “very possible that a payment was being made on behalf of UKT by S&S” under a Hawallah banking arrangement, a legitimate banking arrangement commonly used in the Middle East and Asia. However, we were provided with no evidence that this was could have even possibly been the case.

40 106. We are also not convinced by Mr Doyle’s evidence in regard to TradePal and the Agreement.

107. This is not only vague but inconsistent, with little or no supporting documentary evidence or records. The earliest hint of the existence of TradePal is contained in the letter of 23 October 2006 from Mr Doyle to Mr Stubbs (see paragraph 75, above) followed by the email request to BABT for its IMEI database on 14 November 2006.  
5 However, Mr Doyle said that BRL had been established in 2004 to exclude Mr Erry from the potential profits of the TradePal software.

108. Given that Mr Doyle was fully aware of the high incidence of MTIC fraud in the type of trade in which BRL operated we were not impressed with the following:

- 10 (1) His explanation of his failure to keep adequate records, saying it is “not how I operated”;
- (2) His cavalier approach towards due diligence, eg by obtaining documents from customers after Deals had taken place to “comply” with the HMRC’s “Redhill” requirements;
- 15 (3) His inability to recall details of his meetings with Mr Thompson of UKT, eg where they took place; and
- (4) His absolute trust in Mr Maginn and Mr Erry which in the case of Mr Maginn was explained by a shared Irish heritage and with Mr Erry that he was “very keen and smooth and convinced me”.

109. As there would be no reason to keep records or undertake any due diligence or background checks before entering into Deals if it was known that they were part of a contrived scheme we find, on balance, that it was more likely than not that Mr Doyle, and therefore BRL, knew that the four Deals in which it was involved were connected to the fraudulent evasion of VAT.

110. However, even if this were not the case we find, for the above reasons, that the only reasonable explanation for the circumstances in which these Deals took place is that they were connected to the fraudulent evasion of VAT. As such Mr Doyle, and BRL, should have known that they were connected to fraud.

111. We therefore find that HMRC were correct to deny the claims to recover the input tax attributable to these Deals.

### 30 **Costs**

112. The issue of costs in this appeal was the subject of a direction released to the parties on 28 March 2011 by which the Tribunal Judge (Dr K Khan) directed that the “costs are to be determined pursuant to Rule 29 of the VAT Tribunal Rules 1986”. Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 is  
35 therefore disapplied giving the Tribunal a general costs discretion.

### **Conclusion**

113. The appeal is dismissed with costs to be paid by BRL to HMRC with such costs to be assessed if not agreed.

114. 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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**JOHN BROOKS**

**TRIBUNAL JUDGE**  
**RELEASE DATE: 12 January 2012**

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