



TC02085

Appeal number: LON/2008/1801

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 CHAMBER**

COMVEEN LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JOHN BROOKS
SHAHWAR SADEQUE**

Sitting in public at 45 Bedford Square, London WC1 on 8 – 11 and 14 May 2012

Monica Davis, director of Comveen Limited, for the Appellant

Nicholas Chapman, counsel, instructed by Howes Percival LLP, for the Respondents

DECISION

Introduction

1. This is an appeal, by Comveen Limited (“Comveen”), against the decision of HM Revenue and Customs (“HMRC”), contained in a letter dated 16 July 2008, that it was not entitled to deduct input tax in the sum of £865,856.25 in its quarterly VAT accounting period ended on 30 June 2006 (the 06/06 return) on the basis that eight transactions to which the claim related were part of a missing trader intra-community (“MTIC”) fraud which was connected to the fraudulent evasion of VAT and that Comveen knew or should have known that its transactions were connected to this fraudulent evasion.

2. Comveen was represented by its director Mrs Monica Davis. Mr Nicholas Chapman of counsel appeared for HMRC.

Law

3. It was not disputed that the relevant legal test 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?

(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?

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6. 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)]).

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

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“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.”

8. 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]:

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“... 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.”

Issue

9. As in her response to the direction of the Tribunal (Judge Berner) released on 10 November 2010, before us, Mrs Davis accepted that there had been a loss of tax due to fraudulent evasion and that Comveen's transactions, with which this appeal is concerned, were connected with that evasion.

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10. Therefore, the issue before the Tribunal was whether Comveen, through Mrs Davis, knew or should have known that its transactions were connected to that fraudulent evasion of VAT.

Evidence

11. We heard oral evidence from Mr Craig Panter, the HMRC officer responsible for the extended verification of Comveen's 06/06 VAT return. We also heard from Mrs Davis and Mr Raymond Blow of R J Blow and Company, Chartered Accountants, Comveen's accountants. All three provided witness statements which were accepted as their evidence in chief.

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

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(1) Roderick Stone;

(2) Alison Parrott;

- (3) Michael McBrine;
- (4) Romaine Lewis;
- (5) Martin Evans;
- (6) Fu Lam;
- 5 (7) Dean Walton;
- (8) Mark Rendall;
- (9) Emma James;
- (10) George Edwards;
- (11) Mark Jarrold;
- 10 (12) Russell Hall;
- (13) Nigel Humphries;
- (14) Michele Austin;
- (15) Gordon Fyffe; and
- (16) Daren Cooley.

15 13. The evidence contained in these witness statements were not challenged by Mrs Davis and although we did not hear from these officers their statements were admitted in evidence.

14. We were also provided with detailed documentary evidence which, including the witness statements, was contained in 64 lever arch files.

20 **Facts**

15. Although there was not a schedule of agreed facts there was no real dispute as to the underlying facts and chronology.

16. Insofar as the incorporation and VAT registration of Comveen is concerned we have adopted the description in Mr Chapman’s skeleton argument which Mrs Davis accepts, in her skeleton argument, is “an accurate account”.

Incorporation and VAT Registration

17. Comveen was incorporated on 17 December 2004 with a trade description of “Agents in sale of a variety of goods”. On 20 December 2004, Gulam Hussain (“Mr Hussain”) was appointed sole director. His wife Mrs Davis, who had previously worked as a midwife, was on the same date appointed company secretary. On 11 January 2005, Mr Hussain and Mrs Davis swapped positions, with Mrs Davis becoming director. She was at the time of the transactions in issue, the company’s sole director. Mr Hussain resigned as company secretary on 30 January 2005 and has not, since that date, held a formal appointment with the company (he has however, continued to fulfil an unofficial role within the company). From August 2005, the company secretary has been R J Blow and Company (Comveen’s accountants) and,

since April 2006, R J Blow Secretaries Limited. Comveen's annual accounts for the year ended 2006 indicated that Mrs Davis was the sole shareholder, with one ordinary £1 share.

5 18. By a handwritten application dated 25 January 2005 and signed by Mrs Davis as director, Comveen applied to be registered for VAT. In the application form, VAT 1, Mrs Davis indicated that Comveen's intended business activities were "Buying and selling bulk electrical goods and components. Commercial contracts and services eg, painting, decorating, cleaning". Mrs Davis indicated an anticipated turnover of £100,000 in the first year after registration. She also indicated that Comveen expected
10 to receive regular repayments of VAT but indicated that it would not make any supplies to the EU.

19. In a letter, dated 25 January 2005, which accompanied the VAT 1 application form, Mrs Davis wrote:

15 Mainly, this company has been set up with the intention of providing services such as building, painting, internally decorating ...

 This is the same work on a larger scale to what my husband was doing previously under self employment where he was not achieving the maximum potential due to not being VAT registered.

 ...

20 Secondly we would like to potentially undertake the buying and selling of wholesale electrical materials or components such as the opportunity may arise in our research by approaching large companies, determining their needs and looking into acquiring them at a good price. We will do this by searches over the internet and other medias such as the yellow
25 pages and business pages. This work will only be attempted in spare office time during office hours.

20. Comveen was registered for VAT with effect from 18 January 2005 and was required to submit quarterly VAT returns.

30 21. On 10 February 2005, Comveen made an application to the First Curacao International Bank ("FCIB") to open a 'Corporate eBanking Account'. The application form described Comveen's business sector as "Wholesale Trade Business" and that it had been referred by "International Phone Traders". The application was approved on 14 February 2005 and an FCIB account opened.

Trading and VAT returns

35 22. Since its registration for VAT Comveen's trade has been exclusively in wholesale mobile telephones and CPUs. Despite anticipating a turnover of £100,000 in its VAT 1, Comveen's turnover during its first year of trading was over £50 million. In the six accounting periods covering the 15 month period of active trading up to and including the 06/06 period (the period with which this appeal is concerned) Comveen's turnover
40 was £82,779,589 generating input tax repayments of £992,824.77 on repayment claims totalling £1,827,023.70.

23. Its VAT returns show the following net VAT declarations in each period:

Period 02/05 – £53.86 repayment claim. Turnover – £nil

Period 03/05 – £67.71 payment. Turnover – £1,319.50

Period 06/05 – £2,755.47 repayment claim. Turnover – £17,203,803

5 Period 09/05 – £113,059.96 repayment claim. Turnover – £25,065,801

Period 12/05 – £109,418.68 repayment claim. Turnover – £7,812,654

Period 03/06 – £767,479.05 repayment claim. Turnover – £14,670,826

Period 06/06 – £834,334.40 repayment claim. Turnover – £16,706,915

10 24. Mrs Davis explained that, while she was trying to make deals on a daily basis, at the beginning of a VAT period she would seek to purchase from and sell to UK based suppliers and customers (“buffer deals”) whereas towards the end of the VAT period she would look to purchase goods from a UK supplier and sell to a European Union customer (“broker deals”). As broker deals are zero-rated for VAT purposes, Comveen would therefore not have to wait as long to make a repayment claim as it
15 would have if the broker deals were undertaken at the start of a VAT period.

Visits from and correspondence with HMRC

25. On 7 March 2005, HMRC Officer Sue Bransgrove visited Comveen’s business premises in Luton and met with Mrs Davis. From the questionnaire completed by Ms Bransgrove it would seem that she was told by Mrs Davis that the ‘main business
20 activity’ of Comveen was “Painting, decorating and cleaning for commercial customers” and that its subsidiary business activity was “trading in wholesale mobile phones/components. Also when asked for bank details Mrs Davis did not mention the FCIB account although she did refer to specific accounts for the “commercial side” and “for trading in phones.”

25 26. Officer Bransgrove noted that during the visit Mrs Davis was “educated about MTIC fraud” and was advised of the facility offered by HMRC of checking the validity of customers and suppliers VAT registration numbers via HMRC’s Redhill office (“Redhill checks”). Third party payments were also discussed and Mrs Davis
30 was issued with Public Notice 700/53 and Budget Notices 14/03, 15/03 and 17/03 which contained further information about avoiding involvement in MTIC trading activity.

27. On 20 May 2005 HMRC Officers, Christopher Hodge and Geoff Swinden attended Comveen’s business premises and met with Mrs Davis as part of a ‘Post Registration – Summary of MTIC Assurance Activity’ visit.

35 28. Mrs Davis explained that she checked Company House details, carried out Redhill checks and made telephone contact with her suppliers and customers but had not met any of the their staff or checks on the goods traded. She was informed of the joint and several liability provisions and the need for due diligence.

29. During a subsequent visit, on 7 June 2005, by Officers Brown and Ward of HMRC Mrs Davis told them that as she encountered problems getting Redhill checks she had not undertaken them on all deals but said she would do so in future. It was confirmed that she was aware of the joint and several liability provisions. Mrs Davis explained that she had compiled a 'trading application form' to send to Comveen's prospective customers and that she planned to make appointments to inspect goods and check suppliers. As Comveen had continued to make third party payments these were discussed.

30. On 2 August 2005 HMRC wrote to Comveen in the following terms:

10 Dear Mrs Davis,

Trading in mobile phones, computers, and associated companies

Comveen Ltd

15 As you may know the investigation of Missing Trader Intra-Community (MTIC) fraud continues to be Customs' top VAT fraud priority, and the Department will continue to tackle the criminals behind this type of fraud. It is not a victimless crime; it is robbing the honest taxpayer of monies that could [be] used to fund essential public services. In addition to its criminal powers Customs has in place provisions enabling it to impose joint and several liability on VAT
20 unpaid in the type of trades mentioned above.

I am writing to you because as a result of our enquires in respect of your transaction chains in April, we know that of the transactions examined, 3 commenced with defaulting traders, resulting in the loss of revenue exceeding £90,166.

25 Full details of you sales that resulted in a loss of revenue are as follows:

... [the details of transactions are not relevant for present purposes]

30 As explained in Notice 726, where you have genuinely done everything you can to check the integrity of the supply chain, can demonstrate you have done so, have taken heed of any indications that VAT may go unpaid and have no other reason to suspect VAT would go unpaid, the joint and several liability measures will not be applied to you.

35 However, if you knew, or had reasonable grounds to suspect, that VAT would go unpaid then the measure can be applied to you. From your records you will be able to ascertain who supplied you with the goods detailed above, and you may wish to consider what appropriate action is needed to ensure that VAT does not go unpaid in respect of any future transactions.

40 For the avoidance of doubt I should finally tell you that this letter is without prejudice to any enquiries Customs may be making, or have made, into transactions with which you have already been involved and which are in a chain of transactions where VAT has gone unpaid.

31. Mrs Davis replied to this letter on 14 August 2005 referring to the deals in April 2005 stating that “the checks I made on my buyers and suppliers at that time were adequate and the best I was able to do with the resources and finances I had available at that time”.

5 32. Enclosed with her letter were details of Comveen’s due diligence checks which included:

- (1) the completion of a trading application form;
- (2) a request for two trade references which are followed up and approached in writing;
- 10 (3) Redhill VAT checks;
- (4) Companies House annual return reports;
- (5) Freight forwarders reference to ensure satisfactory release record and good trade record;
- (6) Dun and Bradstreet credit check;
- 15 (7) site visits to trading address (with all director information and proof of trading checked whilst on site);
- (8) stock inspection reports;
- (9) record of box numbers to ensure that same stock has not been re-circulated; and
- 20 (10) a daily log of open market trading prices to ensure stock is not being bought too cheaply without good reason.

33. However, it is clear from a statement above the list of due diligence measures that these are checks which Comveen endeavours to undertake and that although it only trades “on a regular basis once we are satisfied” the “odd opportunistic deal is subject
25 to minimal checks.”

34. Officers Brown and Ward made a further visit to Comveen on 17 August 2005 and discussed joint and several liability with Mrs Davis who showed the officers copies of the due diligence paperwork. She also advised that Comveen had ceased to make third party payments.

30 35. A request by Comveen to make monthly VAT returns had been refused by HMRC and on 17 March 2006 Mrs Davis wrote a letter, which she sent by fax, to HMRC to update Comveen’s position. In the letter she points out that she continually seeks and takes advice from her local officers on a “very regular basis on how to conduct my business within this very delicate trade sector.”

35 36. HMRC sent Comveen Budget Notices 43 and 44 with a letter dated 7 April 2006. These Notices explained HMRC’s powers to direct the keeping of International Mobile Equipment Identity (“IMEI”) and other stock and product identifying numbers by a business.

37. On 31 May 2006 HMRC wrote again to Comveen. The first paragraph of this letter was written in identical terms to the letter of 2 August 2005 (see paragraph 30, above).

5 38. It continued by explaining that in order to assist traders HMRC were notifying them “when there is an irregularity, so that they may make an informed commercial decision as to the true purpose of the transaction and any future transactions” before providing information that checks undertaken by HMRC on IMEI numbers supplied by Comveen in its 03/06 VAT period had produced numerous examples of the same mobile phones having been previously scanned by HMRC at ports and airports. Also
10 22 of those phones had been reported as either stolen or had their sim blocked and were therefore already in general use and circulation prior to having been sold by Comveen as new stock.

39. Mrs Davis responded to that letter on 13 June 2006 writing:

15 I am increasingly becoming more and more aware of the problems of MTIC fraud within this trade sector as I myself have been experiencing some difficulties with my bank account.

40. In their reply, dated 14 June 2006, HMRC enclosed Notices 700/52 and 726 and advised Mrs Davis of internet sites which provide checking services on IMEI numbers.

20 41. 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
25 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:

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

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

35 *06/06 Return*

42. Comveen submitted its 06/06 VAT to HMRC on 3 July 2006. The return, which showed output tax of £2,026,122.16 and input tax of £2,860,456.56 on a turnover of £16,706,915. These figures relate to 63 transactions undertaken during this three month period and include 55 buffer deals and eight broker deals.

43. The input VAT of £865,856.25 reclaimed by Comveen in respect of the broker deals was selected for extended verification and subjected to detailed examination before being disallowed by HMRC in their letter of 16 July 2008. It is the subject matter of this appeal.

5 *The Broker Deals*

44. On 16 June 2006 Comveen sold 1,000 Nokia 880 Black and 3,000 Nokia N90 mobile phones to Fone Link SL, a Spanish company based in Benalmadena, Malaga. This was in response to purchase orders from Fone Link dated 16 June 2006.

10 45. The sale price of the Nokia 880 Blacks, a zero-rated supply, was £445,250. Comveen had purchased these mobile phones from IH Technologies Limited (“IHT”), a UK company, for £519,350 (including VAT) which had, as in the subsequent broker deals, given “advice” Mrs Davis as to which company to export to. This advice was accepted and followed without question.

15 46. IHT had itself acquired the phones from TMEA Trading GmbH (“TMEA”), an Austrian company. The Nokia N90s were bought by Comveen from IHT for £934,125 and sold to Fone Link for £819,000. As with the Nokia 880 Blacks IHT had obtained the phones from TMEA.

47. The invoices issued to Comveen by IHT clearly state:

All goods remain our property until payment received in full.

20 Goods will only be released once confirmation received from Forwarding Agents.

25 Although it did not pay IHT until 20 June 2006 after being paid by its customer on that date, Comveen instructed freight forwarders, Total Logistic Solutions UK (“TLS”), in respect of both the Nokia 880s and Nokia N90s. These phones were inspected by A1 Inspections Limited (“A1”) on 16 June 2006 and transported to Barcelona by road, via the SeaFrance Dover to Calais ferry on 17 June 2006.

48. The phones were stamped as received by SAM Logistics Spain SL (“SAM”) in accordance with the delivery instructions given by Fone Link.

30 49. Analysis of the FCIB records undertaken by HMRC Officer Russell Hall shows the movement of funds in relation to these transactions all of which took place on 20 June 2006 at the following times:

Nokia 880 Blacks

- 35 (1) 17:42:07 Marxman International (“Marxman”) a Dubai based company paid £456,750 to Kima Estates SRO (“Kima) a Czech company;
- (2) 17:45:23 Kima paid £456,000 to Fone Link;
- (3) 18:18:03 Fone Link paid £455,250 to Comveen;

- (4) 18:39:07 Comveen paid £519,350 to IHT;
- (5) 18:54:10 IHT paid £441,350 to TMEA;
- (6) 18:57:08 TMEA paid £440,850 to CDM Comercio SL (“CDM”), a Spanish company;
- 5 (7) 19:00:54 CDM paid £440,350 to Maks information Technology (“Maks”) in Pakistan; and
- (8) 19:12:15 Maks paid Marxman £456,750

Nokia N90s

- (1) 17:42:07 Marxman paid Kima £823,500;
- 10 (2) 17:45:23 Kima paid Fone Link £821,250;
- (3) 18:18:03 Fone Link paid Comveen £819,000;
- (4) 18:24:04 Comveen paid IHT £934,125;
- (5) 18:36:03 IHT paid TMEA £793,050;
- (6) 18:45:54 TMEA paid CDM £791,550;
- 15 (7) 18:51:02 CDM paid Maks £790,050; and
- (8) 19:12:15 Maks paid Marxman £790,050

50. Mrs Davis explained that generally she would be contacted by telephone to be told that money was in Comveen’s FCIB account and that she would then arrange for payment to be made through directly into the FCIB account of Comveen’s supplier.
20 However, on occasions when she was unable to arrange to make payment herself she provided IHT with the bank details and password and asked it to make the payments from Comveen’s FCIB account on its behalf.

51. On 19 June 2006 Comveen sold 2,500 Nokia N80 and 2,500 Nokia 9500 mobile phones to Fone Link which it had purchased from IHT. IHT’s supplier had again been
25 TMEA. The Nokia N80s which had cost Comveen £837,187.50 were sold for £733,875. It had purchased the Nokia 9500s for £828,375 and sold them for £726,125.

52. TLS were again the freight forwarders and the goods were inspected by A1 before purportedly being transported by road on 20 June 2006, via the Dover Calais ferry to Barcelona where the Nokia N80s and Nokia 9500s were stamped as received by
30 SAM. Notwithstanding that Fone Link paid Comveen for the phones (and Comveen in turn paid IHT on 21 June 2006) during a covert inspection by HMRC during the ferry crossing the one of the lorries which according the documentation was supposed to be carrying the Nokia N80s goods was found to be empty. As for the Nokia 9500s one of the lorries was empty and the other was not inspected.

35 53. The movement of funds in respect of these transactions occurred in the FCIB accounts of the participants at the following times on 21 June 2006:

Nokia N80s

- (1) 14:06:02 Marxman paid Kima £737,625;
(2) 14:09:08 Kima paid Fone Link £735,750;
(3) 14:18:07 Fone Link paid £733,875 to Comveen;
5 (4) 14:33:02 Comveen paid £837,187.50 to IHT;
(5) 15:09:04 IHT paid TMEA £710,875;
(6) 15:15:16 TMEA paid £709,625 to CDM;
(7) 15:18:19 CDM paid Maks £708,375; and
(8) 16:24:07 Maks paid £708,375 to Marxman.

10 *Nokia 9500s*

- (1) 14:06:02 Marxman paid Kima £729,875;
(2) 14:09:08 Kima paid £728,000 to Fone Link;
(3) 14:18:07 Fone Link paid Comveen £726,125;
(4) 14:30:23 Comveen paid £828,375 to IHT;
15 (5) 14:36:09 IHT paid TMEA £703,375;
(6) 14:42:12 TMEA paid CDM £702,125;
(7) 14:54:07 CDM paid £700,875 to Maks; and
(8) 15:42:08 Maks paid Marxman £700,975.

20 54. On 20 June 2006 Comveen sold 3,000 Nokia N70s to a Spanish company, Servicios Operativos Surcom SL (“Surcom”) which, although based in Torremolinas in the Malaga region of Spain, requested delivery to SAM in Barcelona.

25 55. Comveen had been advised of the deal with Surcom by its supplier, Exhibit Enterprise Limited (“Exhibit”) which had sent a fax to Comveen on 20 June 2006 to advise that it had stock available. Exhibit had acquired the phones from an Italian Company, Star Trading. Comveen sold the phones to Surcom for £553,200 having acquired them itself for £630,975. It was paid on 26 June 2006 and paid Exhibit later that day.

30 56. The freight forwarders used by Comveen were TLS and the goods were inspected by A1. Although the goods were sent by road, via the Dover Calais ferry, and stamped as received by SAM a covert inspection of the lorry purportedly carrying the phones found it to be empty.

35 57. An analysis of the FCIB accounts showed that in an hour and 45 minutes there was a circularity of funds between eight participants starting and ending with Marxman via Kima Surcom, Comveen, Exhibit, Benton Communications Limited (an Irish company), Techbase Consulting Limited and Maks. There was no payment to Star Trading which had, according to the paperwork, eg invoices etc, supplied Exhibit.

58. On 21 June 2006 1,500 Nokia 9300i mobile phones were sold to Fone Link by Comveen. Its supplier was Exhibit which had acquired the phones from Star Trading. Comveen paid Exhibit £400,968.75 for the phones, which it has sold to Fone Link for £358,500, on 27 June 2006 after it had received payment from Fone Link.

5 59. The phones were inspected by A1 and TLS was the freight forwarder and were transported by road, via the Dover Calais ferry. The lorry was not subject to inspection and the goods were stamped as received by SAM in Barcelona.

60. Other than the inclusion of Fone Link in place of Surcom an analysis of the FCIB accounts again shows a circularity of funds through the same eight participants as in the previous deal. This occurred over a period of just under two hours and, as before, beginning and ending with Marxman.

61. On 28 June 2006 Comveen sold 2,500 Nokia N91s and 2,500 Nokia 9500s to Sotodelia Investments SL (“Sotodelia”) a company based in the Malaga region of Spain. Comveen had purchased the goods from IHT which had been supplied to IHT by Star Trading. Comveen had paid £837,187.50 for the Nokia N91s and £825,437.50 for the Nokia 9500s and sold them to Sotodella for £745,625 and £737,500 respectively.

62. Sotodelia’s purchase order, dated 28 June 2006, requested delivery of the phones to SAM in Barcelona. As in previous transaction the goods were to be transported by road, via Dover Calais. The freight forwarder was TLS and the phones were inspected by A1. Despite being stamped by SAM as being received in Barcelona on an inspection of one the two lorries transporting the goods it was found to contain only shredded paper. The other lorry was not inspected.

63. The FCIB accounts again show a circularity of money movements in a little over two and half hours in regard to the transactions concerning both the Nokia N91s and Nokia 9500s with both starting and ending with Marxman via Techbase Consulting Limited, Sotodelia, Comveen, IHT, Benton Communications Limited, Diavo Trading, based in Cyprus and Maks.

64. Despite a combined sale price, taking all the transactions together, of £5,129,075 none of the goods in any of the broker deals described above were insured by Comveen. This was apparently due to an oversight by an employee.

Financing the Broker Deals

65. Comveen made a total profit (before taking into account VAT, freight forwarder fees etc.) of £181,325 on the broker deals described above having made a profit in each and every one of these deals. However, as it was required to pay VAT when it purchased the mobile phones from its suppliers and did not charge its customers VAT, as the transactions were zero-rated supplies, it suffered an overall shortfall of £684,531.25.

5 66. Mrs Davis explained that this shortfall was met through repayments of VAT in earlier accounting periods, money that had been lent to her by her and her husband's family to enable an investment in Comveen and a loan of £500,000 paid directly into Comveen's FCIB account from a Dubai based company, Future Connection FZCO ("Future") on 27 April 2006.

10 67. The loan from Future had not been disclosed and HMRC were not aware of its existence until Mrs Davis mentioned it in answer to a question during her cross examination. She explained that the loan had been offered to her when she had attended a CEBIT conference for mobile phone traders in Germany in February 2006 as a result of discussions about potential trade with Future which did not in the event materialise. However, there was no supporting documentation to clarify the terms on which it was made

15 68. Although Mrs Davis told us that the loan was to be repaid over a period of time Comveen had not made any repayments. Despite this Comveen has not been pursued for recovery of the debt by Future.

20 69. An analysis of the FCIB accounts undertaken by HMRC shows that Future paid £500,000 into Comveen's account at 14:45:17 on 27 April 2006. The transaction was described as a "loan". At 14:21:09 on 27 April 2006 £500,000 had been deposited in the FCIB account of Future by Marxman. Although there are no deposits of £500,000 in Marxman's FCIB account prior to the payment to Future, there were four deposits into Marxman's FCIB account that occurred directly before the payment to Future. All of these payments were from Mobile Direct in Lahore.

Due Diligence

25 70. The commercial checks or due diligence undertaken by Comveen on Fone Link, included:

(1) a VAT validation request, which was made on 16 June 2006 the date of the first and second broker deals; and

(2) the completion, on 19 June 2006 two days after the transactions, of a "Comveen Trading Application Form" by Fone Link.

30 Although Mrs Davis was informed, on 16 June 2006, that the VAT number given for Fone Link was invalid and no credit checks were undertaken Comveen nevertheless continued to trade with Fone Link and arranged for the transportation of the goods to Spain.

35 71. Although Comveen was provided with information in regard to Surcom much of this was in Spanish with no English translation. This was also true of information provided by Fone Link and Sotodelia. However, in a letter to HMRC, dated 15 November 2006 Mrs Davis wrote:

As for Spanish I actually have a basic knowledge and a dictionary

72. While the check on Surcom's VAT number was showed it was valid, the request was made on 16 June 2006 four days before Exhibit had advised Comveen that the stock was available.

5 73. A positive response to a request for validation of the VAT number of Sotodelia was received by Comveen on 16 June 2006 although the transactions with that company did not take place until Comveen had received Sotodelia's purchase order on 28 June 2006. Also, the director of Sotodelia, a Benjamin Cole, signed a "Comveen Trading Application Form" on 16 June 2006. Despite being given details to obtain a trading reference neither a trade reference or credit checks on Sotodelia
10 were taken up by Comveen.

74. Other than "some" site visits by Mrs Davis's husband, no further due diligence checks were performed on either the freight forwarder TLS or A1 the company charged with inspecting the goods.

15 75. With regard to IHT, Mrs Davis obtained a certificate of VAT registration, certificate of incorporation, validation of the company VAT number from HMRC, a trading application form, a site visit report, copy of a telephone bill, copy of a director's passport, an accountant's letter of confirmation and a trade reference from Exhibit. Although this confirmed the existence of the company but it did not provide any indication as to its financial position.

20 76. A credit reference for IHT was also obtained. Not only was this negative but was dated 17 August 2006, two months after the transactions had taken place.

25 77. The commercial checks undertaken on Exhibit included the acquisition of its certificate of VAT registration, certificate of incorporation, validation of the company VAT number from HMRC, a trading application form, a site visit report, a photograph of the premises, an office rental invoice, a director's passport, accountant's letter of confirmation and a trade reference.

78. As with IHT a credit reference was obtained. However, this was dated 17 August 2006 two months after the transactions had taken place.

Contra-Traders

30 79. It is not disputed that that Comveen's suppliers IHT and Exhibit are both contra-traders and that they have themselves made direct sales to Fone Link, Surcom and Sotodelia.

35 80. In its 08/06 VAT return period, which corresponds with Comveen's 06/06 VAT accounting period, IHT dispatched goods such as mobile phones, laptop computers and other electrical equipment to the EU in 40 transactions. All of these transactions can be traced to one of five defaulting traders. In 35 of these transactions IHT's EU customer was Fone Link, Surcom or Sotodelia.

81. In Exhibit's corresponding 07/06 VAT accounting period, it dispatched electrical goods, mainly mobile phones, to the EU in 44 transactions. Of the 41 of these

transactions that can be fully traced, all lead to one of four defaulting traders (which also appear in the IHT broker chains) and while it is not possible to fully trace the remaining deal chains it is more likely than not that these too lead to defaulting traders.

- 5 82. The effect of Comveen’s transactions with IHT and Exhibit was to move any VAT repayment claims, which can be traced to fraudulent loss of tax, that would have been made by IHT and Exhibit to Comveen.

Discussion

- 10 83. Given the evidence of the nature of the transactions, the involvement of participants, including the contra-traders IHT and Exhibit, taken together with the circularity of funds that has taken place in the FCIB accounts and the “phantom” exports, for which goods were stamped as received and payment made, it would seem highly improbable that Comveen’s broker deals with which this appeal is concerned were commercial transactions between unconnected parties but were part of a pre-arranged contrived scheme for the fraudulent evasion of VAT.

15 84. We have already noted that Mrs Davis (in our view, given the evidence, quite properly and realistically) accepts that Comveen’s transactions were connected to that contrived scheme for the fraudulent evasion of VAT. Therefore, we have to consider whether Comveen, through Mrs Davis knew or should have known this was the case.

- 20 85. During her cross examination and again during her closing submissions Mrs Davis emphasised that at the time Comveen was engaged in the transaction she was not aware of any connection to the fraudulent evasion of VAT but, looking back at these transactions, she accepted that she should have known that this was the case.

- 25 86. Such an admission is, as Mr Chapman reminded us, in itself sufficient for us to find against Comveen and dismiss the appeal. As Moses LJ said in *Mobilx*, at [59]:

30 “... 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*.”

87. However, given that Comveen was represented by Mrs Davis, who is not legally qualified, we consider that we should look beyond her admission and examine the evidence before the Tribunal.

- 35 88. Mr Chapman submitted that there is sufficient evidence for us to find that that Comveen was a willing participant and complicit in the MTIC scheme and that Mrs Davis went into it with her eyes wide open. He contended that there is evidence of complete and continuing control of the scheme by fraudsters and it is not credible for Comveen to have been innocent stooge or dupe.

89. Mrs Davis contended that HMRC had not adduced any direct evidence that she either knew or should have known that Comveen's transactions were connected to the fraudulent evasion of VAT.

5 90. It is not disputed, and is clear from *Moblix* (see paragraph 7, above), that it is for HMRC to establish a trader's state of knowledge. With regard to there being direct evidence of knowledge we remind ourselves that 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)]).

10 91. Before considering whether Mrs Davis and Comveen knew or should have known of the connection with fraudulent evasion of VAT we first examine the whether Mrs Davis was aware of MTIC fraud and the extent of her knowledge in June 2006 when Comveen entered into the broker deals with which this appeal is concerned.

15 92. We note that during the visit to Comveen on 7 March 2005 by HMRC Officer Sue Bromsgrove Mrs Davis was "educated about MTIC fraud" and issued with PN 700/53 and Budget Notices 14/03, 15/03 and 17/03 which contained further information about MTIC fraud. Also when visited by Officers Hodge and Swinden on 20 May 2005 Mrs Davis was informed about the joint and several liability provisions and advised of the need for due diligence with regard to Comveen's customers and suppliers. The first paragraph of the letter to Mrs Davis from HMRC, dated 2 August 20 2005 (which we have set out at paragraph 30, above), provides a clear picture of the effect of MTIC fraud and that tackling it was HMRC's "top VAT fraud priority". These words were repeated in the opening paragraph of the letter, dated 31 May 2006, that was sent by HMRC to Mrs Davis.

25 93. It is apparent from the letter Davis sent to HMRC, dated 17 March 2006, in which she refers to the wholesale trade in mobile phones as "this very delicate trade sector" that she understood the risk of potential MTIC fraud as does her letter of 13 June 2006, days before the first transaction with which we are concerned in which she says she is "increasingly becoming more aware of the problems with MTIC fraud within this trade sector."

30 94. In the circumstances we are not in any doubt that Mrs Davis had knowledge of MTIC fraud in June 2006 when Comveen entered into its broker deals.

35 95. Turning to whether Mrs Davis, and therefore Comveen, knew or should have known of the connection with the fraudulent evasion of VAT we note that although referred to as a secondary intention on its application for VAT registration Comveen only traded in CPUs and mobile phones and did not engage in its intended primary trade of providing building, painting and decorating services. This, and the fact that an FCIB bank account was opened in February 2005 through which the wholesale trade was operated indicates to us that the primary reason for establishing Comveen was to carry out the wholesale trade in CPUs and mobile phones. We also note, that this 40 account was not disclosed to HMRC when bank details were requested in March 2005

96. Comveen does not appear to have taken any risk in its wholesale trade as it made a profit in each of its broker deals which appear to have been handed to it “on a plate”. Mrs Davis was advised by Comveen’s supplier which company to sell to, advice she always accepted. Mrs Davis’s contention that this is not uncommon is, in our view,
5 simply not credible. In a genuine market the supplier would be expected to trade with the end customer to maximise its profits, the inclusion of a third party such as Comveen does not appear to have any commercial purpose.

97. Further lack of commerciality in the transactions can be seen from the fact that the goods, despite their high value, were not insured. Also, with regard to the mobile
10 phones supplied by IHT, Comveen’s supplier in six of the eight broker deals, although the goods remained its property until payment in full (see paragraph 47, above), IHT allowed Comveen to ship goods to Spain without payment and was not paid until after Comveen received its money.

98. Another relevant factor is Mrs Davis’s participation in the circularity of funds through the FCIB accounts of various parties at the correct time and correct order.
15 Also, when she was unable to make the payment herself after being advised the money had been transferred to Comveen’s account Mrs Davis gave IHT her authority to make the payment on Comveen’s behalf to ensure the payment sequence and circularity of money was unbroken.

99. Although Mrs Davis said that she was not trying to hide the existence of the loan from Future, which was offered to Comveen during a CEBIT conference in Germany,
20 and was not aware of any connection with Marxman, we cannot see any commercial rationale for this loan especially given the circumstances in which it arose, the fact that it had not been disclosed to HMRC and the lack of any repayment or any action
25 by Future to recover the debt.

100. We also note the lack of meaningful commercial checks by Mrs Davis on Comveen’s customers and suppliers. For example Mrs Davis was informed on 16 June 2006 that the VAT number for Fone Link that she had provided to HMRC to
30 check its validity was not valid. Despite this she continued with the deal on the same day. Also Comveen’s trade application form was completed by Fone Link two days after its first dealings with company and the check on Surcom was undertaken four days before being advised that stock was available. We also wonder whether a basic knowledge of Spanish and a dictionary would have been sufficient to understand the information provided by Comveen’s Spanish customers as part of its due diligence
35 procedures.

101. In addition, despite having the information to be able to do so, no credit checks or trade reference was undertaken on Sotodelia and credit checks on Comveen’s suppliers was taken up two months after transactions had taken place. Clearly such
40 checks that were undertaken could not provide any protection for Comveen against becoming involved in MTIC fraud. However, there would be no need for such checks or due diligence if it were known that the transactions were part of a contrived scheme.

102. As such, we find that only reasonable inference that can be drawn, having regard to all the circumstances of the case, is that it was more likely than not that Mrs Davis, and therefore Comveen, did know that the transactions with which this appeal is concerned were connected with the fraudulent evasion of VAT.

5 103. However, even if this were not case we find, for the above reasons, that the only reasonable explanation for the transactions, with which Comveen was involved, is that they were connected with the fraudulent evasion of VAT and therefore, as Mrs Davis herself admitted, Comveen should have known that this was the case.

10 104. As such, we find that HMRC made the correct decision that Comveen was not entitled to deduct input tax in the sum of £865,856.25 claimed in its 06/06 VAT return

Costs

15 105. In a direction released on 26 April 2010 Judge John Walters QC directed “Rule 29 of the VAT Tribunal Rules 1986 (relating to costs) will apply to this appeal in place of Rule 10 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009, pursuant to paragraph 7(3) of schedule 3 (Transitional and Saving Provisions) to the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009.” The effect of this direction is to give the Tribunal a general discretion as to costs.

20 106. While, in view of our conclusion it is appropriate to award HMRC its costs of and incidental to and consequent upon the appeal, we consider that we should express some concern about the amount of material placed before the Tribunal (in 64 lever arch files) for a hearing listed for five days especially given the admission by Mrs Davis that Comveen’s transaction were connected to the fraudulent evasion of VAT and that the only issue before the Tribunal was the question of whether Comveen 25 knew or should have known that its transactions were so connected. As we were only taken to five of the 64 bundles we trust that this is matter that will be addressed by HMRC in quantifying its costs of the case.

Conclusion

30 107. The appeal is therefore dismissed with costs to be paid by Comveen to HMRC with such costs to be assessed if not agreed.

Right to apply for Permission to Appeal

35 108. 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: 18 June 2012