TC02437

Appeal number: LON/2008/2007

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

FIRST-TIER TRIBUNAL
TAX CHAMBER

GLOBAL ENTERPRISE (GB) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
GILL HUNTER

Sitting in public at 45 Bedford Square, London WC1 on 1 – 5, 8, 9, 15, 16 and 22 October 2012

Robert Holland of Dass Solicitors for the Appellant

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

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DECISION

Introduction

1. This is an appeal by Global Enterprise (UK) Limited ("Global") against a decision of HM Revenue and Customs ("HMRC") contained in letters, dated 1 September and 30 October 2008 denying Global its right to deduct input tax in the sum of £1,009,741.25 in its VAT accounting period ended 30 April 2006 (04/06) on the basis that 12 transactions, in which it had bought and sold mobile phones, were connected to missing trader intra-community ("MTIC") fraud which was part of an overall scheme to defraud the revenue and that Global knew or should have known that its transactions were connected to that MTIC fraud.

2. Global was represented by Mr Robert Holland of Dass solicitors and Mr Christopher Kerr and Mr Fraser Coxhill, both of counsel, appeared for HMRC. Although throughout this decision we have referred to the respondents as HMRC this should be read, where appropriate, as a reference to HM Customs and Excise.

3. A description of MTIC fraud can be found in many decisions of this Tribunal and in the decisions of the appellate Courts and Tribunals. A recent example is in *POWA (Jersey) Ltd v HMRC* [2012] UKUT 50 (TCC), where Roth J said, at [1-3]:

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

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

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

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

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

4. In the present case, in which we have adopted the jargon referred to by Roth J, of the 12 transactions with which we are concerned, 11 are alleged to involve "typical" MTIC fraud and one "contra-trading".

Law

5. It is not disputed that HMRC bears the burden of proof in this appeal. As Moses LJ said, in the conjoined appeals of *Mobilx Ltd (in Administration) v HMRC; HMRC v Blue Sphere Global Ltd ("BSG"); Calltel Telecom Ltd and another v HMRC* [2010] STC 1436 ("*Mobilx*"), at [81]:

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

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

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

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

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

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

> [56]. … a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.
>
> [57] That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.
>
> [58] In addition such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them.
>
> [59] Therefore, it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and do so even where the transaction in question meets the objective criteria which form the basis of the concept of "supply of goods effected by a taxable person acting as such" and "economic activity".
>
> …
>
> [61] … where it is ascertained, having regard to objective factors, that the supply is to a taxable person who knew or should have known that, by his purchase, he was participating in a transaction connected with the fraudulent evasion of VAT, it is for the national court to refuse that taxable person entitlement to the right to deduct."

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

> "[59] The test in *Kittel* is simple and should not be over-refined. It embraces not only those who know of the connection but those who "should have known". Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in *Kittel*.
>
> [60]The true principle to be derived from *Kittel* does not extend to circumstances in which a taxable person should have known that by his purchase it was more likely than not that his transaction was connected with fraudulent evasion. But a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion."

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

10. On 6 September 2012 the CJEU gave its judgment in the case of *Gábor Tóth v Nemzeti Adó-és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága* [2012] EUECJ C0324/11 ("*Tóth*").

11. In *Mahagében* the question before the CJEU was whether the Hungarian tax authority could refuse the right to deduct on the grounds of improper conduct on the part of one of his suppliers without establishing whether the taxpayer had been aware of that improper conduct. In *Pétér Dávid*, heard at the same time as *Mahagében*, the issue before the CJEU was whether the tax authority could refuse the right to deduct on the grounds that the taxpayer had not satisfied himself of specific matters relating to his supplier.

12. The issue in *Tóth* was whether the right to deduct could be refused by the Hungarian tax authority where the taxpayer's supplier was no longer a taxable person (its business operator's licence had been withdrawn) and the taxpayer had not verified whether the service indicated on the invoice had actually been provided.

13. The decisions of the CJEU in all three cases were consistent with the principle it had enunciated in *Kittel*. In *Mahagében* the Court said:

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

Similarly in *Tóth* the CJEU stated, at [53], that:

> "… in a situation such as that at issue in the main proceedings, the right to deduct may be refused only where it is established by the tax authority, on the basis of objective evidence, that the addressee of the invoice knew or should have known that the transaction relied on as a basis for the right to deduct was connected with a fraud committed by the issuer or another operator supplying inputs in the chain of supply."

14. However, Mr Holland relies on *Mahagében* and *Tóth* to advance the following propositions:

(1) the principles established by *Kittel* do not extend to contra-trading, neither of these cases or indeed the any previous decision of the CJEU or ECJ involves contra-trading;

(2) the fraud must precede the appellant's purchase in the same chain of supply;

(3) differentiation between the conditions or criteria relevant to the existence of the right to deduct input tax are different from the objective factors establishing knowledge on which the benefit of the right to deduct can be refused and the "erroneous conflation of the two different concepts by the Court of Appeal in *Mobilx* has led to a misapprehension on its part" and accordingly the "whole basis of the Court of Appeal's reasoning in *Mobilx* was wrong"; and

(4) *Mahagében* "cannot be construed as lending support to the only reasonable explanation test" formulated by the Court of Appeal in *Mobilx*.

15. We consider each in turn.

Contra-trading

16. We agree with Mr Holland that *Mahagében*, like *Kittel*, does not concern contra-trading. However, in our judgment, his argument that *Mahagében* is authority for the proposition that the knowledge of the taxable person should be confined to one chain of supply, thereby excluding contra-trading, is misconceived. As Roth J said in in *POWA (Jersey) Ltd*, at [53]:

> "… it is clear from the Court of Appeal judgment in *Mobilx*, where one of the cases under appeal was *Blue Sphere Global*, that no special approach is required in a case involving contra-trading. The correct test as regards knowledge is always the same. It is the test derived from *Kittel* as set out in para [59] of Moses LJ's judgment."

17. Therefore, if it is established, as a matter of fact, that a transaction is connected to a fraudulent tax loss, it does not matter if the connection is via contra-trading or a single supply chain as in a "typical" MTIC. If the taxable person knew or should have known of this connection his right to deduct will be lost. In this we agree with the Tribunal (Judge Blewitt and Mr J Stafford) in *Masstech Corporation Limited (in administration) v HMRC* (2011)(unreported) which took the view, at [50], that:

> "the *Kittel*/*Mobilx* test applies to contra-trading in the same way as it does to a "simple" MTIC; it being a variation on the same type of fraud."

18. In reaching this conclusion it follows that we reject the suggestion, made by Mr Holland, that properly understood contra-trading is jargon for a conspiracy which must include the fraudster, the contra-trader, the broker and all parties in between.

19. As Briggs J said in *Megtian Limited (in administration) v HMRC* [2010] STC 840:

> "[37] … there are likely to be many cases in which a participant in a sophisticated fraud is shown to have actual or blind-eye knowledge that the transaction in which he is participating is connected with that fraud, without knowing, for example, whether his chain is a clean or dirty chain, whether contra-trading is necessarily involved at all, or whether the fraud has at its heart merely a dishonest intention to abscond without paying tax, or that intention plus one or more multifarious means of achieving a cover-up while the absconding takes place.
>
> [38] Similarly, I consider that there are likely to be many cases in which facts about the transaction known to the broker are sufficient to enable it to be said that the broker ought to have known that his transaction was connected with a tax fraud, without it having to be, or even being possible for it to be, demonstrated precisely which aspects of a sophisticated multifaceted fraud he would have discovered, had he made reasonable inquiries. In my judgment, sophisticated frauds in the real world are not invariably susceptible, as a matter of law, to being carved up into self-contained boxes even though, on the facts of particular cases, including *Livewire*, that may be an appropriate basis for analysis."

We note that, in *POWA (Jersey) Ltd*, Roth J, at [52], expressly agreed with what Briggs J had said in *Megtian*.

Temporal Restriction

20. Mr Holland submits that the reference to "fraud previously committed by the supplier or another trader at an earlier stage in the transaction" at [45] of *Mahagében* is authority for the proposition that the fraud must precede the appellant's purchase in the same chain of supply. However, this is contrary to *Mobilx*, where Moses LJ said, at [62]:

> "The principle of legal certainty provides no warrant for restricting the connection, which must be established, to a fraudulent evasion which immediately precedes a trader's purchase. If the circumstances of that purchase are such that a person knows or should know that his purchase is or will be connected with fraudulent evasion, it cannot matter a jot that that evasion precedes or follows that purchase. That trader's knowledge brings him within the category of participant. He is a participant whatever the stage at which the evasion occurs."

As a decision of the Court of Appeal *Mobilx* is binding on this Tribunal, but, even if that were not the case, it is apparent from the conclusion reached by the CJEU in *Mahagében*, at [67], that the reference to the fraud being committed "earlier in the chain of supply" should be confined to the context of the facts of that case.

Conflation of Objective Conditions, Criteria and Factors

21. A further argument raised by Mr Holland is that it is clear from *Mahagében* that differentiation between the conditions or criteria relevant to the existence of the right to deduct input tax are different from the objective factors establishing knowledge on

which the benefit of the right to deduct can be refused and the "erroneous conflation of the two different concepts by the Court of Appeal in *Mobilx* has led to a misapprehension on its part" and accordingly the "whole basis of the Court of Appeal's reasoning in *Mobilx* was wrong."

22. However, we are unable to find anywhere in the judgment of Moses LJ in *Mobilx* any conflation or confusion of the objective criteria or conditions in relation to the right to deduct and the objective factors which the Tribunal must take into account in establishing knowledge of a connection with fraud. In any event, even if we accepted Mr Holland's submission, which we do not, the decision in *Mobilx*, which is binding on us, is an application of the principle in *Kittel*.

Reasonable Explanation Test

23. Mr Holland also contends that *Mahagében* "cannot be construed as lending support to the only reasonable explanation test" formulated by the Court of Appeal in *Mobilx* as in a "context where the determining factor must be objective, there is no place for deductive subjectivity which would lie at the heart of such a reasonable explanation test."

24. We have already referred to *Mobilx*, as a decision of the Court of Appeal, being binding on us. However, even if this were not the case we reject Mr Holland's argument and adopt that advanced by Mr Kerr that the phrase "only reasonable explanation" is no more than a logical interpretation of the *Kittel* principle. If the only reasonable explanation for a transaction is that it was connected with the fraudulent evasion of VAT, then it follows as a matter of logic that, having regard to the objective factors, the taxable person should have known of it.

Evidence

25. There was extensive documentary evidence which, including witness statements, was contained in 64 lever arch files.

26. Witness statements were made by the following officers of HMRC:

(1) Gemma Huston whose evidence concerns the extended verification of Global's 04/06 VAT Return;

(2) Timothy Waxman who accompanied another officer, Laura Taylor, to a meeting with Global on 15 December 2004;

(3) Nigel Saunders who analysed data from the First Curacao International Bank ("FCIB") for the purposes of HMRC's civil investigations into MTIC fraud;

(4) Andrew Letherby, the lead digital forensics officer responsible for recovery of evidence held on the FCIB computer system;

(5) Roderick Stone whose statement consists of 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;

(6) Ian Webster whose evidence was in relation to Calltel Telecom Limited ("Calltel");

(7) Claire Sharkey who examined the trading activities of AC Electrical EU Limited ("AC Electrical");

(8) Peter Davies the case officer for Anfell Traders Limited formerly known as Anfell College Limited ("Anfell");

(9) Pankaj Mandalia whose evidence concerns Apollo Communications Centre Limited ("Apollo");

(10) Phyllis Mee, the allocated officer of East Midlands Engineering Services Limited ("East Midlands");

(11) Douglas Armstrong who replaced an officer on long term sick leave as the allocated officer of KEP 2004 Limited ("KEP");

(12) Paul Cole, the allocated officer of Realtech Distribution Limited ("Realtech");

(13) Gary Saul, the allocated officer for SS Enterprises GB Limited ("SS Enterprises");

(14) Peter Cameron-Watson, the allocated officer for Swindon Star Limited ("Swindon Star") and UK Communication Limited ("UK Communication");

(15) Vivien Parsons the officer allocated to AAA Multilink Limited ("AAA");

(16) Erika Carroll whose evidence concerns Booming Technologies Limited ("Booming");

(17) Paul Fisher whose evidence is in relation to Causeway Initiatives Limited ("Causeway");

(18) Marva Harry who became the officer responsible for Infotel Communications Limited ("Infotel") in April 2009;

(19) Barry Patterson whose evidence is in relation to IT Data Technicians Limited ("IT Data") and Subbuma Limited ("Subbuma");

(20) Colin Needs, the allocated officer for the trader purportedly trading as Okeda Limited ("Okeda");

(21) George Edwards, the officer allocated to Phone City Limited ("Phone City");

(22) John Cordwell whose evidence is in relation to S-Electrical Store Limited ("S-Electrical"); and

(23) Jennifer Davis whose evidence concerns the trading activities of USM IT Suppliers Limited ("USM").

27. Of these witnesses, Claire Sharkey, Erika Carroll, Phyllis Mee, Vivien Parsons, Douglas Armstrong, Barry Patterson, Ian Webster, John Cordwell, Jennifer Davis,

Gemma Huston, Timothy Waxman and Nigel Saunders gave oral evidence and were cross examined by Mr Holland. Although we did not hear from the other witnesses their evidence was not challenged and their statements were admitted in evidence.

28. Witness statements were also provided by Mr Mohammed Shafiq who, as its director, gave oral evidence on behalf of Global. He was cross examined by Mr Kerr.

29. We did not find Mr Shafiq to be a convincing witness.

30. His answers to questions during cross examination were evasive and lacked credibility, eg he was unable to explain how the deals in which Global participated were put together. Also in his statement, dated 16 August 2010 which he confirmed as being true, he had explained how a former employee of Global had left to pursue a career with the West Yorkshire Police. However, when cross examined and asked why that employee, who had been responsible for drafting documents and conducting due diligence for the company, had not been asked to give evidence on Global's behalf Mr Shafiq said that she was in the United States "working for the police department, but it could be the higher authorities … moving up towards the secret services or whatever."

31. During cross-examination Mr Shafiq denied that he knew MTIC fraud involved intra-community trade, that it could involve hijacking of VAT numbers or could encompass the onward supply chain and circulation of goods until he was shown documents which showed he must have known that this was the case. He also claimed the existence of documents, such as an earlier version of Global's terms and conditions that had applied to the transactions with which this appeal is concerned despite there being no documentary evidence of these documents.

32. Mr Shafiq's assertion that IMEI numbers for mobile phones sold prior to March and April 2006 but not for those months had been supplied to HMRC was contradicted by a letter from Global's tax consultant, Veracis, to HMRC sent in July 2006 which states that "IMEI numbers have not been kept to date." Mr Shafiq sought to explain this saying he was told, by Mr Plowman of Veracis, that HMRC would not believe him if he said what had happened, namely that there had been a hard disk failure on the computer and that the IMEI numbers had been lost and it was better to say to HMRC that IMEI numbers had not been kept until July 2006.

33. In addition, on the second day of his evidence Mr Shafiq claimed, for the first time, that 40 files had been removed by HMRC and never returned. When asked why this had not been previously mentioned he said that "it had never come to mind."

34. Mr Shafiq was not re-examined on any of these matters.

35. Therefore, where his evidence was in conflict or inconsistent with that of other witnesses we have preferred their evidence over that of Mr Shafiq.

Facts

Background

36. Before becoming involved in the sale of mobile phones Mr Shafiq had been a shoe retailer trading as Ackroyd's Footwear.

37. The business had been registered for VAT by Mr Shafiq on 23 December 1996 when he had acquired it as a going concern from its previous owners. In 1999 he became involved in the retail sale of mobile phones under the trading name of Total Phone Network ("TPW"). Mr Shafiq explained that before it became TPW the business was known as Bingley Home Entertainment, a video library. On 15 November 2000 the HMRC was notified that the business name had changed from Ackroyd's Footwear to TPW. TPW was incorporated in May 2004 as Total Phones Limited with Mr Shafiq as its director.

38. Global was incorporated on 21 August 2002. Its director is Mr Shafiq who is the company's sole shareholder and he is responsible for its day to day management. Musurat Bibi, Mr Shafiq's wife, is the Company Secretary. She plays no part in the running of Global

39. An application for registration for VAT (form VAT 1) was completed by Mr Shafiq on 29 November 2002. Its business activity was described in the VAT 1 as "Imports and exports, shipping exports, including exports of all exportable commodities from the UK (machinery)". Mr Shafiq estimated Global's supplies in the 12 months from registration at £1million and stated that it did not expect to receive regular VAT repayments.

40. Although Global was registered for VAT with an effective date of registration of 29 November 2002 its first taxable supply was included in its VAT return for the period ended 30 November 2004 (11/04). Mr Shafiq explained that Global did not start trading before this time as it was intended that it would trade in earth moving machinery exporting it from the UK to the Middle East but that the person who was going to manage the company had left. The company had then been dormant until Mr Shafiq considered entering the wholesale market in mobile phones in 2004 following the success of TPW.

41. TPW had been awarded "Independent Dealer of 2002" for achieving the highest target set by the Orange network and was runner up in 2003-04. This gave TPW exposure in the trade press and brought enquiries from the wholesale market. Although TPW had been involved in a wholesale deal in 2004 Mr Shafiq explained that Global was for wholesale and TPW for retail. However, TPW did engage in a wholesale transaction in its 07/04 VAT period.

42. On 15 July 2002 TPW received a visit from HMRC Officer Sylvia Jones. This was because an MTIC trader had attempted to verify TPW's VAT registration number through HMRC's Redhill office. During the visit Ms Jones emphasised to Mr Shafiq the importance of verifying VAT numbers of suppliers and customers through Redhill. Ms Jones wrote to TPW on 3 December 2002 reminding Mr Shafiq of this.

43. On 1 September 2004 Ms Jones wrote again to Mr Shafiq to inform him of the measures put in place that had been announced in the 2003 Budget such as the evidence required for deduction of input tax and the introduction of joint and several liability. The letter warned that:

> A notice of Requirement may be issued to you if you have engaged in one or more supply chains involving businesses who evade substantial VAT payments by deliberately using another businesses [sic] VAT registration number without their consent, going missing or becoming insolvent owing VAT

and that:

> Due diligence is to be used in all transactions and must be clearly evident.

44. In a further letter, dated 22 September 2004, from Ms Jones Mr Shafiq was informed that TPW's 07/04 VAT return was subject to verification. This was followed by a letter, dated 8 October 2004, in which Ms Jones told Mr Shafiq that goods bought from Triton Communications Limited had been traced back to a defaulting trader and the correct VAT liability had not been paid.

45. Although a repayment of input tax claimed in the 07/04 VAT return was made to TPW, as notified in the letter of 3 November 2004 from Ms Jones to Mr Shafiq, it was made clear in that letter that this repayment was made "without prejudice" and:

> In the interests of your retail footwear and retail mobile phone business and that any future repayment claims will be subject to similar scrutiny and that further repayments will not be made on this basis

46. In a letter dated 25 July 2005, to TPW, the Tax Operations Manager, Andrew Tromans, wrote to say that:

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

Enclosed with the letter was a copy of HMRC's Notice 726.

47. Although the title of Notice 726 is "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. This includes mobile phones (section 1.4). Section 4.4 of the Notice asks "How can I avoid being caught up in MTIC fraud?" It is answered in section 4.5 which advises that "reasonable steps" are taken to "establish the legitimacy of your supply chain and avoid being caught up in a supply chain where VAT would go unpaid." It continues:

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

Examples of checks are contained at section 8 of the Notice. However, 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."

48. On 14 July 2004 Officer Roderick Stone wrote to Global. The letter explained that MTIC fraud:

> … constitutes one of the most costly current forms of VAT fraud within the EU. It is a serious problem for the UK and is Customs' top VAT fraud priority

It continues stating that HMRC were still experiencing problems with businesses offering commodities regularly involved in MTIC fraud and informed Mr Shafiq that 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 if it was known:

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

49. Before it had commenced trading Global received a visit from Ms Jones on 5 August 2004.

50. Although the visit was made in connection with TPW, which was, Ms Jones noted, "an MTIC trader and will be the subject of separate reports" her report records that Global had been set up by Mr Shafiq with the intention of taking over the wholesale mobile phone deals from TPW.

Wholesale Trading

51. Global's first wholesale deal took place on 20 October 2004 when it acquired mobile phones from Calltel. The goods were sold by Global to Eurolink General Trading and exported to Dubai. Mr Shafiq explained that he had become aware of Calltel as it had approached TPW offering it stock.

52. On 15 December 2004 Officers Laura Taylor and Timothy Waxman visited Global's business premises and met with Mr Shafiq. The visit report notes that Mr Shafiq "is aware of MTIC problem" and that Global deals "with established traders only." Contrary to Mr Shafiq's assertion, Mr Waxman did not give any advice about which company Global should trade with or indicate that it was "in order" to trade with Calltel.

53. Following its entry into the wholesale market Global experienced an increase in turnover from £306,950 in its 11/04 quarterly VAT accounting period to £17,335,370 in April 2006, its application to allow it to submit monthly VAT returns having been granted by HMRC on 2 March 2005. During this period it made claims and received repayments in respect of the input tax incurred during the VAT accounting periods 02/05, 03/05, 05/05, 06/05, 07/05, 08/05, 10/05, 11/05, 12/05 and 01/06. Although the Returns for these periods were examined by HMRC before a repayment was made they were not subject to the extended verification process as was the 04/06 VAT Return.

54. Mr Shafiq put the increase in Global's turnover down to the "huge demand" for handsets, an injection of capital into the company, and an increase in advertising.

55. Global advertised on the International Phone Traders ("IPT") and ITX mobile phone wholesale market websites as a broker/trader. Mr Shafiq said that this had cost approximately £2,000 in 2006. Global also took out a subscription with a company called Third Dimension Limited so that it could be introduced to other mobile phone trading companies and advertised in "Mobile/Trade Directory", a trade magazine.

56. The injection of capital into Global consisted of an initial amount of £50,000 by Mr Shafiq from his savings. He explained that this was followed by a further investment of £80,000 from a loan he obtained from HSBC. A letter from HSBC, dated 23 May 2005, states:

> HSBC Bank plc ('the bank') is pleased to offer Mohammed Shafiq ('the Borrower') a loan ('the Loan') for the purpose of assisting with property purchase, but the bank shall be under no responsibility to ensure the Loan shall be used for such purpose.

57. On 23 November 2005 Global entered into a "Loan Agreement" with a Mr Bilal Ahmed under which Mr Ahmed agreed to lend Global £50,000. Mr Shafiq said that the agreement was drafted by an employee of Global, the one that had left to join the police. Despite the agreement referring, in clause 4, to the lender being able to "demand the immediate repayment of all moneys due or incurred by the Borrower to the Lender together with interest and any other sums forthwith", clause 2 of the agreement provides that "this is an interest free loan" (and therefore compliant with

Sharia Law). Mr Shafiq explained that Mr Ahmed was a "family friend" that he had "known from childhood" who had not been provided with any business plan and knew "nothing at all" about the Global's business.

04/06 VAT Return

58. Following receipt of its 04/06 VAT Return HMRC contacted Global by letter, dated 30 May 2006, to say that this Return would be subject to extended verification.

59. During April 2006, the period covered by its 04/06 VAT Return, Global entered into 33 deals, 20 of which were buffer deals in which it purchased and sold mobile phones from and to UK traders. However, 13 of its transactions were broker deals in which it bought mobile phones from UK traders and sold to traders based in another EU Member State. It is 12 of these deals that are the subject of this appeal. As Global was also engaged in buffer transactions the numbers of the broker deals are not sequential.

Deal 1

60. On 18 April 2006 the following transactions occurred.

61. Global purchased 1,500 Nokia 8800 mobile phones from Owl Limited ("Owl") which it sold to Navigo IT ("Navigo") an Italian company. Owl had purchased the phones from Xcel Solutions PLC ("Xcel") which in turn had acquired them from Excell Distribution Services Ltd ("Excell"). Excell purchased 500 Nokia 8800s from Park Supplies Limited ("Park"), which it had acquired from Apollo. Excell had also purchased 1,000 Nokia 8800's from AC Electrical and sold 1,500 Nokia 8800s to Xcel.

62. Apollo, to which the supply chain in this deal and Deals 6 and 7 have been traced has an unpaid VAT liability of over £51 million which includes output tax generated by the sales in Deals 1, 6 and 7. It is not disputed that the failure to account for VAT by Apollo is as a result of fraud.

63. The supply chain in this deal, and also Deals 2 and 3, has also been traced back to AC Electrical. Assessments remain outstanding against AC Electrical in excess of £12 million and it is accepted that the loss of tax was the result of fraud.

64. In this deal and Deal 3, whilst in the UK the goods were held by freight forwarders Interken Freighters (UK) Limited ("Interken") and were released to each trader in turn by the issue of release notes on 18 April 2006 until Owl released the goods to Global on 20 April 2006. The phones were shipped, on the instruction of Global and at the request of Navigo, to Speed International in Torino in Italy. They were shipped from Dover to Calais in the early hours of 19 April 2006 and on 20 April Global instructed Interken to release them to Navigo.

65. The terms and conditions of Owl, as set out in its "Supplier Declaration" specified that "full legal title" of the goods will be passed to Owl upon it making "full

payment" to its supplier. However, in this deal and in Deals 13 and 14 Owl released the goods to Global before it had paid its supplier and, according to its own terms and conditions, before it had acquired legal title.

66. Analysis of data of the FCIB accounts of the participants shows that on 20 April 2006 Navigo paid Global for 1,500 Nokia 8800s having itself been paid for 1,500 Nokia 8800s on 20 April 2006 by Dantec Enterprises SL ("Dantec"), a Spanish company. Also on 20 April 2006 Global paid Owl and the monies passed down the supply chain until they reached Excell. However, Excell did not pay its UK supplier Park, rather it paid Macdelta Limited ("Macdelta") a Cypriot company on the instruction of Park. Macdelta transferred the money to Maktrim ACC ("Maktrim"), a Polish company, and Mortop Global Limited ("Mortop"), a company based in Israel. Maktrim and Mortop transferred funds to Dantec and Amex FHU, a company based in Poland on 21 April 2006.

Deal 2

67. On 18 April 2006 Global sold 150 Nokia 9300is to Navigo which it had purchased, on 18 April 2006, from Owl. Owl's supplier, on 12 April 2006, had been Grovner Trading Limited ("Grovner") which had supplied Owl with 1,750 Nokia 9300i phones. Grovner acquired the 1,750 phones from Xcel on 12 April 2006. Xcel had purchased the phones on the same day from Excell which had also bought them on 12 April 2006 from AC Electrical.

68. The goods remained at Interken and were successively released by each trader on 12 April 2006 until they were released to Global by Owl on 18 April 2006. Global instructed Interken to ship "and hold" the goods to Speed International in Torino and these were shipped as part of the same consignment as the phones on Deals 1 and 3.

69. Having received payment from Dantec on 20 April 2006, Navigo paid Global for the 150 Nokia 9300i phones on the same day. Global then paid Owl, also on 20 April 2006. There is no record of Owl paying Grovner for these goods. However, on 13 April 2006 Grovner paid Xcel which paid Excell. Excell did not pay its supplier but, on the instruction of AC Electrical, had paid Maktrim which, on 13 April 2006 paid Dantec.

Deal 3

70. The following transactions also occurred on 18 April 2006. Global purchased 1,000 Nokia 6680s from Owl which it sold to Navigo. Owl had acquired the phones from Xcel and they can be traced via Excell to AC Electrical.

71. Global received payment for the goods from Navigo on 20 April 2006 and it paid Owl the same day. The monies passed through the supply chain from Owl to Xcel and on to Excell. Excell did not pay AC Electrical but made payment to Macdelta which transferred the monies to Maktrim which paid Dantec.

Deal 6

72. On 21 April 2006 Global sold 2,000 Nokia 8800s to Dantec. As in previous Deals Global acquired the phones from Owl on the same day. Also on 21 April 2006 Owl had acquired 1,000 Nokia 8800s from Tibuski Tech and 1,000 Nokia 8800s from Xcel. Tibuski Tech ("Tibuski") had been supplied by Maxwell Trading Limited which had acquired the phones from Apollo. Xcel had been supplied by Excell and Excell had purchased the phones from Apollo with all transactions taking place on 21 April 2006.

73. As in the previous deals the phones were held by Interken and released by each of the participants in the transaction chain on 21 April 2006. Although Owl released the goods to Global on 25 April 2006 Global had instructed Interken to ship and hold the goods to Interken's warehouse in Madrid at Dantec's request and this was done on 21 April 2006, before Global had received payment, with the phones being released to Dantec on 25 April 2006.

74. On 24 April 2006 Macdelta made a payment to Maktrim which transferred funds to Dantec. Dantec paid Global for 2,000 Nokia 8800s on 25 April 2006 following which, on the same day, Global paid Owl. Owl then paid its suppliers Tibuski and Xcel. Tibuski paid Maxwell and Xcel paid Excell both of which paid Macdelta on 25 April 2006.

Deal 7

75. Global sold 2,000 Nokia N70s to URTB SARL ("URTB"), a French company. Although URTB's purchase order and Global's pro-forma invoice are dated 19 April 2006 Global's invoice is dated 25 April 2006. Global acquired the phones on 19 April 2006 from Owl. Owl's supplier had been Tibuski which had acquired the phones from Excell. Excell's supplier was Park and Park had been supplied by Apollo with all transactions taking place on 19 April 2006.

76. Interken held the goods which were released by each trader on 19 April 2006 until Owl released them to Global on 26 April 2006. On 19 April 2006 Global instructed Interken to ship and hold the goods on behalf of URTB to AFI Logistique in Paris. The goods were shipped early on 20 April 2006 and released to URTB on 26 April 2006.

77. URTB paid Global for the phones on 25 April 2006 and Global paid Owl the same day. Owl made a payment to Tibuski on 20 April which paid Excell on the same day. Also on 20 April 2006 Excell paid Macdelta (not its supplier Park). On 25 April 2006 the following transfers of funds took place from Macdelta to Mortop to Amex to URTB and it was from this money that URTB made payment to Global.

Deal 13

78. On 28 April 2006 the following transactions took place. Global sold 500 Nokia 8800s to URTB which it had bought from Owl. Owl had acquired the phones from

Xcel which had been supplied by Excell. Excell's supplier was Daraj Trading Limited ("Daraj") which acquired the goods from SS Enterprises.

79. SS Enterprises, to which the phones in this deal, and Deals 14 and 15 have been traced, is a missing trader that been assessed to output tax exceeding £14 million which remains outstanding. It includes the VAT attributable to these deals and it is not disputed that this loss of tax was as a result of fraud.

80. In this deal and Deal 15 the phones were held by Interken and released by each trader in the transaction chain on 28 April 2008. However, Owl did not release the goods to Global until 8 May 2006 in respect of Deal 15 and 9 May 2006 for Deal 13. On Global's instruction Interken shipped the goods to AFI Logistique in Paris and they were released to URTB on 8 May 2006.

81. Payment for the phones was received by Global from URTB on 8 May 2006. On 9 May 2006 Global paid Owl. The monies subsequently passed through the supply chain from Owl to Excell via Xcel on 12 May 2006. On receipt of the money it was transferred by Excell not to Daraj, its supplier, but to Macdelta. Funds were then transferred from Macdelta to Mortop and on to Amex on 12 May 2006. On 8 May 2006 Amex had transferred funds to URTB from which it had purchased the goods from Global.

Deal 14

82. The following transactions also took place on 28 April 2006. Global sold 2,100 Nokia 9300i mobile phones to Dantec having bought them from Owl. Owl had been supplied by Tibuski which in turn had purchased the goods from Excell. Excell had been supplied by Park with 3,000 Nokia 9300is which it had acquired from SS Enterprises.

83. The goods in this deal were also held by Interken and successively released by each trader on 28 April 2006 although they were not released to Global by Owl until 2 May 2006. On the instructions of Global acceding to the request by Dantec the goods were shipped to AFI Logistique in Paris on 3 May 2006 and released to Dantec.

84. On 2 May 2006 Global was paid by Dantec and paid Owl. Monies passed along the supply chain from Owl to Excell on 11 May 2006. On 11 May 2006 Excell had made a series of payments to Macdelta which had transferred funds to Maktrim on 2 May 2006. On receipt of these funds, also on 2 May 2006, Maktrim had made a transfer to Dantec from which it paid Global.

Deal 15

85. Also, on 28 April 2006 Global sold 1,900 Nokia 8800s to URTB that it had acquired from Owl. Owl had been supplied by Tibuski which, in turn, purchased the phones from Performance Specifications Limited ("Performance"). Performance had been supplied by Park and its supplier had been SS Enterprises.

86. Global was paid for these goods by URTB on 8 May 2006. On the same day it paid Owl which paid Tibuski which paid Performance. Performance then transferred funds to Macdelta which paid Mortop enabling it to transfer monies to Amex which in turn made a payment to URTB all of which occurred on 8 May 2006. The monies passed through these accounts in quick succession commencing and finishing with Owl in under three hours.

Deal 17

87. On 21 April Global sold 2,000 Nokia 9300i mobile phones to World Communications SARL ("World"), a French company. In this transaction Global's supplier was Calltel which had acquired the goods from Benelux Gift Trading BV ("BGT"), a company based in the Netherlands.

88. Calltel was a contra-trader (see paragraph 3, above for a description of contra-trading). During its quarterly VAT accounting period 06/06 in which it supplied the 2,000 Nokia phones to Global Calltel was entering into broker deals of its own. It is not disputed that the supply chains in Caltell's broker deals led back to fraudulent tax losses.

89. In the deal in which it supplied Global the goods were delivered on behalf of Calltel to the warehouse of freight forwarders AFI Logistics Limited ("AFI"). On 24 April Global instructed AFI, at the request of World, to ship and hold the phones to AFI's Paris warehouse. The goods were shipped from Folkstone to Calais-Coquelles on 26 April 2006.

90. World paid Global for the goods on 4 May 2006 having received payment from Amex on the same day. Also, on 4 May 2006, Global paid Calltel and Calltel paid BGT. BGT then paid Foneok, based in the Republic of Ireland, which transferred the monies to Maktrim. Maktrim paid A&R General Trading ("A&R") which was based in the UAE, and A&R made a series of payments to Amex which, in turn, made a series of payments to World. The monies passed through the accounts of all participants including Global, from Amex, which made the first payment to World at 14:03 on 4 May 2006, to A&R arriving in its account at 14:54.

91. Despite a specific reference to the retention of title until payment in full on the invoices of both Calltel and BGT, goods were physically shipped out of the UK by Global before any payment had been made.

Deal 18

92. Global sold 1,800 Sony Ericsson W900i mobile phones to GTC SARL ("GTC"), a French company. GTC's purchase order and Global's pro-forma invoice are dated 26 April 2006 although its invoice is dated 28 April 2006. It acquired the phones from Impact World Limited ("Impact World") on 26 April 2006 which had bought the goods from Delbank Limited ("Delbank") on the same day. Also on 26 April 2006 Delbank had been supplied by Booming Technologies Limited ("Booming") which had bought them from Decode Direct Marketing Limited

("Decode"). Decode's supplier was Time Corporates Limited ("Time") which had bought the phones from KEP. .

93. The supply chain in this deal, and also Deals 19 and 30, have been traced back to KEP. Deal documents obtained by HMRC indicated that its VAT number had been hijacked and an entity using the identity of KEP was, in April 2006, supplying wholesale quantities of mobile phones which it had acquired from a Spanish trader. Assessments in excess £109 million have been issued against the entity trading as KEP, which includes the output tax generated by the supplies in Deals 18, 19 and 30. None of these supplies had been declared on a VAT return and no appeal has been made against the assessments which remain outstanding and unpaid.

94. It is not disputed that this loss of tax was due to fraud.

95. The phones in this deal were held by Peat UK Limited trading as Twins Logistics ("Twins Logistics") on behalf of Delbank which released the goods to Impact World on 26 April 2006. Impact World released the goods to Global on the same day and, at the request of GTC, Global instructed Twins Logistics to ship and hold the goods to AFI Logistique in Paris. They were shipped from Dover to Calais on 28 April 2006.

96. Payment for the goods was received by Global from GTC on 4 May 2006, GTC having received funds from Amex on the same day. Also on 4 May 2006 Global paid Impact World which paid Delbank which in turn paid Booming. Booming transferred its payment to Decode, also on that day. However, Decode did not pay its supplier Time, rather it made a payment to A&R which on 4 and 5 May 2006 made a series of payments to GTC with funds moving through the accounts of the participants within the space of 42 minutes.

Deal 19

97. Global sold 1,000 Nokia N70s to GTC. Its purchase order and Global's shipping instructions are dated 26 April 2006. However, Global's invoice is dated 28 April 2006. Global had purchased the phones from Capital Imports Limited ("Capital") on 26 April 2006 the date on which the remaining transactions in the supply chain occurred. Capital's supplier was IA Associates Limited ("IA Associates") which had purchased the phones from Booming. Booming had been supplied by Decode which had been supplied by Time. Time had acquired the goods from KEP.

98. The phones in Deal 19 were held by AFI on behalf of Booming and released to Capital on 26 April 2006 which released them to Global on the same day. Also on that day Global, at the request of GTC, instructed AFI to ship and hold the goods to AFI Logistique with them being shipped from Dover to Calais on 29 April 2006.

99. Having received a payment from Amex GTC paid Global for the phones on 3 May 2006. On 4 May 2006 Global paid Capital and payments were made along the chain from Capital to Decode via IA and Booming. However, rather than pay its

supplier, Time, Decode made a payment to A&R which on 4 and 5 May 2006 made a series of payments to Amex.

Deal 30

100. . Global supplied 1,000 Nokia 8800s to GTC. Although Global's invoice is dated 28 April 2006, GTC's purchase order and Global's pro-forma invoice are dated 26 April 2006. Global acquired these phones from Capital on 26 April 2006 and they can be traced back to KEP via Calltel, Booming, Decode and Time with these transactions taking place on 26 April 2006.

101. The goods were held by Twins Logistics on behalf of Calltel. They were released to Capital on 26 April 2006 which notified Twins Logistics that they were to be allocated to Global but not released until payment in full. On the same day, 26 April 2006, Global instructed Twins Logistics to ship and hold the goods to AFI Logistique with them being shipped from Dover to Calais on 28 April 2006.

102. GTC, which had received a payment from Amex, paid Global for the phones on 4 May 2006 following which Global paid its supplier Capital. Capital then paid Calltel and payment proceeded through the supply chain to Decode. Decode then transferred payment to A&R which paid Amex providing it with funds to transfer to GTC. It took under an hour for these money transfers to take place.

103. Mr Shafiq explained that, with regard to payments through the FCIB accounts, he would receive a telephone call from Global's customer to tell him that a payment was to be made. He then contacted Global's supplier on making payment requesting the release of the goods.

Other 06/06 Deals

104. During its 04/06 VAT accounting period, in addition to the 12 broker deals described above, Global was concerned with 20 buffer deals in which it purchased mobile phones from UK traders and sold them on to other UK traders. The supply chains in these buffer deals contained many of the same participants as in the broker deals such as Apollo, KEP, SS Enterprise, Park and Daraj. As with the above broker deals all transactions were for mobile phones with two pin chargers.

105. On 28 April 2006 Global entered into a broker deal in which it sold 500 Nokia N91s to Dantec which it had bought from Owl. Owl had acquired the phones from Newway Associates Limited which in turn had been supplied by Fone Logistics. Fone Logistics had bought the goods from Elite Mobile plc which had purchased them from Clockwork Logistics which in turn had been supplied by Nokia UK. Although Global's invoice states that the goods are of "central European spec" Elite Mobile specified on its "Goods Received" note that the phones have English manuals and three pin plugs which indicates the goods, which were initially purchased from Nokia UK, were intended for the UK market. As there was no loss of tax found in this transaction chain the input tax incurred by Global on the purchase of these phones was repaid.

Due Diligence

106. Global obtained a report on Owl, its supplier in Deals 1, 2, 3, 6, 7, 13, 14 and 15 which was compiled by Veracis in July 2005. The report, which is based on an interview with Owl's director, indicated that the company had begun to trade in mobile phones in 2002, employed four people and had a turnover of £41 million.

107. Accounts, prepared on a "small business" basis had been filed at Companies House but no relevant details were available. Although the report indicated that Veracis had been authorised to approach Owl's accountant for a reference this was not obtained. Mr Shafiq did not question why, despite its turnover, Owl had only filed "small business" accounts and was unable to explain why a reference was not obtained from Owl's accountant.

108. A further Veracis report on Owl complied in December 2005 showed that its turnover was estimated at £50 million and the number of employees had increased to nine. Owl completed Global's "Trading Application Forms" on 27 June and 19 September 2006.

109. Calltel was Global's customer in Deal 17. It was also Global's customer in four of the buffer deals. A Veracis report complied in January 2006 was obtained by Global. This report, which includes company and identification documents, was prepared on the basis of an interview with two employees of Calltel described as the internal lawyer and accountant. Although it had a turnover of £500 million in the year to 31 August 2005 it filed abbreviated "small company" accounts at Companies House, something that was not questioned by Mr Shafiq who also did not pursue a request for a reference from the company's accountant when this was not received.

110. However, Mr Shafiq did obtain what he described as a "very positive" Creditsafe report on Calltel which indicated "very good credit worthiness" as at 6 April 2006. Calltel completed Global's "Trading Application Form" in September 2006.

111. Impact World supplied Global in Deal 18 and was its customer in one of the buffer deals. A Veracis report compiled in July 2005 on the basis of an interview with the director recorded that the company had been established in April 2005 and had commenced trading in June 2005. Global obtained a second Veracis report compiled in January 2006 which showed that other than its director Faisal Ahmed, the company had no other employees. Mr Ahmed was unable to supply a copy of his passport or utility bills for his home address. He was also not able to estimate the turnover for 2006. Impact World completed Global's "Trading Application Forms" in June 2006 after Deal 18 had taken place.

112. Mr Shafiq explained that he met Mr Ahmed, Impact World's director, at Global's accountants. While no written reference was received Mr Shafiq said he was told by his accountant that Impact World traded in mobile phones and that they acted for them. A credit check by Experian Silver was obtained on Impact World in October 2006. This stated that the "credit limit is £500" and that it is "an above average risk company."

113. Capital was Global's supplier in Deals 19 and 30 as well as supplying Global in one of the buffer deals. A Veracis report compiled on 14 April 2006 showed that although Capital had been incorporated in 2002 it did not commence trading in mobile phones until 2005. No turnover information was supplied, accountants had not been appointed and its accounts were not audited.

114. A credit report obtained in October 2006, after the Deals had taken place, shows that Capital is a "high risk company.

115. Navigo, an Italian company, was Global's customer in Deals 1, 2 and 3. Mr Shafiq did not question the volume of trade claimed to have been undertaken by Navigo which in its letter of introduction stated:

> Our current trading volumes are more than **100,000 units** (hundred thousand units) **per week** (some time over 150,000 units / week) of different models and brands. These include NOKIA, SIEMENS, SAMSUNG, MOTOROLA, SONYERICSSON, PANASONIC etc.

The letter from Navigo was undated and the only indication as to when the letter and other documents were received is that Global's Trading Application Form appears to have been faxed from Italy on 12 September 2006, sometime after the deals took place.

116. A Veracis report, dated 30 March 2006, was also obtained by Global. This included the company and identification documents which were in Italian. Mr Shafiq confirmed he does not speak Italian.

117. Mr Shafiq explained that GTC, Global's customer in Deals 18, 19 and 30, contacted Global although he could not remember when. A Veracis report on GTC was obtained on 21 April 2006 (the Deals took place on 26 April 2006). Veracis had visited GTC and interviewed its sole director, a Mr Timothy David Mason a British national. Although GTC is a French company based in Boulogne, Mr Mason gave a UK address, his mother's, as his home address, and said that his main occupation had been running camping sites in France and had no experience in the operation of a mobile phone trading business. As can be seen from the report, Veracis found:

> The company has set up an office in an unimposing two-storey block. There are two desks with very little equipment on show and no evidence of any commercial documentation or activity.

The report highlights the following "Negative Indicators:

- Office is set up and no business done from here.
- Director gives the impression he has no idea what trading is going on.
- Director will not disclose arrangement with person in Spain who seems to be the organiser of the business and trader.
- No documentary proof of the company's legal and tax status provided.

- No information on due diligence or stock inspections.
- Stock is bought from and sold to the UK.
- Director previously acted as a director of a mobile phone trading company which is still active in the UK, he did not disclose this.
- Director has a track record of appointments in over 13 UK companies which have been dissolved

We would not recommend trading with this company because of the above issues.

In addition to the companies which had been dissolved Mr Mason was also a director of Quadrant Homes Limited and Quadrant Cookware. A joint director of these companies was a Mr Michael Ainsworth who was the director of Capital, Global's supplier in the deals in which GTC was its customer.

118. A further Veracis report was obtained on GTC on 18 May 2006 after the deals had taken place.

119. Turning to the freight forwarders, Global used AFI in Deals 17 and 19, Twin Logistics in Deals 18 and 30 and Interken in all other Deals. Mr Shafiq produced Veracis reports on AFI and Twins Logistics.

120. The report on AFI which was compiled in November 2005 recorded that it was incorporated in 2004 but was not a member of the British International Freight Association ("BIFA"). Neither of the directors was present and no identification was provided despite a request to the controlling office in Dubai. AFI's security was described as "chaotic" and the person nominally in charge did not appear to be in full control. No accounts had been filed and it was not possible to assess liquidity.

121. The report concluded that:

> Without this information, placing high value cargo in its charge may present a risk factor. In short, the company has not been in existence long enough to demonstrate a track record of trading and tax compliance

122. The Veracis report of Twins Logistics was compiled in January 2006. It stated that the company had been incorporated in October 2004 but had only commenced trading on 23 January 2006. The director was not present at the time Veracis visited the company and it had no stock in the warehouse or any transport of its own. It was not a member of BIFA and did not have any security apparatus in place.

Issues

123. In *Blue Sphere Global* the Tribunal identified the issues to be determined in an MTIC appeal. These were approved by the Court of Appeal in *Mobilx*, at [69] and are as follows:

(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?

Discussion and Conclusion

Fraudulent Tax Loss

124. It was accepted that there was a loss of tax in every one of the 12 deals with which this appeal is concerned and that this loss was as the result of fraud.

125. Mr Holland referred to the fact that HMRC had denied Global its input tax whilst allowing participants further back in the transaction chains to exercise their right of deduction and contended that it was disproportionate for HMRC to seek to transfer the consequences of their inaction to Global.

126. However, it is clear from the principle enunciated by the ECJ in *Kittel* that such an argument cannot succeed. As Moses LJ said in *Mobilx* at [66]

> "It is not arguable that the principles of fiscal neutrality, legal certainty, free movement of goods and proportionality were infringed by the Court itself, when they were at pains to preserve those principles (see §§ 39-50). By enlarging the category of participation by reference to a trader's state of knowledge before he chooses to enter into a transaction, the Court's decision remained compliant with those principles."

127. Given the involvement of many of the same participants in the same order together with the circularity of funds (which, we note, was not challenged) in the deals described above, most of which took place over a single day, it would seem highly improbable that these were legitimate commercial transactions between unconnected parties. Indeed the evidence leads us to conclude that there was a contrived scheme for the fraudulent evasion of VAT with each of the deals having been pre-arranged.

Connection

128. Other than in Deal 17 we find that there is a direct link between Global's transactions and the fraudulent tax loss. In Deal 17 we find that there is also, as a matter of fact, such a link, albeit in that transaction the connection is through contra-trading.

Knew or Should Have Known

129. Having found that Global's transactions were connected to this fraudulent evasion it is necessary to determine whether it, through Mr Shafiq, knew or should have known that this was the case.

130. In doing so it is clear from *Mobile Export 365 v HMRC* [2007] EWHC 1737 (Ch), at [20(4)], that we are entitled to rely on inferences drawn from the primary facts. It is also clear, from the approach taken by Christopher Clarke J in *Red12 v HMRC* [2010] STC 589 which was adopted by Moses LJ in *Mobilx* that we should not unduly focus on whether a trader has acted with due diligence but consider the totality of the evidence. Moses LJ said, at [83]:

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

> at the totality of the deals effected by the taxpayer (and their characteristics), and at what the taxpayer did or omitted to do, and what it could have done, together with the surrounding circumstances in respect of all of them."

131. Mr Kerr submits the Global, through Mr Shafiq, knew that the deals were connected with the fraudulent evasion of VAT as:

(1) it would not have been rational for the organisers of the fraud to have used Global as an unknowing conduit for goods and monies;

(2) the trading environment was so unrealistically benign that it was too good to be true;

(3) the trading model was otherwise not consistent with rational commerce; and

(4) Mr Shafiq did not take any reasonable basic steps that any reasonable prudent businessman would have taken to protect Global's commercial interests, evidence that he knew the business was not for commercial purposes.

132. On behalf of Global, Mr Holland contends that while it is not contrary to EU law to require a trader to take every step which could reasonably be required to satisfy himself that a transaction does not result in participation in tax evasion it is necessary for HMRC to establish "indications pointing to an infringement or fraud" before such a requirement can be imposed. He relies on the following passage from *Mahagében*:

> "53. According to the Court's case-law, traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud, be it the fraudulent evasion of VAT or other fraud, must be able to rely on the legality of those transactions without the risk of losing their right to deduct the input VAT (see *Kittel and Recolta Recycling*, paragraph 51).
>
> 54. On the other hand, it is not contrary to European Union law to require a trader to take every step which could reasonably be required of him to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion (see, to that effect, Case C-409/04 *Teleos and Others* [2007] ECR I-7797, paragraphs 65 and 68; *Netto Supermarkt*, paragraph 24; and Case C-499/10 *Vlaamse Oliemaatschappij* [2011] ECR I-0000, paragraph 25).
>
> …
>
> 59. In those circumstances, it follows from the case-law referred to in paragraphs 53 and 54 of the present judgment that determination of the measures which may, in a particular case, reasonably be required of a taxable person wishing to exercise the right to deduct VAT in order to satisfy himself that his transactions are not connected with fraud committed by a trader at an earlier stage of a transaction depends essentially on the circumstances of that particular case.
>
> 60 It is true that, when there are indications pointing to an infringement or fraud, a reasonable trader could, depending on the circumstances of the case, be obliged to make enquiries about another trader from whom

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

133. Mr Holland submits that, in the present case, as HMRC have adduced no evidence of an infringement or fraud by another trader acting earlier in the chain of supply there is no justification for any enquiry and Global is entitled to assume the apparent good order of commercial dealing. This, he contends, is consistent with the long established approach of the Courts (see *Sanders Bros. v Maclean & Co* (1883) 11 QBD 327 at 343 which was cited with approval in *National Westminster Bank Plc v Rabobank Nederland* [2007] EWHC 1056 (Comm) at [379]).

134. We reject Mr Holland's argument which we find to be wholly misconceived. It does not address the position where a trader acting on his own volition has obtained information, not detected by HMRC, which unequivocally links his transaction to a fraudulent loss of tax. In such circumstances, despite the information available to him, on Mr Holland's argument, it would follow that such a trader is entitled to assume the apparent good order of commercial trading and retain his entitlement to deduct notwithstanding that he knew of the connection to fraud. This is clearly inconsistent with the principles established by *Kittel* and *Mobilx* that a trader will lose his right to deduct if he knew (or should have known) that he was participating in a transaction connected with fraudulent evasion of VAT.

135. As Mr Holland states in his skeleton argument, despite not being "required" to do so Global did in fact make enquires "carrying out some checks on its customers and suppliers before dealing with them. Those checks included verification of their existence and VAT registration and some checks on whether those who claimed to act for the relevant companies were indeed officers of those companies. More specifically Global had utilised the checking facilities offered by HMRC by undertaking (though not required to do so) 'Redhill Checks'".

136. However, before looking at how Mr Shafiq used the information available to him as a result of those enquires, we first consider his knowledge and awareness of the prevalence of MTIC fraud in the trade sector in which Global was operating.

137. In evidence, he confirmed that he knew that MTIC fraud involved missing traders "going off with the VAT" and could involve the hijacking of VAT numbers, that it involved intra-community trade; that one of the commodities involved was mobile phones and that there was a large-scale fraud which was a serious problem for the UK.

138. Having received letters from HMRC on 14 July 2004 (sent to Global) and 25 July 2005 (sent to TPW) which specifically referred to the problem of MTIC fraud, and having confirmed in evidence that he had read and understood Notice 726 which had been enclosed with the 25 July 2005 letter, we have no doubt that Mr Shafiq was very well aware of the nature and prevalence of MTIC fraud both before and at the time of the Deals with which this appeal is concerned.

139. Turning to the information available to him, Mr Shafiq accepted that it was important to make sure that Global's suppliers and customers were genuine and legitimate commercial businesses. However, he did not appear to be concerned or question why Owl and Calltel were filing abbreviated "small company" accounts at Companies House when their turnovers were £41 million and £500 million respectively. Also he does not seem to have taken any follow up action when the accountants' references promised to Veracis by Owl, Calltel and Impact World were not received.

140. With regard to Impact World, Mr Shafiq appears to have been willing to trade on the basis of oral confirmation from Global's accountant that it was involved in the wholesale trade in mobile phones and very little else. The Veracis report indicates that it had no staff and that the director was unable to estimate its turnover. While there is evidence that credit checks were carried out on Impact World and Capital these were in October 2006 after the deals had taken place.

141. Although he said that he was concerned by the information contained in the Veracis report on GTC Mr Shafiq did not wait until he received the report before proceeding to deal with the company. He claimed to have raised his concerns with Peter Plowman of Veracis who, Mr Shafiq said, told him "you can conclude the deal", but we did not hear from Mr Plowman who was not asked to give evidence or provide a witness statement which could confirm Mr Shafiq's account in relation to this and the missing IMEI numbers to which we referred in paragraph 32, above.

142. Also, despite accepting that it was very important to make sure that the freight forwarders were reputable and substantial entities, Mr Shafiq does not appear to have been concerned by the negative factors highlighted in the Veracis reports on AFI and Twins Logistics, to which we have referred at paragraphs 120-123, above. Notwithstanding the conclusion of the Veracis reports he continued to place high value cargo in the charge of those freight forwarders.

143. In our view, this is not the reaction that could be expected of a reasonably prudent businessman, with the same knowledge and awareness of MTIC fraud and in possession of the same information as Mr Shafiq. We consider that a lack of concern and failure to follow up any discrepancies arising out of the Veracis reports could be

explained by knowledge that the transactions concerned were connected to fraud or part of a contrived scheme to defraud HMRC. In such circumstances there would be no need to undertake due diligence other than to provide "window dressing" to satisfy HMRC.

144. In this regard we note that there is no documentary evidence that, other than carrying out Redhill checks to verify the companies' VAT registrations, any due diligence was undertaken on Dantec, Global's customer in Deals 6 and 14. Similarly with World, Global's customer in Deal 17, and URTB, its customer in Deals 7, 13 and 15, there is no documentary evidence that any checks other than Redhill verification was undertaken. Mr Shafiq confirmed that he understood that a Redhill check was to verify the VAT registration numbers of the companies concerned and did not provide confirmation that the trader was legitimate.

145. Knowledge of a connection to fraud may also explain why, in every deal, goods were released along the supply chain without payment being made, contrary to the terms and conditions of some of the participants in the transactions.

146. However, Mr Holland submits that it would be wrong for us to infer that, from its manner of trade, Mr Shafiq and therefore Global, knew of a connection with fraud. He referred to the transaction during April 2006, described in paragraph 105, above, in which Global sold goods to Dantec that it had purchased from Owl. In that transaction the supply chain was traced back to Nokia UK and as there was no loss of tax Global recovered its input tax. Mr Holland points out that Global entered into this transaction in exactly the same way and made a similar profit as it had its other transactions in April 2006. Also, there was a similar supply chain, similar due diligence undertaken and payment was received after the goods had been released.

147. Mr Kerr contends, and we accept, that just because this particular transaction, one of 33 undertaken during April 2006, appears to have commenced with the manufacturer does not mean that all or some of the rest of that supply chain could not have been for a fraudulent purpose. He points out that all of the handsets involved in fraudulent trading must have originated with a manufacturer at some point and the fact that this supply chain originated from Nokia does not indicate whether the rest of the supply chain was for the satisfaction of a genuine market. In particular he refers to the fact the Elite Mobile had specified that the goods had three pin plugs and English manuals whereas Global's invoice, and inspection report, indicates the phones are of central European specification with two pin chargers.

148. Accordingly, having regard to the totality of the deals effected by Global and what it did or omitted to do, together with the surrounding circumstances in respect of all of them, we find that it was more likely than not that Mr Shafiq, and therefore Global, knew that the Deals in which it participated were connected to the fraudulent evasion of VAT.

149. However, 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 and that Global through Mr Shafiq should have known that they were connected to fraud.

150. We therefore find that HMRC were correct to deny the claims to recover the input tax attributable to these deals and dismiss the appeal.

Costs

151. In this case Global appealed to the VAT and Duties Tribunal on 18 September 2008 but its appeal was heard by this Tribunal, the Tax Chamber of the First-tier Tribunal, as "current proceedings" under the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 in accordance with the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009.

152. Rule 10 of the Tribunal Rules, which applies to costs provides that, other than wasted costs, costs can only be awarded where a party has acted unreasonably or, which is not applicable in the present case, where an appeal has been allocated as "complex" under Rule 23.

153. However, it is possible, in the case of "current proceedings" (under paragraph 7(3) of schedule 3 to the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009) for the Tribunal to direct that Rule 10 ("the new costs regime") does not apply and but that Rule 29 of the VAT Tribunal Rules 1986 ("the old costs regime") does. The effect of such a direction is to give the Tribunal a general discretion as to costs.

154. The issue of whether the Tribunal should exercise its discretion to make a direction dis-applying the new costs regime and applying the old in "current proceedings" was considered by Warren J, the President of the Tax and Chancery Chamber of Upper Tribunal, who identified the following factors in *HMRC v Atlantic Electronics Ltd* [2012] UKUT 45(TCC):

> (1) The relative amount of time and money spent on the proceedings before and after 1 April 2009 (at [47]);
>
> (2) The passage of time which has elapsed since 1 April 2009. However, less weight should be attached to the delay because it was open to an appellant to make an application for a prospective direction that the new regime applied although this point "must not be pressed to far" because the new regime is the default regime (at [50]); and
>
> (3) Whether HMRC has made it clear all along that it would be seeking a costs order at the end of the proceedings if successful. Any expectation the appellant had that the default regime would apply must "be tempered by a clearly articulated intention of HMRC to seek to persuade the tribunal at the end of the proceedings to depart from that default regime" (at [52]).

155. In exercising our discretion in relation to whether to dis-apply the new costs regime and apply the old costs regime we remind ourselves that we are required to

give effect to the overriding objective in Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 to deal with a case "fairly and justly".

156. In this case, as no direction in relation to costs had been made prior to the hearing, Mr Kerr urges us to make a direction to apply the old cost regime in place of the new. He contends that this is consistent with *Atlantic Electronics* as HMRC's Statement of Case, which is dated 3 April 2009, after the commencement of the new costs regime makes it clear that costs would be sought in the event of the appeal being withdrawn and that Global knew that the Tribunal had a discretion to apply the old costs regime.

157. Mr Holland submits that we should adopt the approach encouraged by Warren J in *Atlantic Electronics* (at [36] and [46]) that the old costs regime should apply to those arising before 1 April 2009 and the new costs regime applied to subsequent costs.

158. We agree with Mr Holland.

159. As HMRC did not apply for a direction that the new costs regime should be dis-applied and the old one applied until making their closing submissions, we consider that it would have been reasonable for Global to expect the new costs regime to apply which is after all the default position. We note that HMRC's Statement of Case is dated 3 April 2009 and it would therefore seem, although we have not heard any evidence as whether or not this is the case, that substantial time and money would have been spent after the new costs regime had come into effect.

160. Therefore, having regard to the overriding objective we direct that the costs incurred before 1 April 2009 should be subject to the old costs regime and costs incurred thereafter subject to the new costs regime. As such we direct that Global shall pay the costs incidental to and consequent upon the appeal incurred by HMRC before 1 April 2009 with such costs to be assessed if not agreed.

Wasted costs

161. At the commencement of the hearing on Tuesday 2 October 2012 (following a reading day on 1 October), Mr Holland said that the evidence of all of HMRC's witnesses was to be challenged and a timetable of witnesses was agreed. However, an indication was given that not every witness for HMRC would be required to attend the hearing to be cross-examined.

162. At 16:07 on 2 October 2012 HMRC emailed Mr Holland with a list of witnesses scheduled to attend the Tribunal on Friday 5 and Monday 8 October 2012. The email stated:

> Some of the officers will need to make travel arrangements as they are travelling from Leeds and Manchester and even Glasgow, we would therefore be grateful if you could confirm by 1pm on Thursday which of the officers you require to attend on Friday and by 10am on Friday which of the officers you require to attend on Monday.

Mr Holland did not reply to the email. However, he did inform HMRC that the attendance of Officer George Edwards, who was due to give evidence on Monday 8 October 2012, was not required but did not tell HMRC that the evidence of Officers Pankaj Mandalia, Peter Cameron-Watson, Paul Fisher, Marva Harry, Colin Needs and Paul Cole was not challenged.

163. Consequently they all travelled to the Tribunal on Monday 8 October 2012 to be available to give evidence. It was only on that Monday morning, after they had taken the time and trouble to attend the hearing, that Mr Holland said that their evidence was unchallenged and he did intend to cross examine any of them. They were therefore all were released at 10:15 without giving evidence.

164. In the circumstances, on the conclusion of the evidence on 16 October 2012, we requested HMRC to produce a schedule of the travel costs incurred and invited Mr Holland to make representations, in accordance with rule 10(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, as to why a wasted costs order should not be made.

165. The schedule of costs provided by HMRC showed that the total cost incurred by HMRC for the attendance of the unchallenged witnesses was £363.92.

166. Insofar as it relevant to the present case "wasted costs" are defined by s 29(5)(a) of the Tribunals, Courts and Enforcement Act 2007 as any costs incurred by a party:

> as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative…

167. Mr Holland accepted that the costs were wasted but submitted, relying on the commentary contained in the "White Book" in relation to Part 48.7 of the Civil Procedure Rules that he had acted neither improperly, unreasonably or negligently. Also, that it would not be just for Dass to compensate HMRC having regard to the overriding objective of the Tribunal Rules which, under Rule 2(2)(a) includes:

> dealing with the case in ways which are proportionate to the importance of the case, the complexity of issues, the anticipated costs and resources of the parties."

168. He explained that he had been involved in three back to back MTIC cases. One had finished on Monday 1 October 2012 and he had made his opening submissions in this case the day after. When accepting instructions for these cases Mr Holland did not envisage that he would be appearing on behalf of his clients, rather he would instruct counsel. However, due to funding issues it was not possible to do so. The same funding issues led to uncertainty of payment of fees leaving a very short space of time to undertake the necessary work to do the best for the client causing potential difficulties to arise in resolving the conflict between duty to the client and Tribunal.

169. The commentary in the White Book provides the following guidance on what may be regarded as improper, unreasonable or negligent conduct by a legal representative:

> "Improper" covered, but was not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty.
>
> "Unreasonable" aptly described conduct which was vexatious, designed to harass the other side, rather than advance the resolution of the case, and it made no difference that the conduct was the product of excessive zeal and not improper motive.
>
> "Negligence" should be understood in an un-technical way to denote failure to act with the competence reasonably expected of ordinary members of the profession. In adopting that approach the court firmly discountenanced any suggestion that an application for a wasted costs order needed to prove, under the negligence head, anything less than they would have had to prove in an action for negligence. See Saif Ali v Sydney Mitchell & Co [1980] A.C. 198 at 218, 220 (see also Sampson v John Boddy Timber Ltd , Independent, May 17, 1995, CA; and D. Walter & Co Ltd v Neville Eckley & Co (1997) B.C.C. 331 per Sir Richard Scott, V.-C.).

Applying this guidance to the present case it is clear that Mr Holland's failure to inform HMRC that the witnesses would not be required to attend to give evidence was not the result of improper or unreasonable conduct.

170. However, with regard to negligence we note that HMRC sent Mr Holland the email requesting confirmation of which witnesses he required to attend on Tuesday 2 October. The following two days were reading days with the hearing resuming on Friday 5 October. We also note that the witness statement of Pankaj Mandalia consisted of 15 pages; that of Peter Cameron-Watson 21 pages; Paul Fisher, 11 pages; Marva Harry, 12 pages; Colin Needs, 18 pages; and Paul Cole whose first statement was 14 pages and second was three pages long.

171. We consider that the two reading days was sufficient to give Mr Holland ample opportunity to read the witness statements in enough detail to be able to give an indication on the resumption of the hearing as to whether or not the attendance of the witnesses would be required.

172. Although we sympathise with Mr Holland's heavy workload and appreciate the difficulties he faced with conflicting duties to his client and the Tribunal, especially given the cost issues he described, we are unable to find that he acted with the competence reasonably expected of ordinary members of the profession.

173. However, in *Persaud (Luke) v Pursaud (Mohan)* [2003] EWCA Civ Peter Gibson LJ accepted a submission by counsel that:

> "…there must be something more than negligence for the wasted costs jurisdiction to arise: there must be something akin to an abuse of process if the conduct of the legal representative is to make him liable to a wasted costs order."

An "abuse of process" has been explained by Lord Bingham LCJ in *Attorney General v Blake* [2000] EWHC 453 (Admin), at [19], as:

> "a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."

174. Although we consider that Mr Holland could, and should, have utilised the reading days between 2 and 5 October 2012 to go through the witness statements concerned and been in a position to advise HMRC which witnesses he wished to cross examine it does not, in our view, amount to an abuse of process.

175. As such we do not consider a wasted costs order to be appropriate

Decision

176. The appeal is dismissed with costs incidental to and consequent upon the appeal incurred before 1 April 2009 to be paid by Global with such costs to be assessed if not agreed.

Right to Apply for Permission to Appeal

177. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 17 December 2012