



**TC02855**

**Appeal number: TC/2011/06115 & TC/2011/02081**

*Income Tax – trading in mobile phones as agent and on own account - whether activities single trade or separate trades – single trade - whether single trade ceased in tax year 2006-07 – no*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**DHALOMAL KISHORE**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE GREG SINFIELD  
MICHAEL SHARP FCA FIH FIOD**

**Sitting in public in London on 8 and 9 July 2013**

**Hui Ling McCarthy, counsel, instructed by Hill Dickinson LLP, for the Appellant**

**David Yates, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION ON PRELIMINARY ISSUES

### Introduction

1. This decision relates to two preliminary issues in an appeal by Mr Dhalomal Kishore against a closure notice dated 15 July 2011 issued by the Respondents (“HMRC”) in respect of an enquiry into Mr Kishore’s self-assessment return for the year ended 5 April 2007. The preliminary issues are whether Mr Kishore carried on a single trade or two separate trades and, if he carried on a single trade, did it cease in the tax year 2006-07.
2. For the reasons set out below, we have found that Mr Kishore carried on a single trade and that the trade did not cease in 2006-07.

### Background

3. Between 2000 and 2006, Mr Kishore, trading as Movil 2000, bought and sold wholesale consignments of mobile telephones from UK and EU suppliers and then exported them to persons outside the EU.
4. In the majority of the transactions, Mr Kishore purchased the phones as agent of a company in Singapore called Dhalomal Ramchand Pte Limited (“DRPL”) which was owned by Mr Kishore’s brother, Lal Nanwani (“Lal”), and nephew, Manoj Nanwani (“Manoj”). Mr Kishore’s activity of buying and selling mobile phones on behalf of DRPL is referred to in this decision as the DRPL Agency.
5. Mr Kishore also bought mobile phones and sold them to third parties on his own account. That activity is referred to in this decision as the Third Party Trade.
6. In relation to both the DRPL Agency and the Third Party Trade, Mr Kishore, who was registered for VAT trading under the name Movil 2000, claimed repayments of input VAT incurred on buying the phones because they were all exported to customers outside the EU and thus subject to VAT at the zero rate.
7. In 2006, HMRC refused to pay £22 million VAT input tax claimed by Mr Kishore on the grounds that he knew or should have known that the transactions were connected with the fraudulent evasion of VAT. Mr Kishore denies that any of the deals were connected with the fraudulent evasion of VAT and, even if they were, he denies that he had knowledge or means of knowledge of the connection with fraud. Mr Kishore appealed to the First-tier Tribunal against HMRC’s refusal to refund the input tax. This decision is not about the VAT appeal.
8. In July 2010, Mr Kishore submitted tax returns for 2004-05, 2005-06 and 2006-07. In the return for 2006-07, Mr Kishore claimed terminal loss relief under section 89 of the Income Tax Act 2007 (“ITA 2007”) of £24,234,078. Mr Kishore claimed that he had suffered a trading loss as a result of HMRC’s refusal to refund the input tax in the year 2006-07 when he permanently ceased to carry on a trade. The effect of the claim was to relieve profits self-assessed by Mr Kishore for earlier years from the

charge to tax. HMRC enquired into the return for 2006-07 and issued a closure notice on 15 July 2011. Among other things which are not material to this decision, the closure notice denied the terminal loss relief claim. Mr Kishore appealed this closure notice on 4 August 2011. This decision relates to Mr Kishore's appeal against the closure notice insofar as it relates to the terminal loss relief claim.

9. There are also proceedings in the Watford County Court brought by HMRC to recover tax self-assessed by Mr Kishore prior to his subsequent claim for terminal loss relief. These proceedings are currently stayed and are not directly relevant to the preliminary issues before this Tribunal although reference is made below to some of the evidence in the County Court proceedings.

### **Preliminary issues**

10. At a hearing for directions on 15 June 2012, HMRC applied for a preliminary hearing of two issues. Mr Kishore opposed the application but it was granted and directions were issued on 2 August 2012 that two issues should be determined as preliminary issues.

11. The two issues directed to be heard as preliminary issues were:

- (1) Whether the Third Party Trade and the DRPL Agency were part of a single trade or were separate trades (the "single/separate trade issue"); and
- (2) Whether, insofar as there was a single trade, that trade ceased in the tax year 2006-07 (the "cessation of trade issue").

12. Ms Hui Ling McCarthy, who appeared on behalf of Mr Kishore, submitted that Mr Kishore carried on a single trade which was permanently discontinued during the tax year 2006-07. Mr David Yates, who appeared for HMRC, submitted that the Third Party Trade and the DRPL Agency were two separate trades but if there was a single trade then it continued after 2006-07.

### **Application to introduce a third preliminary issue**

13. At the hearing, Mr Yates submitted that the first preliminary issue required the Tribunal to determine whether the DRPL Agency was a trade or trading activity. HMRC accepted that the Third Party Trade was a trade. He acknowledged that the preliminary issues could have been drafted as three questions but it was unnecessary to do so as the question of whether the DRPL Agency was a trade was implicit in the first question. As the question was implicit in the two other preliminary issues, Mr Yates submitted that HMRC did not need permission to deal with the point. In the event that they needed permission, HMRC applied to amend the preliminary issues.

14. Ms McCarthy submitted that the first of the preliminary issues, which had been drafted by HMRC, assumed that the DRPL Agency was a trade. Ms McCarthy pointed out that the further preliminary issue third question was only introduced in HMRC's skeleton. This had not allowed Mr Kishore time to obtain witness evidence

from DRPL in Singapore to deal with the point. She said that, if the Tribunal allowed the additional issue to be included then Mr Kishore would ask for an adjournment.

15. We decided that the first preliminary issue should be confined to the question of whether the Third Party Trade and the DRPL Agency were part of a single trade or were separate trades and that question should be determined on the basis that the DRPL Agency was a trade. The question of whether the DRPL Agency was a trade was not addressed at the directions hearing on June 2012. We read the wording of the first preliminary issue, which was drafted by HMRC, as containing an assumption that the DRPL Agency was a trade or trading activity. We consider that it is highly unlikely that if, at the time of the directions hearing in June 2012, HMRC had considered that the question of whether the DRPL Agency was a trade should be dealt with as a preliminary issue, they would not have included it in their draft questions.

16. In effect, Mr Yates was seeking to introduce a new preliminary issue to the preliminary issues which had been directed to be heard. We considered whether we should grant HMRC's application to add another preliminary issue. We decided to refuse the application because the additional issue raised further issues of fact which Mr Kishore would be entitled to respond to with further evidence. Had such an application been made by HMRC earlier than at the hearing then perhaps such further evidence could have been obtained. In the circumstances, an adjournment, with all the attendant waste of time and costs, would be inevitable. That factor weighed heavily against granting the application. Further, we were not persuaded that the issue of whether the DRPL Agency was a trade or trading activity was suitable for a preliminary hearing. It seemed to us that it was likely to involve consideration of evidence from those who dealt with Mr Kishore in relation to the DRPL Agency, such as his suppliers and Lal and Manoj from DRPL, in order to establish the facts necessary to answer the question. In contrast, the question of whether there was one trade or two trades, and, if one, whether it ceased in 2006-07 were discrete issues where the evidence, being primarily that of Mr Kishore, was self-contained and did not impinge on other aspects of this appeal, the VAT appeal or the County Court proceedings.

### **Evidence**

17. Mr Kishore produced a witness statement for the preliminary hearing. There were also witness statements relating to the County Court proceedings from Mr Kishore, Mr Vinay Mehta, Mr George Kelly, and Mr Raj Nainani on behalf of Mr Kishore and by Mr Nigel Wood on behalf of HMRC. There were eight bundles of exhibits to which both parties referred. Only Mr Kishore gave evidence at the hearing. His witness statements stood as evidence in chief and he was cross-examined by Mr Yates.

18. On the basis of the evidence, we find the material facts to be as set out below.

## Facts

19. Mr Kishore moved from Singapore to London in 1979. He re-located in order to assist with his family's business, namely DRPL. Mr Kishore has lived and worked in London since then.

5 20. At that time, the family business was called Dhalomal Ramchand and traded wholesale in garments and, to a lesser extent, small electronics. The business was established over 50 years ago in Singapore. The business was run by Mr Kishore's father, and his father before him. DRPL is still based in Singapore and now it is run by Lal and his son Manoj. Lal and Manoj are directors of DRPL. Mr Kishore is not a  
10 director or an employee of DRPL and he does not hold any shares in the company. DRPL has no trading presence in the UK.

21. Between 1979 and 1983, Mr Kishore travelled abroad selling goods to customers on behalf of DRPL.

15 22. From 1983, Mr Kishore set up a company purchasing foodstuffs in Europe and exporting them to Nigeria. Later he formed another company which carried on a wholesale trade in clothing and textiles.

23. In or about 1998, DRPL identified a market for mobile phones in India, Bangladesh and Malaysia, as well as other Far East countries, and started to buy stock from the UK (among other places) mainly for export to these countries. Mr Kishore  
20 purchased phones from suppliers in the UK and also elsewhere in Europe (mostly Portugal and Spain) and exported them to DRPL in Singapore. Mr Kishore said that he conducted this trade in mobile phones as a sole trader. He was not registered for VAT at the time.

24. On a visit to London in 1999, Lal asked Mr Kishore to help DRPL to source  
25 phones from his contacts in the mobile phone trade. Mr Kishore, trading under the name Movil 2000, registered for VAT with effect from 10 March 2000 with VAT number 751 9185 14.

25. In his witness statement, Mr Kishore summarised his business procedures and records in relation to DRPL as follows:

30 "DRPL notifies its requirement by telephone (models, prices etc.).

I then look for the various suppliers in the UK to see whether they have these specific types and models available: again, this is carried out by telephone, with no written records kept.

35 My UK suppliers tell me what stock they have got and whether it meets the requirements notified: again all this is done by telephone with no written records kept.

40 If goods are going to be bought, I agree with the relevant supplier numbers, description, price, etc. and then type a "pre-alert" on Movil 2000 headed paper which I fax to a freight forwarder; this details the goods that are to be moved, including any relevant inspection instructions.

A pro-forma or final invoice for each individual consignment then arrives from my supplier in the UK; this is always faxed, followed by a hard copy by post.

5 I then raise an invoice addressed in all instances to DRPL, keeping a hard copy for my records and faxing a copy to DRPL in Singapore.

Export documentation, including Air Waybill, C88 (Customs export declaration), packing list if available and any other relevant paperwork is sent to me by the relevant agent.

10 I am constantly put in funds by DRPL to pay my suppliers and other outgoings. These were not always specific amounts, but lump sums, from which I would allocate either payments in full or part-payments from suppliers' invoices."

15 We set out below our findings in relation to the different steps described above by which Mr Kishore, using the trading name Movil 2000, bought mobile phones in and arranged for them to be exported to DRPL's customers.

### *Buying phones*

20 26. Mr Kishore bought mobile phones in bulk direct from suppliers in Europe (including the UK). Mr Kishore's wife also bought phones. Mrs Kishore did not buy from wholesalers but from UK retailers, including Argos, Comet and Phones4U, in quantities of up to 60 units at a time.

25 27. Mr Kishore took the decision as to who the suppliers would be. He made the contacts and agreed terms with them. The purchase prices had to be agreed with DRPL. DRPL set price guidelines but would expect Mr Kishore to try and get a better price on the market. The final decision to buy and on what price was taken by DRPL. Mr Kishore did not have the authority to finalise or agree prices. Mr Kishore paid the suppliers in his name from the UK bank account in the name of Movil 2000. The funds in the account were provided by DRPL. Sometimes Mr Kishore made a pre-payment for the phones, sometimes payments were made on the day of the sale and sometimes in arrears.

30 28. In his witness statement, Mr Kishore said that he acted as an undisclosed agent for DRPL. In evidence before us, however, he said that the suppliers of the mobile phones knew that he was acting for DRPL in Singapore and this gave them comfort as to his financial standing and meant that they were prepared to advance him short term credit.

35 29. We conclude that Mr Kishore negotiated with the suppliers and bought the mobile phones in his own name (or using the name Movil 2000) but that he did so openly on behalf of DRPL and always, whether paying in advance or arrears, using DRPL's funds.

*Selling/invoicing phones to DRPL*

30. DRPL sold the phones to its customers. DRPL was responsible for finding customers, negotiating the prices and terms of sale, collection of payments and foreign exchange transactions. Mr Kishore had no responsibility for finding  
5 customers or selling to them. Mr Kishore said that the customers knew that he acted for DRPL because he arranged the transport of the phones (discussed below) and the customers would contact him if they had any queries. Also, Mr Kishore sometimes went with Lal and Manoj to meet the customers just so they knew who he was. He thought that the customers saw him as part of DRPL.

10 31. Mr Kishore sold the phones and issued invoices, in the name of Movil 2000, for them to DRPL. Mr Kishore did not make any profit on the sales of the mobile phones. Mr Kishore sold the phones to DRPL at the same price as he had paid the suppliers but without any VAT as DRPL's customers were all outside the EU.

15 32. DRPL provided Mr Kishore with the money required to pay the prices, including VAT, charged by the suppliers and overhead costs such as freight charges, including VAT where appropriate. As such, DRPL funded the cost of the VAT from the time of the payment to the supplier until HMRC made a repayment of the VAT to Mr Kishore. When the VAT repayment was received, it was either passed to DRPL or retained by Mr Kishore and used towards the next purchase of mobile phones.

20 *Exporting phones to DRPL's customers*

33. All the mobile phones bought on behalf of DRPL were exported to DRPL's customers in countries outside the EU namely, Dubai, Singapore, Hong Kong and, later, Switzerland. Although the goods were bought on behalf of DRPL which had already agreed to sell them to its customers, Mr Kishore, as Movil 2000, was  
25 responsible for the logistics and acted as the exporter.

34. Mr Kishore made the necessary freight arrangements to export the goods to DRPL's customers. This involved packing or re-packing the goods, arranging inspections, booking space on flights, and making sure they got to the airport on time and safely (although some movements to Switzerland went by road). In some  
30 instances, Mr Kishore, trading as Movil 2000, would arrange for the goods to be shipped by the suppliers directly to DRPL's customers. Mr Kishore said that, in other cases, it was often quicker and cheaper to bring the goods to London before shipping them onwards.

35. Mr Kishore recharged and invoiced all freight and ancillary costs to DRPL. Sometimes Mr Kishore charged DRPL freight costs in advance and sometimes requested settlement of amounts already expended. We were shown an invoice dated 21 January 2006 that was for a total of £449,000, being £299,000 for stock and £150,000 for freight costs reimbursement. Mr Kishore told us that the amount of £150,000 was not the freight charge for the stock on that invoice but was a cumulative  
40 total of freight charges by three or four freight forwarders that had requested payment by the end of the month.

### *Financial arrangements with DRPL and family*

36. As already stated, Mr Kishore did not make any profit on the sales of the mobile phones to DRPL. Mr Kishore was not an employee of DRPL and so did not receive any salary for his services. Nor was Mr Kishore a shareholder in DRPL and so he did not share in the profits of the company by way of dividend. Mr Kishore, as Movil 2000, did not charge DRPL any fee or commission for his services as an agent or representative. Mr Kishore said that the arrangements were as they were because of the family connection.

37. Mr Kishore received an allowance from the family resources in Singapore. In addition, Mr Kishore lived (and continues to live) rent-free in a house owned by Manoj. Mr Kishore estimated that the rental value of the house was approximately £10,000 per month. Mr Kishore said that he received the allowance even before he started trading as Movil 2000. After Mr Kishore's father died in April 2007, the allowance was paid by Lal. The amounts varied between £50,000 and £125,000 a year in the years between 2000 and 2006. Mr Kishore said that he was paid the allowance regardless of whether he worked for DRPL or not, as occurred after April 2006. The amounts increased over time and Mr Kishore said that he thought that the increase in part reflected the effort that he put into the family business and the profits that he enabled DRPL to make. Even though he had stopped acting for DRPL, which stopped trading in mobile phones in 2006, the allowance increased and, in 2009, Mr Kishore received more than £120,000. He said that he thought that DRPL or the family felt they had a moral obligation to look after him and his family in bad times because he had worked hard for them when the business was good.

38. In our view, Mr Kishore's family allowance was not simply a payment for services provided to DRPL but nor was it made purely out of love and affection. The allowance and the ability to live rent-free in his house, part of which was used as an office for the business, carried with them certain obligations which included an obligation to work on behalf of the family business, DRPL.

### *Third Party Trade*

39. Mr Kishore built up a number of supplier and customer contacts as a result of acting as DRPL's agent. From around 2003, Mr Kishore, acting on his own account, bought mobile phones from some of his existing suppliers and sold them to customers in the Middle East, Hong Kong and Europe. The customers were contacts that Mr Kishore had met when he attended trade fairs with DRPL or they had been recommended to him by other traders. These customers were not DRPL customers. Mr Kishore arranged the export of the phones and issued invoices to the customers just as he had done for DRPL except that he did not sell at cost but added an uplift to the purchase price.

40. The transactions went through Mr Kishore's records and VAT returns in the normal way and were paid for from the Movil bank account. The business was run from the same office as Mr Kishore used for the DRPL business.



41. Mr Kishore said that he used exactly the same methodology to purchase goods for DRPL and the third parties. He was responsible for locating the goods. He exported them in the same way. He recorded them the same way. He organised the purchases from the same office premises. They were not one-off trades. The  
5 difference was that for the Third Party Trades he agreed the prices and actively sought out a customer for these consignments.

42. Mr Kishore did not use his own funds for the Third Party Trades. Mr Kishore funded the purchase of the phones by using DRPL's money which had been left in the Movil 2000 bank account. Mr Kishore said that he saw an opportunity to use money  
10 lying in the account to trade on his own account without his brother, Lal, being any the wiser.

43. In November 2004, HMRC held back a repayment of approximately £500,000 input tax that related to Mr Kishore's Third Party Trades pending further investigation. Mr Kishore said that he had a sick feeling in his stomach because he  
15 realised that, if he received any order from DRPL to buy phones, he would have to explain to Lal why there was not enough money in the account. In February 2005, HMRC refused to repay the money. Mr Kishore instructed a firm of solicitors and, as a result of their actions, HMRC repaid the money to Mr Kishore. At around the same time, Mr Kishore told Lal what he had done. Lal was furious and said that the money  
20 was not Mr Kishore's but belonged to DRPL. Mr Kishore said that he did not believe that he had entered into any Third Party Trade transactions after February 2005.

44. Because DRPL considered that he had used their funds, which had created a surplus in the Movil account to pay for or to "underwrite" the purchase costs, Mr Kishore later agreed with Lal that the profits from the trades belonged to DRPL.  
25 Subsequently, amounts of money received from DRPL in respect of stock purchases were reduced to take account of the profits from the Third Party Trade. Effectively, Mr Kishore did not make profit from the Third Party Trade.

#### *Other events*

45. Mr Kishore became ill with a fever while he was in India in mid-April 2006.  
30 He spent some time convalescing in India. Manoj tried to fulfil some orders on Mr Kishore's behalf from Singapore but it was not practical to do so from there. The last trade in mobile phones on behalf of DRPL took place on 25 April 2006.

46. Mr Kishore was not able to continue trading after he had recovered his health, because, by that time, HMRC had begun to refuse to repay Mr Kishore's input tax  
35 claims. Ultimately, HMRC withheld £22,366,910.41 which had been claimed by Mr Kishore as deductible input tax in accounting periods 03/06 and 06/06. In addition, one of Mr Kishore's suppliers, Team Mobile, failed to deliver a large consignment of stock which Mr Kishore had paid for in advance. Team Mobile was unable to repay Mr Kishore's prepayment of £1,535,000.

40 47. Around June 2006, Mr Kishore spoke with Mr Limpkin, a VAT Officer, and asked him why he had still not been repaid for period 03/06 when others in the chain

of supply had been repaid. Mr Kishore said that he decided he would not trade in this market any more until the VAT position was resolved. He carried on doing VAT registration number checks on his suppliers (or had them done on his behalf) until December 2006. He said that this was in case the position was sorted out quickly. Mr  
5 Kishore said that the position was not sorted out and, as time went on, he knew he was not going to carry on the business.

48. In his witness statement, Mr Kishore said that he certainly stopped trading permanently from the beginning of 2007. He said that he had no intention of carrying on. He referred any opportunities relating to mobile phones that came his way to  
10 other contacts.

49. In his witness statement, Mr Kishore relied on a letter dated 31 January 2008 from his advisers to HMRC that said “Movil 2000 commenced operations in April 2000, and ceased operations in April 2006...”

50. In or around April 2007, DRPL conceived the idea of investing in property in  
15 Dubai. Mr Kishore made a few trips to Dubai on behalf of DRPL to look at investing in property “off-plan” in 2007 and 2008. As a result, DRPL invested in a few properties, starting in April or May 2007. It all came to an end in October 2008 when the world economy crashed. The developers of the properties became bankrupt or left and the money invested was lost.

20 *2009 transaction*

51. Mr Kishore said that from 2006 onwards, he had no intention to carry on trading in mobile phones. In June 2009, however, Mr Kishore bought a consignment of 50  
25 8GB Apple iPhones at £297.83 each in the name of “M2K Promotions” and sold them to Rancom UK Limited (“Rancom”). The background to this transaction is as follows.

52. One of Mr Kishore’s suppliers of mobile phones was a partnership called Narain Brothers. The principal trading partner was Ashok Nainani. Around 2009, Ashok Nainani and his brother Raj decided to go back into the mobile phone market. They were buying iPhones from Apple retail stores in the UK, particularly in London.  
30 They also set up Rancom to buy some of the iPhones from Apple. In June 2009, one of the Nainani brothers told Mr Kishore that their Apple contact would not supply them with the same amounts of phones as previously but would accept an order from somebody else. So Mr Kishore, using the name M2K Promotions, bought 50 8GB Apple iPhones from Apple and immediately sold them on to Rancom using a Movil  
35 2000 VAT invoice. Mr Kishore said that he was offered a profit on the deal but he declined. He was reimbursed the purchase price that he had paid Apple plus £1 per unit, ie £50, to cover bank transfer charges and travelling costs.

53. Although he stated that he had ceased to have any intention to trade in June  
40 2006, Mr Kishore continued to be registered for VAT, under the trading name Movil 2000, up to and including the period of the June 2009 transaction. No outputs were

recorded between July 2006 and June 2009 but Mr Kishore claimed repayments of input tax incurred on advisers' fees in relation to the VAT appeal.

54. Mr Kishore charged and invoiced Rancom for VAT on the phones using a Movil 2000 invoice. He said that he did so because he had the template in the house and there was no point in setting up an entirely new trading style with stationery and all the other details for what was otherwise a one-off transaction. Mr Kishore accounted for the output tax charged to Rancom less the input tax he was charged by Apple in his VAT return for PE 06/09.

55. Mr Kishore said that regarded the Apple transaction as a one-off. He did not regard it as a resumption of trading. Mr Kishore said that he only agreed to enter into the transaction as a favour for an old friend. Mr Raj Nainani, one of the partners in Narain Brothers, confirmed in his witness statement that Mr Kishore entered into the transaction as a favour.

### Single/separate trade issue

#### 15 *Submissions*

56. Ms McCarthy submitted that Mr Kishore's business consisted of two activities: the main activity was acting as an undisclosed buying agent on behalf of DRPL in relation to wholesale consignments of mobile phones. The other activity involved buying and selling mobile phones on his own behalf. Ms McCarthy contended that both activities were conducted by Mr Kishore and concerned the same type of goods and the same steps, namely buying, selling and transporting mobile phones. Although there were two activities, Mr Kishore's case was that there was only one business and one trade.

57. Ms McCarthy referred to and relied on the guidance published by HMRC on the issue of whether there is more than one trade. The HMRC manual BIM70530 refers to *Scales (Inspector of Taxes) v George Thompson & Co Limited* (1927) 13 TC 83 in which Rowlatt J, having held that book-keeping did not throw any light on the question of whether there was one trade or two, held that:

30 "I think the real question is, was there any inter-connection, any interlacing, any inter-dependence, any unity at all embracing those two businesses; and I should have thought, if it was a question for me, that there was none. But I do not think it was a question of law."

58. HMRC manual BIM70540 states that there are a small number of cases where a trader has been accepted as carrying on more than one trade and then lists four, including *Scales v George Thompson & Co*. The guidance then sets out five cases where the taxpayer was found to be carrying on a single trade and states that they underline the difficulty of arguing that there is more than one trade.

59. As well as *Scales v George Thompson & Co*, we were taken to *IRC v William Ransom & Son Ltd* [1918] 2 KB 709, 12 TC 21; *IRC v Turnbull Scott & Co* [1924] 12 TC 749; *The Howden Boiler and Armaments Co Ltd v Stewart* [1924] 9 TC 205; and

*North Central Wagon and Finance Co Ltd v Fifield* [1953] 1 All ER 1009, 34 TC 59. As Mr Yates, who appeared for HMRC, acknowledged, none of the case law in this area is particularly illuminating since, for the most part, it simply involves the courts recognising that the issue of whether a business was carrying on one trade or two is a question of fact – see the comments of Lord Clyde in *Howden Boiler and Armaments Co Ltd* at pages 214 - 215.

60. Mr Yates pointed out that the Third Party Trade involved the buying and selling of goods as principal with the source of profits arising from the difference between turnover and costs of sales. The DRPL Agency by contrast involved the provision of arrangement services but Mr Kishore did not make any profit because he simply re-charged his costs to DRPL. Mr Kishore received an allowance from his family but there was no correlation between the agency services provided to DRPL and the allowance, as Mr Kishore would have received the allowance whether he worked or not. Mr Yates submitted that the Third Party Trade and the DRPL Agency were separate trades because

(1) both were quite capable of being separated and operated independently of each other;

(2) there was no inter-dependence, interlacing etc between the two activities which would prevent the Tribunal from regarding them as distinct;

(3) neither could one activity be regarded as ancillary to the other;

(4) the character of each trade was fundamentally different despite the mechanics and day to day function of both activities being essentially the same.

#### *Conclusion on single/separate trade issue*

61. None of the cases that were cited to us is directly on point and it is difficult to derive any principle from them. Those cases where the taxpayer was held to be carrying on more than one trade seem to have involved activities that were very different from each other, for example the growing of herbs and the production of medicines, using the herbs, in *IRC v William Ransom & Son* and operating a fleet of ships and Lloyds underwriting in *Scales v George Thompson & Co Ltd*. On the other hand, it appears that the courts have taken a high level view of what constitutes a single trade in some of those cases where the taxpayer was held not to carry more than one trade. In *Howden Boiler and Armaments Co Ltd*, the activities of manufacturing boilers and, during the First World War, artillery shells in separate parts of the premises were held to be a single business. In some of the other cases, the fact that the subject matter of the business was the same seemed to be sufficient to constitute a single trade even where the business operated in different ways. In *Turnbull Scott & Co*, a firm of shipbrokers and managers of ships managed ships for private customers for a commission and managed ships seized during wartime for the UK government for a fixed fee. The different methods of remuneration were not sufficient to make the two activities separate trades. In *North Central Wagon and Finance Co Ltd*, the company sold railway wagons on hire purchase and also leased them on hire. The company was held to carry on one business and not two.

62. It is clear that there is no bright line test for determining whether the activities of a business are a single trade or more than one trade. We are thrown back on the words of Rowlatt J in *Scales v George Thompson & Co* and ask ourselves was there any inter-connection, any interlacing, any inter-dependence, any unity at all embracing the different activities. The answer to that question is a matter of impression formed from consideration of all the activities of the business. Those activities must be viewed realistically and not artificially dissected or distinguished.

63. We have found that, throughout the period 2000 - 2006, Mr Kishore bought and sold mobile phones for export from the EU. All of the transactions were in the name of Mr Kishore, trading as Movil 2000, and were funded by DRPL. Mr Kishore entered into the majority of the transactions on behalf and under the instruction of DRPL. In many, possibly all, of those transactions, the suppliers of the mobile phones knew that Mr Kishore was representing DRPL. Mr Kishore carried out some other trades in mobile phones on his own account, at least initially. Mr Kishore also used DRPL's funds for those other transactions. When Mr Kishore's brother, Lal, found out, those trades were also agreed to be for the account of DRPL and Mr Kishore was obliged to account for the proceeds.

64. On the basis of those findings, it is clear that all Mr Kishore's activities related to the purchase, sale and transport of mobile phones. Both the DRPL Agency and the Third Party Trade transactions had the following features in common:

- (1) the subject matter, namely mobile phones;
- (2) the suppliers;
- (3) the customer/principal, namely DRPL (even ultimately being recognised as such for the Third Party Trade transactions); and
- (4) the mechanics and day to day operation, including the use of Movil 2000 as a trading name, the VAT registration and bank account.

65. We consider that those activities were, to use Rowlatt J's words, inter-connected, inter-laced and interdependent. We do not consider that the fact that Mr Kishore acted as agent of DRPL in relation to some trades in mobile phones and on his own account in relation to others destroyed the unity of the activities. In every case, Mr Kishore placed orders with and was invoiced by suppliers in the name of Movil 2000 and, in turn, he invoiced his customer, whether it was DRPL or a third party, as Movil 2000. In our view the transactions that Mr Kishore engaged in as agent of DRPL and those that he conducted on his own account were fundamentally the same activities and were not so different as to constitute separate trades.

66. Our conclusion on the single/separate trade issue is that Mr Kishore carried on a single trade between 2000 and 2006.

## Cessation of trade issue

### *Submissions and discussion*

67. Having concluded that there was a single trade between 2000 and 2006, we must now consider whether that trade ceased in the tax year 2006-07. This issue is also largely a matter of fact rather than law.

68. Section 388 of the Income and Corporation Taxes Act 1988 provides for the carry back of terminal losses only where a trade etc is permanently discontinued. Section 89 of the ITA 2007 provides that a person may make a claim for terminal trade loss relief if the person permanently ceases to carry on a trade. We are concerned with a permanent discontinuance. A temporary cessation is not enough. Both parties agreed that where there is a suspension of trading followed by further trading (even after a period of years), there is not necessarily a cessation of trade; see *Kirk & Randall Ltd v Dunn (Inspector of Taxes)* (1924) 8 TC 663.

69. In order to determine when the trade ceased, it is necessary to examine what the trade was and when that activity ceased. HMRC submitted that if Mr Kishore carried on a single trade then it was the trade of providing agency services and not of buying and selling mobile phones. That trade continued when Mr Kishore went to Dubai in 2007 and 2008 on behalf of DRPL. We do not accept that Mr Kishore's trade was providing general agency services even though we have found that he was an agent of DRPL. As stated above, we consider that the features of Mr Kishore's trade related to dealing in mobile phones, sometimes as agent of DRPL and sometimes on his own account. In both cases, the trade involved Mr Kishore, as Movil 2000, buying and selling mobile phones. Mr Kishore did not make any profit on the transactions where he acted for DRPL (including the trades initially made on his own account but where he eventually had to account to DRPL). It follows that we do not regard Mr Kishore's visits to Dubai in 2007 and 2008 on behalf of DRPL as a continuation of this trade.

70. Ms McCarthy submitted that the evidence showed that Mr Kishore ceased trading permanently in 2006. It is not disputed that Mr Kishore's last mobile phone transaction, until the one in 2009, took place on 25 April 2006. Ms McCarthy contended that the evidence showed that, by June 2006, Mr Kishore had formed the view that HMRC would not repay any of the disputed VAT to him. As a consequence of the HMRC action, DRPL would not continue to trade and Mr Kishore had no funds to carry on trading.

71. Ms McCarthy acknowledged that Mr Kishore continued his VAT registration but said that we should accept his explanation that he only did so to recover the VAT on legal fees in relation to the VAT appeal. Similarly, Mr Kishore continued to check the VAT status of his suppliers until November or December 2006 not because he had any intention of trading but simply to ensure that the suppliers were not blacklisted by HMRC because he thought that the fact they were not blacklisted would help him to recover his VAT.

72. Ms McCarthy submitted that the transaction in 2009 was a one-off and simply done as a favour for a friend as stated by Mr Kishore and Mr Nainani. She contended that it did not constitute a continuation of Mr Kishore's previous trade.

*Conclusion on cessation of trade issue*

5 73. At all times between 2006 and 2009, Mr Kishore retained the capacity to carry on trading in mobile phones, either as agent or principal, in that he maintained his VAT registration and continued to make VAT returns, he retained blank Movil 2000 invoices and he had an office in his home. It makes no sense to us that, if Mr Kishore had genuinely formed the view by June 2006 that HMRC were not going to repay him  
10 any VAT and that he was never going to buy mobile phones again, that he continued to check the VAT status of his suppliers for another 5 or 6 months. Continuing to check his suppliers' VAT status is, however, consistent with an intention to continue trading if and when the VAT situation improved. Maintaining his VAT registration and continuing to make VAT returns are also consistent with an intention to resume trading if and when circumstances allowed. Mr Kishore said that he kept his VAT  
15 registration going in order to recover input tax on legal fees and we accept that he might have held that view (although it was not strictly correct) but that does not mean that he intended to cease trading. We consider that Mr Kishore was keeping his options open.

20 74. In 2009, some three years after Mr Kishore maintains that he had ceased trading, he still had contacts in the mobile phone trading sector who felt that he would be prepared to buy and sell mobile phones on their behalf. Those contacts, Ashok Nainani and Raj Nainani, had resumed trading in mobile phones after a break but needed someone else to buy some phones. They asked Mr Kishore to help them by  
25 buying and selling mobile phones. In 2009, Mr Kishore, as M2K Promotions, bought 50 iPhones from Apple on behalf of Rancom and, as Movil 2000, immediately sold them on to Rancom. Mr Kishore said that he did not make any profit on the transaction but he did charge a small mark-up to cover costs. Mr Kishore charged and invoiced VAT to the company using a Movil 2000 invoice and the Movil 2000 VAT  
30 number. Mr Kishore accounted for the VAT charged, having deducted the input tax incurred on the purchase of the phones, on his VAT return for period 06/09. Mr Kishore carried out the transaction in 2009 in the same way as he had bought and sold mobile phones for DRPL previously. We find that the 2009 transaction was a trading transaction.

35 75. In 2006, Mr Kishore could have signalled his intention to cease trading permanently by deregistering for VAT and disposing of his Movil 2000 stationery. We find that Mr Kishore remained able to trade in mobile phones after June 2006 in exactly the same way as he had done before. We consider that the reason that he did not do so was because he was aware that HMRC were likely to refuse to repay claims  
40 for input tax incurred in relation to such transactions. We find that Mr Kishore did not rule out the possibility of trading in mobile phones again if the circumstances were right and the opportunity arose. Such an opportunity did arise in 2009 and Mr Kishore, perhaps encouraged by the fact that his contacts were starting to trade in

mobile phones again, resumed trading in the same way as he had done previously with DRPL.

5 76. For the reasons given above, we conclude that although Mr Kishore stopped trading in mobile phones after 25 April 2006, he did not intend to cease trading permanently at that time and did not in fact cease trading in 2006-07.

#### **Decisions on preliminary issues**

77. We find that Mr Kishore carried on a single trade and that the trade did not cease in 2006-07.

#### **Rights of appeal**

10 78. This document contains full findings of fact and reasons for the preliminary  
decision. Any party dissatisfied with this preliminary decision has a right to apply for  
permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-  
15 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. However,  
either party may apply for the 56 days to run instead from the date of the decision that  
disposes of all issues in the proceedings, but such an application should be made as  
soon as possible. The parties are referred to “Guidance to accompany a Decision  
from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of  
this decision notice.

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**GREG SINFIELD**

**TRIBUNAL JUDGE**

**RELEASE DATE: 3 September 2013**

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