TC03416

Appeal number: LON/2008/01229

VAT - input tax - MTIC fraud acknowledged - whether Appellant knew or ought to have known about the fraud - yes - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

INTEKX LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JILL GORT
MRS GILLIAN HUNTER

Sitting in London on 18 June 2013 to 1 July 2013

Robert Morris of Counsel instructed by Jeffrey Green Russell appeared on behalf of the Appellant.

Christopher Kerr and Ben Hayhurst of Counsel instructed by Howes Percival LLP appeared on behalf of the Respondents.

DECISION

1. This is an appeal against a decision of the Commissioners contained in a letter dated 1 May 2008 denying entitlement to the right to deduct input tax in the sum of £176,487.50 relating to two deals in the Appellant's monthly VAT accounting period 09/06.

2. The grounds for the decision are that the deals were connected to the fraudulent evasion of VAT and that the Appellant ("Intekx") knew or should have known, of that connection. The deals were alleged to be part of a Missing Trader Intra Community fraud ("MTIC").

3. The decision relates to two separate deals involving the sale of mobile telephones in September 2006, both of which trace back to tax losses within contra (or offset) trading schemes (a description of which follows at paragraphs 13-14 below). The contra-trading company was Optronix Limited ("Optronix"). Intekx was the exporter on both occasions.

4. By its notice of appeal dated 28 May 2008 various matters were pleaded by Intekx. However by the time the appeal was heard it was quite properly acknowledged by Intekx that the law had moved on and that the only issues in dispute were:

(i) Did Intekx know that its transactions were connected to a fraudulent tax loss?

(ii) Was it the case that Intekx ought to have known that its transactions were connected to a fraudulent tax loss?

5. These therefore were the only two issues before the Tribunal.

6. There were two Statements of Agreed Facts, by the first of which it was accepted by Intekx *inter alia* that the two deals which are the subject of the appeal were connected with a fraudulent evasion of tax through the activities of its supplier Optronix. It was accepted that:

> "During the relevant period Optronix, the supplier to Intekx in both deals one and two ….. was acting as a contra-trader, setting off part of its input tax claim (in respect of its broker transactions undertaken in deal chains which each commenced with a fraudulent tax loss) against an output tax liability (in respect of its acquisition deals in which the goods it imported were exported by Intekx and other traders). Whereas it might therefore appear at first glance that each of Intekx' broker transactions under this head is not connected with a tax loss, each is so connected by virtue of the offsetting exercise conducted by the contra-trader Optronix.

> Investigation into the trading of Optronix has revealed that all of Optronix's broker deals in the relevant period trace back to a tax loss occasioned by a defaulting or missing trader."

The Respondents' evidence relating to Optronix's activities as a contra-trader, and the details of its acquisition deals, its broker deals, its buffer deals and the various defaulting traders were also accepted. We do not propose to set out the agreed facts in full.

7. The second Statement of Agreed Facts relates to HMRC's MTIC policy, to the Nemesis database, to IMEI numbers, to HMRC's powers since 19 July 2006, and also specifically stated the following:

> "There is a legitimate grey market in mobile phones and grey markets are not illegal.
>
> "Prior to the introduction of the reverse charge mechanism (1 June 2007) there were significant levels of MTIC fraud in which the participants' commodity of choice were (sic) mobile phones."

Missing Trader Inter Community Fraud (MTIC) and Contra-Trading

8. When the VAT system is correctly operated, it is axiomatic that

- An amount of VAT charged by one VAT registered trader to another VAT registered trader should be accounted for as output tax, and then
- The amount of VAT previously charged as output tax, may subsequently be reclaimed by the purchaser as input tax (so as to ensure that the tax is neutral regardless of how many transactions are involved); and
- When a business's input tax claim exceeds its output tax it will be entitled to make a claim for a repayment of VAT.

A transaction chain in an MTIC fraud involves a "missing" or "defaulting" trader, who imports goods from another EU Member State; a number of intermediary or "buffer" traders, and a "broker" trader, who exports the goods. These are known as "tax loss chains" or "defaulter chains". In an effort to disguise or hide any tax loss, "contra trading" chains are often contrived to run in conjunction with tax loss chains as part of an overall scheme to defraud the revenue.

9. The basic scheme operates as follows:

(i) Trader A, based in an EU Member State (e.g. France), sells taxable goods to Trader B, in another EU Member State (e.g. the UK). In effect, Trader B acquires those goods free of VAT.

(ii) Trader B, who is the defaulting trader in the UK (i.e. a trader who incurs liability to VAT but who goes missing without discharging that liability)

or the trader using a hijacked VAT number (i.e. a trader using a VAT number belonging to someone else), sells the goods to a UK "buffer" (UK Buffer 1).

(iii) Trader B charges VAT on the supply to UK Buffer 1. Trader B is liable to account to HMRC for the output VAT it has charged to its customer (UK Buffer 1), but goes missing before discharging that liability to the tax authorities.

(iv) The goods can then be sold through a number of UK Buffer companies.

(v) The last UK Buffer company (UK Buffer 3) sells the goods to the UK Broker 1 (Trader C). As is normally the case with all buffer traders, UK Buffer 3 pays HMRC the output VAT charged after having deducted the input VAT paid.

(vi) UK Broker 1/Trader C exports the goods to another Member State or outside the EU Exports are zero-rated for VAT purposes, but UK Broker 1/Trader C is entitled to claim a refund of the input VAT paid on the purchase of the goods from HMRC. Should HMRC makes this repayment, the loss of VAT by Trader B is crystallised and goes on to fuel the next round of MTIC transactions.

10. HMRC first became aware of contra-trading in July 2005. 'Contra-trading' is the term employed where a trader who has acted as a broker (Trader C in the above example) in a chain of transactions (known as a 'dirty' chain) which involves a missing trader and a fraudulent VAT loss, seeks to conceal his involvement in such a chain. He does so by acquiring goods which he sells to another trader, Trader D (in this case Intekx) who exports the goods. Trader D claims back the input tax from Trader C but does not have to account to HMRC for any output tax because the sale was by way of an export. This transaction is known as the 'clean' chain. This is done in the same period in which Trader C has acted as broker in the dirty chain, and Trader C's claim for input tax in that chain is off-set in whole or in part by the output tax due on the transaction(s) with Trader D. The (apparently) legitimate transaction(s) with Trader D are undertaken by Trader C in order to disguise Trader C's involvement in the fraudulent chain(s).

11. The above form of the fraud was very clearly set out by Lewison J (as he then was) in the case of *HMRC v Livewire Telecom Ltd* [2009] EWHC 15 Ch paragraph 2:

"ii) … A trader … imports goods from another Member State. No VAT is payable on the import. Typically the goods are high value low volume goods, such as computer chips or mobile phones. He then sells on those goods to a domestic buyer and charges VAT. He dishonestly fails to account for the VAT to HMRC and disappears. The domestic buyer sells on to an exporter at a price which includes VAT. The exporter exports the goods to another Member State. The export is zero-rated. So the exporter is, in theory, entitled to deduct the VAT that he paid from what would

otherwise be his liability to account to HMRC for VAT on his turnover. If he has no output tax to offset against his entitlement to deduct, he is, in theory, entitled to a payment from HMRC. Thus HMRC directly parts with money. Sometimes the exported goods are re-imported and the process begins again. In this variant the fraud is known as a carousel fraud. There may be many intermediaries between the original importer and the ultimate exporter. These intermediaries are known as "buffers". The ultimate exporter is labelled a "broker". A chain of transactions in which one or more of the transactions is dishonest has conveniently been labelled a "dirty chain". Where HMRC investigates and find a dirty chain they refuse to repay the amount reclaimed by the ultimate exporter.

"iii) In order to disguise the existence of a dirty chain, fraudsters have become more sophisticated. They have conducted what HMRC call "contra-trading". The trader who would have been the exporter or broker at the end of a dirty chain, with a claim to repayment of input tax, himself imports goods (which may be different kinds of goods) from another Member State. Because this is an import he acquires the goods without having to pay VAT. This is the contra-trade. He sells on the newly acquired goods, charging VAT but this output tax is offset against his input tax, resulting in no payment (or only a small payment to HMRC). The buyer of the newly acquired goods exports them and reclaims his own input tax from HMRC. Again there may be intermediaries or buffers between the contra-trader and the ultimate exporter. The fraudsters' hope is that if HMRC investigate the chain of transactions culminating in the export, they will find that all VAT has been properly accounted for. This chain of transactions has conveniently been called the "clean chain". Thus the theory is that an investigation of the clean chain will not find out about the dirty chain, with the result that HMRC will pay the reclaim of VAT on the export of the goods which have progressed through the clean chain. I should add that HMRC do not agree with the label "clean chain" because they say that both chains are party of an overall fraudulent scheme."

The Legislation

12. Articles 167 and 168 of Council Directive 2006/112 EC of 28 November on the common system of VAT (the EC Sixth Directive) provide

"167. A right of deduction shall arise at the time the deductible tax becomes charged.

168. In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay.

(a) The VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person."

13. Sections 24 to 26 of the Value Added Tax Act 1994 ("the VAT Act"), which implemented Article 17(1) to (3) of the EC Sixth Directive, deal with a taxpayer's entitlement to input tax credit. Those sections are mandatory terms and provide that if a trader has incurred input tax which is properly allowable, he is entitled as of right to set it off against his output tax liability or to receive a repayment if the input tax credit due to him exceeds his liability.

14. Regulation 29 of the VAT Regulations provides:

29(1) Subject to paragraph (2) below, and save as the Commissioners may otherwise allow or direct either generally or specifically, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable.

(2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of -

(a) a supply from another taxable person, hold the document which is required to be provided under regulation 13 …

15. It follows that if a taxable person has incurred input tax that is properly allowable, he is entitled to set it against his output tax liability and, if the input tax credit due to him exceeds tax liability, receive a payment.

16. The Court of Justice of the European Communities ("the ECJ") has decided that there is an exception to Article 17, as implemented by sections 24-26 of the VAT Act. In *Axel Kittel v Belgium State and Belgian State v Recolta Recycling* SPRL (joined Cases C-439/04 and C-440/04 [2006] ECR I-6161 ("Kittel") the ECJ held:

54. As the Court has already observed, preventing tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive (see Joined Cases C-487/01 and C-7/02 Gemeente Leusden and Holin Groep [2004] ECR I-5337, paragraph 76. Community Law cannot be relied on for abusive or fraudulent ends (see, inter alia, Case C-367/96 Kefalas and Others [1998] ECR I-2843, paragraph 20; 373/97 Diamantis [2000] ECR I-1705, paragraph 33; and Case C-32/03 Fifi HJ [2005] ECR I-1599, paragraph 32).

55. Where the tax authorities find that the right to deduct has been exercised fraudulently, they are permitted to claim repayment of the deducted sums retroactively (see, inter alia, Case 268/83 Rompelman [1985] ECR 655, paragraph 24; Case C-110/94 INZO [1996] ECR I-857, paragraph 24; and

Gabalfrisa, paragraph 46). It is a matter for the national court to refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent ends (see Fini H, paragraph 34).

56. In the same way, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with the 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.

17. At paragraph 61 the ECJ summarised the positions thus:

"… 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".

18. Relevant to the Tribunal's considerations in this regard are what steps the Appellant took to protect itself. Paragraph 5 of the ECJ's judgment in *Kittel* provided as follows:

"… 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 …"

19. The burden of proof in this appeal is at all times on the Respondents and the standard of proof is the balance of probabilities.

The Evidence

20. The Tribunal heard live evidence from the following officers on behalf of HMRC:

Pauline Smith
Geoffrey Swinden
Susan Bransgrove

Lesley Camm
Matthew Bycroft

The following provided witness statements which were not challenged by Intekx:

Terrence Mendes
Elaine Emery
Carol Ann Batley
Jennifer Stubbs
Adam Smith
Olutoyin Alabi
Roderick Stone
Richard Meynell
Andrew Letherby
Mark Stuart Jarrold

21. The only witness called on behalf of Intekx was Lindsay Mark Hackett, director of Intekx, who submitted five witness statements.

22. Thirty agreed files of statements and authorities and exhibits were produced. In addition we were provided with two core bundles.

The Background

23. Intekx was formerly called Three Acre Farm Limited ("the Company"). The company was incorporated on 21 January 2004. The director was a Lindsay Mark Hackett ("Mr Hackett") and the Company Secretary was his wife, Sheila Hackett. The company was registered for VAT with an effective date of 22 January 2004. Its main business activity was stated to be management services, commission sales, import/export and distribution of IT and office products. The estimated value of its taxable supplies in the next 12 months was £500,000.

24. The company initially operated from Mr Hackett's home address, Three Acre Farm. At some point it moved to premises in Rickmansworth and in June 2006 it took a 12 month lease of office space there.

25. By a letter dated 30 November 2006 Mr Hackett notified the Commissioners that the company had changed its name to "Intekx Limited", but it had in fact been trading under that name for some time prior to this.

Intekx' contact with HMRC

26. On 14 June 2004 Officer Swinden had made an unannounced visit to the Three Acre Farm ("TAF") because a known MTIC trader, Micropoint UK Limited, had made enquiries at Redhill about TAF. TAF's VAT 1 gave its intended business activities as "management services, commission sales, import/export and Distribution of IT and Office Products. Mr Hackett told Officer Swinden both that he had no desire to deal in computer hardware and software and that he may eventually do so as that was where his expertise lay. However Mr Hackett informed Officer Swinden that

his intention was to deal in equine products. Officer Swinden advised Mr Hackett about the risk of entering into deals which might result in his being involved in carousel and MTIC fraud, and advised him what steps he should take to avoid such involvement. After the meeting Officer Swinden concluded that Mr Hackett was unlikely to be dealing in the type of goods known to be involved in carousel fraud such as CPUs and mobile phones.

27. Officer Swinden's only contact with Mr Hackett after that visit was by three subsequent letters dealing with Mr Hackett's request to go onto monthly returns. In a letter of July 2004 to Officer Swinden Mr Hackett stated that he had not traded in IT products to date and did not see 'immediately favourable market conditions in that area', but he was 'proceeding' with horse- related products. In his witness statement Mr Hackett had described dealing with Officer Swinden "on a regular basis" and that he had a "very good relationship with Officer Swinden". Officer Swinden did not accept that this was an accurate portrayal of the relationship. Mr Hackett had also stated that Officer Swinden and Officer Bycroft "never criticised any aspect of my trading". The company had not started trading at the time Officer Swinden met Mr Hackett, and we find that his evidence in respect of Officer Swinden is misleading and inaccurate.

28. Officer Bycroft had visited TAF on 29 September 2004 with regard to a repayment claim for £65,647.46 in respect of 08/04 VAT return. This repayment related to a deal in Nokia and Ericsson mobile telephones, which had been purchased from Micropoint, the company which had earlier checked on TAF with Redhill. TAF had sold phones to a company in Dubai. Mr Hackett told Officer Bycroft that he had had extensive dealings with Micropoint in the past. Officer Bycroft discussed third party payments and the necessity of checking potential suppliers and customers with Redhill with Mr Hackett. Officer Bycroft authorised the repayment on a "without prejudice basis" because the deal chains had not been checked. Mr Hackett's deal records included a proforma invoice reference 2084 which showed the sale by Micropoint to be to a company called Amplio Limited not TAF. When this was queried, Mr Hackett produced a similar tax invoice reference 20804/1 that showed the sale was to TAF. On checking, Officer Bycroft found that Mr Hackett was a director of Amplio Limited, a fact which had not at this stage been disclosed by Mr Hackett. At the September meeting Mr Hackett told Officer Bycroft (according to Officer Bycroft's note) that he was setting up a website to sell horse-related products, and whilst that business was being set up he was doing some general trading in IT and office products. In his evidence to the Tribunal Mr Hackett stated that he had always 'done' IT, office and electronic products.

29. On 9.11.2004 Officer Bycroft had again visited TAF because a further deal in mobile phones bought from Micropoint had been carried out in 10/04 and a repayment was sought, which eventually was repaid to TAF in the sum of £81,580. Mr Hackett informed Officer Bycroft that he was in the process of trading in monitors, having signed a distribution agreement with a company in Taiwan called AOC. Evidence shows that these monitors were sold in Spain, having been imported into Rotterdam. There is an inspection document from A1 inspections which shows

IMEI numbers having been checked, which is not something which was done in respect of any of Intekx' deals with Optronix.

30. In his evidence to the Tribunal Officer Bycroft described Mr Hackett as a "very knowledgeable businessman, very professional, who understood the markets he was engaged in". Mr Hackett believed that there had been a third meeting, but the above were the only two meetings recorded by Officer Bycroft in his very detailed records, which also recorded numerous telephone contacts and correspondence. Officer Bycroft's evidence differed at several points from that of Mr Hackett as to the content of those telephone calls, and also as to the existence of a telephone call said by Mr Hackett to have been made on 31 July 2006 concerning a repayment supplement of which Officer Bycroft has no record and which he did not accept had taken place. In a letter dated 7 March 2007 written to Officer Bycroft's successor, Officer Adjare, Mr Hackett referred to his apparent dealings in July and September 2006 with Officer Bycroft as follows:

> "I had a detailed discussion with Officer Bycroft, who informed me he was no longer responsible for verifying our paperwork that we had submitted in support of our reclaim. He informed me that this was done by several separate teams in Wigan and that he would have to progress our claim with them and report back.
>
> "Having done so, he informed me that the claim had been approved and we would be receiving a repayment supplement as the verification exercise that had been carried out had delayed our repayment beyond the 30 days required."

Officer Bycroft's evidence in respect of this was that he had no record of any such telephone conversation, he had never worked on repayment supplements, and would never talk to a trader about a repayment supplement. After moving to Peterborough in February 2006 he had forwarded all the documents sent by Mr Hackett to Officer Adjare. Officer Bycroft's records show no personal contact with Mr Hackett between January and 4 November 2006, when a telephone call is recorded.

31. In April 2006 when extended verification was introduced by HMRC, all reclaims were dealt with in Wigan. Intekx did receive repayment supplements for the periods 05/06, 06/06 and 07/06 after Mr Hackett had chased up the Wigan office about them. The National Advice Service records show regular calls from Mr Hackett between July and September about repayments, and in particular there is a record on 1 September 2006 that payment for 07/06 had been released, a further record on 5 September 06 that that payment is shown as released, but also not yet authorised and on 8 September 2006 there is a record that Mr Hackett was told that he would not have been advised that payment had been released if it had not been; similar advice was given on 14 and 15 September 2006. When Mr Hackett was in effect told that, whilst the payment had been released, it had not yet been processed. It was not until November 2006 that Mr Hackett advised HMRC that the company's name was changed to Intekx.

32. In his third witness statement Mr Hackett had recorded that he had in July and September 2006 had telephone conversations with Officer Bycroft during which Officer Bycroft "made me believe that he was recognising the legitimacy of our trading and encouraged me to believe that we were adopting proper practices". Officer Bycroft not only denied that he would have said such things, but also that he had had telephone conversations with Mr Hackett in July or September 2006. Officer Bycroft had kept meticulous records of all his contacts with Mr Hackett, Mr Hackett provided no such records and yet had made assertions about conversations with Officer Bycroft which had taken placed over 7 years ago. Mr Hackett in evidence maintained that he was "more than 100% confident" that what he had recorded about the telephone conversations in his witness statement was correct. On each occasion we prefer the evidence of Office Bycroft to that of Mr Hackett, given that Officer Bycroft kept records and Mr Hackett did not, and given in particular the fact that Mr Hackett in evidence to the Tribunal when cross-examined about these differences had said: "The way I generally keep my business records is frankly in my head".

33. Between 2004-2006 Intekx (as TAF) on several occasions received repayments from HMRC which were accompanied by letters which stated such things as "This repayment has been released on a without prejudice basis and may be subject to checks at a later date", (6.10.04) or "Whilst it has been decided that, based on the evidence currently available, your claim is to be repaid, this payment is being made without prejudice to any other action that may result from our continuing enquiries into the relevant supply chains". (29.11.05). the repayment was also accompanied by a 'remittance advice' which did not contain that statement.

The deals subject to appeal

34. The deals which generated the input tax which is the subject matter of the appeal consisted of wholesale purchases by Intekx of mobile phone handsets from a UK trader, Optronix, and the onward sale and despatch of the goods to EC Trading APS ("EC Trading") a Danish-based trader. The goods were purchased with VAT at the standard rate, and sold with VAT at the zero rate. The supply chains and the goods traded are as described in the following two tables.

Deal 1

Trader	**Date**	**Goods**	**Quantity**	**Price (£)**
Kima	26 September	Nokia N93	1,700	353.75
Northcom	26 September	Nokia N93	1,700	354.25
Optronix	28 September	Nokia N93	1,700	355
Intekx	28 September	Nokia N93	1,700	371
EC Trading	28 September	Nokia N93	1,700	271.50
Techbase				

Deal 2

Trader	**Date**	**Goods**	**Quantity**	**Price (£)**

Kima	26 September	SE W900i	1,500	268.50
Northcom	26 September	SE W900i	1,500	269
Optronix	28 September	SE W900i	1,500	270
Intekx	28 September	SE W900i	1,500	282
EC Trading	28 September	SE W900i	1,500	282.50
Techbase				

35. In addition to the above deals the Commissioners also rely on four deals undertaken by Intekx in June and July 2006 (details of which are set out below at paragraph 41) in respect of which Intekx was similarly supplied by Optronix and sold the goods to EC Trading, other than in the fourth deal where the customer was a company called France Affaires International.

36. In respect of all the above deals the freight agent was AFI Logistics ("AFI") to whom the goods were delivered and whom Intekx instructed to ship "on hold" to AFI Logistique, the Paris-based warehouse of AFI. The carrier was a company called Eagle Logistics (see paragraph 54 below).

37. The goods sold by Optronix to Intekx in deal 1 are simply described as "Nokia N93". Intekx on its documents refers to them as "Nokia N93 Sim free Mob phones". No further descriptions are given. Optronix' invoice to Intekx dated 28 September 2006 states: "payment due by 28 September 2006". The deal is stated to be subject to Optronix' terms and conditions, but none are set out. Intekx placed the order for the goods in both deals 1 and 2 on 28 September. In its purchase order Intekx gives the terms of payment as "payment in full on release". It makes reference to its website and to the terms and conditions of trade of Three Acre Farm Limited on that website. The purchase order from EC Trading, Intekx' Danish customer, was also raised on 28 September and similarly describes the goods as just "Nokia N93" and gives a delivery date of 29 September 2006. Whilst Intekx raised its purchase order to EC Trading on 28 September, the document appears not to have been faxed by Intekx until 3 October. The order provides "delivered and duty paid" and "payment term T/T in advance". There are no terms and conditions on the purchase order but payment is to be made to the First Curacao International Bank ("the FCIB"). That bank had been closed in August 2006. Intekx' invoice, which is No. 280906-1 in respect of the Nokia phones, again provides that payment should be in full on release/inspection. Intekx itself did not arrange any inspection of the goods. Its instruction to AFI on 28 September 2006 requests that the goods in respect of both deals are sent "ship on hold". The document also provides that the goods are to go to EC Trading c/o AFI Logistique and "no insurance required as have own".

38. Despite EC Trading's purchase order giving the delivery date as 29 September, there is a shipping certificate from AFI dated 4 October 2006 which confirms that the goods were shipped on 2 October 2006. However this document whilst referring to invoice No. 280906-1, relates to shipping 1,400 Nokia N93s. It was however accepted on behalf of HMRC that the remaining 300 Nokia N93s were shipped with the goods in deal 2. There is also an international consignment note dated 2 October 2006 to EC Trading which again refers to 1,400 Nokia phones. There is no

explanation given as to why some of the documents referring to the same invoice number refer to the shipping of 700 Nokia N93s. In particular there is an invoice from AFI, again quoting that same invoice number which states that 1,700 Nokia N93s and 1,500 Sony Ericsson W900i were shipped on 2 October 2006.

39. There is a pro forma invoice dated 28 September from EC Trading to its customer Techbase Consultancy in Poland which also gives a delivery date of 29 September 2006 for 1,700 Nokia N93s. The terms are: "delivered and duty paid T/T in advance". This document gives the FCIB as the payment reference. However the invoice itsself gives different bank details, and does not refer to the FCIB. The only inspection report relating to the goods is one sent to EC Trading by AFI Logistique on 3 October 2006 which is in respect of both the Nokia N93 phones and the Sony Ericssons, and it gives the origin as made in Finland/China, the amount as "1,700 NK N93/1,500 SE W00i", the condition of packing as "5 in a box/loose stock". It refers to the manual for the Nokia being English/French and being English for the Sony Ericssons. The languages are given as English, French, German for the Nokia N93s and Eurospec for the Sony Ericssons. There is no reference to the condition of the products nor any more specific description of the phones themselves. On 3 October EC Trading instructed AFI Logistique to release the goods to Techbase. On 4 October AFI notified Intekx that it had shipped the Nokia N93s on 2 October. On 5 October Intekx received payment from EC Trading for the Nokias, but the sum was £850 short. Despite this, Intekx paid Optronix the full invoiced amount for both deals.

40. The only other relevant document is a letter dated 5 October 2006 from Intekx to AFI Logistics UK Limited instructing them to release the 1,700 Nokia and the 1,500 Sony phones to EC Trading APS c/o of AFI Logistique in France. The letter states that the goods have been released to Intekx by Optronix Limited. All the documents in respect of each of the two deals are in English pounds.

Other relevant deals

41. The deals carried out by Intekx in June and July are as follows:

June deal 1

Trader	**Date**	**Goods**	**Quantity**	**Price**
AXT	13 June	Nok 8800	2800	£339
Optronix	15 June	Nok 8800	2800	£340
Intekx	15 June	Nok 8800	2800	£355.3
EC Trading				

June deal 2

Trader	**Date**	**Goods**	**Quantity**	**Price**
AXT	13 June	Nok N70	2500	£179
Optronix	15 June	Nok N70	2500	£180
Intekx	15 June	Nok N70	2500	£188

EC Trading				

June deal 3

Trader	**Date**	**Goods**	**Quantity**	**Price**
Infortec SL	26 June	Nok N71	1620	£213.5
Northcom	28 June	Nok N71	1620	£214
Optronix	28 June	Nok N71	1620	£215
Intekx	28 June	Nok N71	1620	£224.50
EC Trading				

July deal 4

Trader	**Date**	**Goods**	**Quantity**	**Price**
TMEA	21 July	Nok N91	1750	£268.25
Opronix	21 July	Nok N91	1750	£269
Intekx	21 July	Nok N91	1750	£279.75
AFI				

42. Each of Intekx' June and July deals involved the same goods being bought and sold through six wholesalers within a few days, with no manufacturer, no authorised distributor and no retailer being involved at any stage. This was also the case in respect of the two deals which are subject to this appeal.

43. The goods were imported into the United Kingdom from another Member State and lodged with the freight handler until exported within a few days to a third Member State by the French-based warehouse of the same freight handler.

44. The goods were successively released by each trader to the next, culminating in the shipping of the goods to France by Intekx, and the release by EC Trading, Intekx' customer, to Techbase without any payment having been made further up the supply chain.

45. In its 5 broker deals in which it sold to EC Trading Intekx' profit margins were between 4.42 and 4.51%. Its margin when selling to France Affaires was 4%. Optronix, who was the contra trader was not dependent upon its VAT repayments to conduct the deals and achieved a margin of 0.81 – 1.55% in its broker deals.

Optronix

46. Optronix, Intekx' supplier, was not a legitimate trader operating in a genuine market, a fact which was not disputed by Intekx. The supply chains in Optronix' 14 broker deals in the same VAT accounting period as Intekx' disputed deals, namely

11/06, all led back to fraudulent tax losses. Optronix conducted its trade in period 11/06 in such a way that the output tax generated by its broker deals was wholly offset by the input tax credits generated by the purchases in the supply chains in each case leading back to fraudulent defaulters; thereby the output tax liability incurred by Optronix in its acquisition and its buffer deals was entirely set off by the input tax credits generated by its broker deals. The repayment claims arising from its broker deals would be made not by Optronix but by the other broker traders such as Intekx.

47. The transactions in the "clean" chains, such as the supplies to Intekx, were connected as a matter of fact to the transactions in the "dirty" chains which resulted in the fraudulent tax losses. As was accepted on behalf of Intekx, Optronix was not trading legitimately, but was a vehicle for the fraudulent evasion of VAT via the mechanism of contra-trading.

48. In 17 of Optronix' 21 acquisition deal chains it despatched goods to the same trader, EC Trading, who was also Intekx' customer in both its deals in the period 09/06, and also in three of the four earlier deals on which the Respondents rely.

49. Optronix was part of the Mitek Group, which, having sustained a large bad debt, had been taken over in December 2005 by Global Management Group Holdings (GMGH), based in the Virgin Islands. Following the takeover, Optronix's turnover, and that of its associate company Mitek Computer Components Limited ("MCC") increased dramatically. Optronix's quarterly turnover increased from £1.2million in the period 02/06 to £20million in 05/06 and £115million in 08/06. MCC's turnover increased from £3.6million in 12/05, £214million in 03/06 and to £188million in 06/06.

50. The evidence showed that the clean chains in Optronix' dealings, that is the ones in which Intekx was involved, all related to mobile phones, whereas in the dirty chains other electrical goods were involved. Whether Optronix was in fact exporting electrical goods is very much open to doubt, there being unchallenged evidence of bales of hay and paper in loads described by Optronix as being Cannon goods.

51. The consignment records produced by Optronix as evidence of its acquisitions in VAT period 08/06 (which was the period in which the earlier deals transacted by Intekx which are now disputed by HMRC, but are not the subject of the appeal, appeared) do not appear to be genuine. They were handwritten and barely legible; neither of the two carriers of the goods was recognised by the Spanish authorities; neither of those carriers could be found at the relevant trading address. A number of vehicles ostensibly transporting goods on behalf of Optronix in this period were found to be either empty or carrying unrelated cargo. All of the supply chains leading to Optronix' 103 broker deals in June and July 2006 have been traced to defaulting or contra-traders resulting in a tax loss to HMRC of about £10million.

52. In December 2006 there was a criminal investigation into Optronix. By 12 January 2007 it had gone missing and had failed to submit a return for the period 11/06.

53. The prime mover behind Optronix and MCC at the relevant time was a David Donnelly. On 27 January 2012, well after the deals in question, David Donnelly was convicted of conspiracy to cheat the Revenue of VAT between 1 August 2005 and 13 December 2006. He had been charged with conspiring together with the director of the Mitek Group, Imran Hussain, and a Sukhdeep Singh Bassi of AFI Logistics, but Mr Hussain, who was considered to be the controlling mind behind the MTIC frauds, did not attend the trial and was believed to have fled to Pakistan

54. Sukhdeep Singh Bassi controlled the freight forwarder AFI Logistics and the carrier Eagle Logistics. On 29 April 2013 he was convicted of conspiring with Imran Hussain between 1 January 2005 and 30 November 2005, and also of a second count which related to conspiring with Imran Hussein, David Donnelly (see above) and others between 1 August 2005 and 13 December 2006 to defraud the Revenue.

The Banking Evidence

55. Mrs Camm, a Higher Officer of HMRC and a member of its MTIC team in Stoke on Trent, analysed data obtained from the Netherlands in respect of the FCIB Bank Master Plus and Datastore. The Bank Master Plus data shows the flow of money between traders, the Datastore shows the documents presented by the account holders in support of their applications to open an account with the FCIB. Her analysis was based on evidence she obtained from the Dutch server of FCIB. Subsequently HMRC obtained evidence from the FCIB Paris server and this evidence was checked by Elaine Emery, also a Higher Officer of HMRC, who confirmed the data obtained by Mrs Camm.

56. Initially Mrs Camm examined the documents relating to Optronix in respect of a sample of 16 transactions carried out in June and July 2006. The analysis of the FCIB evidence in relation to this sample of 16 of Optronix' broker deals was not challenged. Mrs Camm’s evidence was that in choosing these 16 she had included each of the defaulters, each of the suppliers and each of the EU customers within the chains to give a representative sample, and the sample had been selected prior to her being asked to look at Intekx' deals.

57. At the time of its deals in period 08/06 Optronix banked with the FCIB, as did all the traders in its supply chains, including Intekx. The FCIB records showed that typically in Optronix' broker deals (i.e. not those directly involving Intekx) its customers paid for the goods several days after the deal had been concluded. Each party in the supply chain then paid its supplier the invoiced amount in sequence on the same day, retaining a margin. The defaulting trader at the start of the UK supply chain then paid the monies it had received for the goods, including the VAT for which it was liable to account to the Revenue, to an account in the name of one of two offshore Pakistan-based traders; Mobile Direct (“Mobile”) or Maks Information Technology (“MIT”). The defaulter retained a commission of, typically, several thousand pounds.

58. Mobile and MIT then remitted the monies, minus a substantial proportion of VAT, to the account of a Dubai-based company in the name of Marxman International

("Marxman"). Earlier on the same day Marxman had transferred precisely the same sum to an account in the name of one of three traders: Kima Estates in the Czech Republic ("Kima"), Nordic Telecommunications APS in Denmark ("Nordic") and Techbase Consulting Ltd in the UK ("Techbase"). This company is not to be confused with the company called "Techbase Consultancy", which is based in Poland, which was the customer of EC Trading, Intekx' customer in both the disputed deals. In each case one of the three companies put Optronix' customer in funds to pay for the goods after retaining a small commission.

59. In these broker deals all the payments relating to the deals occurred on the same day in sequence, starting and finishing with Marxman, which was acting merely as a clearing house. The effect of the arrangement was that the funds, net of VAT, were simply circulating from and to Marxman. The margins retained by each of the traders in the payment chain, plus the profit of Optronix, precisely equalled the output tax element injected by Optronix which it paid to its supplier with VAT charged at the standard rate.

60. Mrs Camm concluded that Optronix had structured its trading in such a way as to ensure that its FCIB account was always in credit by arranging that acquisition deals were conducted first and then the broker deals, which was the way the deals in which Intekx was involved were conducted. In this way Optronix did not require additional loans to fund its VAT payments. We concur with Mr Kerr's submissions in his opening skeleton argument that from this it can be seen that this trade was not commercial activity by traders operating at arms length in a genuine market, but an organised fraud, the purpose of which was to extract UK VAT revenues. The fraud was financed by the injection of the VAT by Optronix, which it would subsequently set off against its output tax liability; the right to make the corresponding reclaim from the revenue being transferred to traders such as Intekx.

61. Mrs Camm was also asked to analyse the four deals in June and July in which Intekx had acted as a broker. She identified circularity of payment in each of the four deals. Again, the actual evidence provided by Mrs Camm was not challenged although some of her conclusions were. By the time of its June and July deals, Intekx had opened an account with the FCIB. An analysis of the FCIB evidence shows that EC Trading, Intekx' customer, paid for the goods a day or two after the deal, having received the monies from Techbase in Poland, and in the second deal in July from Nordic. Intekx then paid Optronix, which in turn paid its supplier, based in another Member State, Optronix retaining the output tax for which it was liable to account to the revenue. Optronix' supplier then paid the monies to one of three entities: Kima (the Prague-based entity), Infortec SL based in Spain, or CDM Comercio in Spain. These entities then paid the monies to MIT. MIT in turn transferred the funds to Marxman. In the first two June deals, and in the first July deal, Marxman had earlier in the day transferred monies to Techbase which had enabled Techbase to fund Intekx' customer. In the second July deal the money had gone to Nordic to fund Intekx' customer. The funds had passed in a circular fashion, returning to Marxman, minus the margins retained by each entity in the payment chain.

62. Mrs Camm's conclusion that her analysis of the deals showed that in each instance the money travelled in a circle with the United Arab Emirates-based company Marxman International and the Pakistan-based Maks Information Technology Company in pivotal positions was not challenged. The FCIB documents showed that there was always an amount of money paid out by Maks Information Technology which was exactly the same value as the amount paid to them in respect of that transaction. On the dates in question, all payments from the account of Maks Information Technology were made to Marxman International.

63. Mrs Camm also analysed the funding of Intekx' account and her conclusions in respect of this were challenged. She located receipts in Intekx' FCIB account that did not appear to relate to customers' payments for specific transactions. She gave evidence that the "Book Balance" in Intekx' account on 5 June 2006 was £7,317.27. Payments for deals 1 and 2 were made on 16 June 2006. Intekx received a total of £1,464,840 from its customer, EC Trading APS, and paid out a total of £1,647,350 to its supplier, Optronix. The "shortfall" of £182,510 between amounts received and paid out by Intekx was covered by receipts of £150,000 on 14 June 2006 (see paragraph 65 below for relevant VAT repayment receipts) and £25,500 from an FCIB account belonging to Micropoint UK Limited, allowing Intekx to pay its supplier in full (inclusive of VAT). This pattern was repeated for deal 4, where the shortfall of £63,568.75 between the amount received and paid out by Intekx was covered by the receipt of a VAT refund of £80,000 on 7 July 2006. Prior to this refund Intekx' balance in its FCIB account was only £30.74. Mrs Camm concluded that without those additional funds, Intekx would not have had sufficient money in its trading account to pay the VAT to its supplier, Optronix.

64. Mrs Camm had in fact set out a chart showing seven occasions when there were receipts into Intekx FCIB account that did not appear to relate to customers' payments for specific transactions. In respect of all of these seven instances, which date from between 31 August 2005 and 7 July 2006, Mr Morris was able to show that the payments had either come from Mr Hackett's NatWest account, or from a Travelex account belonging to Intekx. However, we were not provided by Mr Hackett with evidence as to the source of those funds into those two accounts, he did make reference to currency dealings in respect of the Travelex account, but the nature and extent of that dealing was not explained at any point. Mr Kerr referred us to VAT repayments received by Intekx which corresponded with the monies which came into the FCIB account. The particular dates of the relevant VAT repayments were 26 September 2005 when £115,030 was received, 5 June 2006 when there was a VAT repayment in the sum of £275,646, and 6 July 2006 when there was a repayment of £107,413, all these payments went into TAF's Natwest account.

65. Because the FCIB was closed down in early August there was no banking evidence in relation to the two deals in the period 09/06 which are the subject of this appeal.

Mr Hackett's Evidence

66. Mr Hackett had taken a BA degree in economics at Warwick University in 1977. He had then worked for EMI where he studied for, and subsequently obtained, a diploma from the Chartered Institute of Purchasing and Supply and had later become a member of that Institute. After that he had worked for various different companies in the IT and computer industries, principally in the sales department.

67. In April 1987 Mr Hackett started his own business, Status Computer Products and Services Limited, with a colleague. The company, which sold computer consumables, expanded and in 1990 became The Status Group Plc. Mr Hackett's business partner sold his share in the company to a new company, Status Group Management Limited, of which Mr Hackett was sole shareholder. The Group expanded further, and in December 2003, Mr Hackett sold it to Logcom Group Plc. This company established a new company and retained Mr Hackett to run it. That company failed, going into receivership in January 2004.

68. Mr Hackett was restricted from working in the same area by a two year non-competition clause in his contract with The Status Group. That area was described by Mr Hackett in his evidence as "business to business computer sales and service". However by about September 2004 he was apparently free of that restriction because the Logcom companies were wound up. In February 2004 he set up Three Acre Farm Limited as referred to in paragraph 23 above. Mr Hackett also took a 25% shareholding in another business, Amplio Limited, which had been set up to purchase the assets of Logcom and aimed to sell IT products on a commission basis. It "partially" (in Mr Hackett's words) occupied Logcom's premises, which were owned by a company called Rinmoor Limited, a company which had formerly been part of The Status Group Management Limited. Mr Hackett left Amplio in January 2005, but did not state why, or what happened in respect of his involvement with Rinmoor Limited.

69. Because Mr Hackett and his family were interested in horses, part of Three Acre Farm Limited's business involved equestrian supplies. Mr Hackett operated the electronics side of the business via a website in the name of Intekx which was set up in about April 2004, and via eBay. He had established contacts abroad whilst at The Status Group. In his witness statement Mr Hackett stated that in 2005 Intekx registered with a number of Internet trading platforms including International Phone Traders ("IPT"), although in his evidence he said that he had started trading in mobile telephones earlier, namely in August 2004.

70. In the first of his witness statements Mr Hackett set out his understanding of the grey market, which he understood to be a legitimate market "that seeks to profit from the imbalances in the supply and demand of particular types of phones in any particular market". After referring to the position of an authorised distributor by the over- or under-ordering of a particular model, and to how the authorised distributor would then want to get rid of surplus stock, he stated: "The goods will then travel to where there is a shortage of supply … the key is then for wholesalers to identify the markets where there is an over- or under-supply and seek out the markets that are the

respective counter-balances." Mr Hackett also referred to the existence of a grey market where the cost of a particular model is more in one market than in another.

71. In respect of Intekx' business Mr Hackett stated that he "discovered very early that there was a supply of handsets in the UK market. The shortages in the marketplace … were on mainland Europe." Mr Hackett does not appear to have asked himself the question why all the phones in which Intekx traded had been imported to the UK from Europe in the first place given the perceived shortage being in Europe, but he did say that he believed that the UK acted as a trading hub.

72. Intekx had been funded in part by Mr Hackett's sale of The Status Group Management Limited. At the time it was set up Mr Hackett had income from the receivers in respect of help that he was giving them with regard to the collapse of the Logcom Group, and he was given a personal loan by his brother and sister-in-law. In 2004 Intekx started buying flat screens manufactured by a company called AOC and in 2005 it became an official distributor for that company. Mr Hackett never considered approaching a mobile phone company to become an authorised distributor because he considered his business was not large enough. In his evidence he claimed that he was approached on 100 + occasions each week with offers to trade in mobile phones, the offers increasing after Intekx went on the IPT website. At a later stage in his evidence he withdrew the suggestion that he was receiving substantial numbers of offers each week.

73. Mr Hackett described his business model as: "Ship on hold … cash with delivery and it was up to the customer to obtain their own inspection report, accept the goods and make payment".

74. If the goods were not as described Mr Hackett considered that Intekx was not at risk because it had not paid its supplier, and so if the supplier had provided the wrong goods, he would not be paid, and the goods would have been returned. Mr Hackett did not appear to have considered either the cost to Intekx of sending the goods abroad in the first place, or the possibility of the supplier suing Intekx for non-payment of goods in his turn. Mr Hackett stated in his evidence that he believed that Optronix, Intekx' only supplier of mobile phones in the deals with which we are concerned, would have been prepared to take the goods back, but there was no contractual term to this effect.

75. The due diligence described by Mr Hackett was to check the Europa website – – and to send to Redhill the company information provided by its supplier, including the certificate of incorporation, the VAT certificate, the invoices and the company's introductory letters, together with purchase orders from its own customer. He claimed that Intekx carried out Europa checks on both its suppliers and its customers. However the Europa site only confirms that a particular VAT number exists. As set out in paragraph 82 below, he did not always wait for a reply from Redhill before conducting the deal in question.

76. Mr Hackett had in his first witness statement claimed that for every deal undertaken he had retained copies of the following documents in a deal pack for his

records "Shipping, insurance and inspection instructions to freight forwarder". When cross-examined about this and the fact that he had not obtained any inspection reports in respect of any of the deals Mr Hackett said: "Well, it's a general comment regarding shipping instructions. It doesn't specifically say there was an inspection report." This response was typical of the way Mr Hackett gave evidence and is one of many instances of contradictions in his evidence which caused us to be unable to place much, if any, reliance on him as a witness.

77. In May 2007 Mr Hackett had written to Officer Adjare (who had taken over from Officer Bycroft) saying, in support of a repayment claim, that "as she knew" his supplier, Optronix had provided an inspection report to HMRC. If became clear on cross-examination that Mr Hackett had no evidence of this, and did not know what Optronix had provided to HMRC.

Evidence re dealings with Optronix

78. Mr Hackett's evidence about his initial contact with Optronix was, as per his third witness statement, that he was "repeatedly" offered mobile phones by Optronix, yet in his letter introducing Optronix to Intekx Mr Paul Spooner does not refer to mobile phones as being part of Optronix' business (and see paragraph 72 above). In the same paragraph in his witness statement Mr Hackett continued: "After conducting what I considered to be proper checks to ensure that I was comfortable dealing with them (bearing in mind the fact that I was aware of the risks involved and the need to conduct proper checks on suppliers) I followed them up …". The nature of that follow up was very limited. There is a trading account opening document from Intekx relating to Optronix which was signed on behalf of Optronix by Paul Spooner on 15 June 2006, together with a declaration that all the information on the form was correct. It was returned to Intekx by fax on the same date. Optronix's directors are named as Paul Spooner and Philip Kingsland, and Paul Spooner is also referred to as the managing director. In fact Companies House records show that both Paul Spooner and Philip Kingsland had resigned as directors on 14 June 2006. Paul Spooner was Mr Hackett's contact at Optronix, although they never met. The first deal with Optronix was made on 15 June 2006. Mr Hackett had not known that Paul Spooner had resigned on 14 June 2006, but in evidence said that if he had known, it would not have concerned him, as Optronix was in the process of being restructured at that time.

79. Optronix had given Mitek Computer Components Limited, Ingrammatico (UK) Limited and Future Upgrades Limited as trade references. Mr Hackett was aware that at that time that Optronix was part of the Mitek Group. He had made an informal telephone call to Ingrammatico, a company he had traded with in the past, but was only told that Ingrammatico traded with Optronix. He did not contact Future Upgrades Limited. Mr Hackett did not consider trade references were helpful. He did not take up any bank references in respect of Optronix, and admitted that he had not obtained any independent information about Optronix and claimed never to have met Mr Spooner.

80. Mr Hackett had only sent the documents he had relating to Optronix to Redhill on 16 June, the day after the first deal, but in evidence he said that he had made a check

with the EU website, Europa, beforehand. Intekx did not get a reply from Redhill until 11 September 2006, nonetheless it went ahead with the deals with Optronix. Intekx provided evidence that it had sent requests re Optronix to Europa on 7 September 2006, 22 September 2006, 28 September 2006 and 19 January 2007, but there is no evidence of any such request in June or July. Mr Hackett claimed to believe that, by taking three months to reply to Intekx' request of 16 June, Redhill had been carrying out checks on Optronix, and that by its reply of 11 September 2006, it was sanctioning Intekx' trade with Optronix. This belief was despite the clear disclaimer on the Redhill website and on its letter of 11 September 2006 that it was not approving the trade. In his witness statement Mr Hackett had put: "Redhill approved the Appellant's choice of co-contractant" based on purchase orders and invoice which I copied to Redhill.

81. Mr Hackett had been referred by Mr Paul Spooner to a 2005 website about the Mitek Group and Optronix. That website referred to the Mitek Group having sold a controlling interest to Global Management Group, and Mitek Components having gone "from the depth of despair", and Global Management Group Holdings introducing a "substantial new investment" into the Mitek Group. Mr Hackett saw this website on about 15 – 16 June, but made no enquiries into Global Management Group Holdings. He stated that he had taken at face value that there was an investment going into the Mitek Group.

82. It was claimed by Mr Hackett that prior to trading he had downloaded Optronix' accounts from Companies House, but these documents were not exhibited by him. We were shown a Dun & Bradstreet report on Optronix dated 1 February 2007 which had been obtained by Intekx. Mr Hackett had only opened an account with Dun & Bradstreet at the beginning of 2007, after the present deals. The Dun & Bradstreet gives a maximum credit rating for Optronix of £16,000, and the latest accounts as being 31 March 2005. At the time Mr Hackett looked at the accounts he would have seen the 2005 accounts and so he would have been aware of Optronix' financial position. Dun & Bradstreet gave Optronix as having a greater risk of failure than 80% of all UK businesses. Mr Hackett had not seen this report at the time of doing business with Optronix, but claimed to have seen from Company House documents that the Mitek Group had a net worth of £1.5million.

83. Mr Hackett had in his witness statement claimed not to have been given a copy of Notice 726 by HMRC prior to his first dealing with Optronix in June 2006, a matter which was deemed to be very unlikely by Officer Swinden, although he had not specifically noted giving Mr Hackett a copy. Nonetheless Mr Hackett did not deny being fully aware of the contents of Notice 726 prior to his June deals. Mr Hackett had exhibited four documents headed "Legitimacy Assessment Form (Notice 726)" all of which gave the name of the supplier as Optronix, and are dated respectively June 2006, June 28-30, 21 July 2006 and September 2006. The documents consist of a list of checks which are apparently taken from Notice 726 on the left hand side, a space for comments and a column for the date. On the form dated June 2006 there is a comment relating to each of the 19 questions. At the bottom of the forms Mr Hackett had written comments including that all the goods were direct importation, all the goods were inspected, IMEIs were checked by AFI and the supply details were

checked by Redhill. On the document relating to June 28-30, only four of the questions were answered. At the bottom is a note which says: "Now received OK on May repayment". In the comment column for July 2006 there is a "Y" (which we take stands for "yes") in all the columns, except in relation to a question "Premises visit" where it records: "Visit to be arranged". The September document refers *inter alia* to the price having been re-negotiated, to Optronix now having been approved by Redhill and again records that a visit is to be arranged. At the bottom is recorded:

> "Approved Redhill September – also repayment supplement from June rec. Aug, 05 – must be "legitimate" as per N702 – repayment policy HMRC. Supply checked AFI – Redhill by supplier."

84. These documents, which had been produced as part of Intekx' evidence on its due diligence, give the impression of having been filled in contemporaneously, but in his evidence to the Tribunal Mr Hackett stated that they were filled in later, after the deals in question had been done. There is also reference in his witness statement to this being the case. His evidence to the Tribunal was not clear as to who had provided the template, or when, but Mr Hackett was clear that he had not created it himself. He claimed that he had had the document on file, but also that it had possibly come from some VAT consultants he had seen when he first became aware of a problem with his VAT repayment. He stated that he did "use this … to evaluate our position". Despite the template possibly having been provided by a VAT consultant, Mr Hackett was adamant that he had not been given advice as to what to put in the documents. He claimed that he had compiled the documents from notes of various matters that he had kept in his office. At a later point in his evidence, having been uncertain earlier, Mr Hackett was clear that the forms were filled in after November 2006. In his witness statement he had said: "For each of our deals we completed with Optronix, we kept a deal sheet reviewing these checks". No record of these deal sheets other than the forms referred to above was provided by Intekx.

85. On the June 2006 template is recorded "mobile phone market is c1 billion units per quarter", which Mr Hackett thought referred to the EU market. He understood the UK market to be worth 20 million units per month at the time. He was asked how he knew that Optronix had verified the goods to which he replied: "They had allocated the goods to us and then the goods were as we know inspected and released". However, the goods were at no time inspected before they reached AFI in Paris. When asked how he knew that Optronix had verified the goods, he replied "They told me that they had". When pressed on this he replied that he had not met the person in Optronix who had told him this.

86. The forms record a "Y" to a question on background credit checks, when in fact no credit checks were carried out by Intekx, the reason given by Mr Hackett for not making credit checks was that, as Intekx was not extending credit, it was not necessary. However, this does not explain the "Y" recorded on the form.

87. Companies House checks had been carried out, but no visits were ever made to Optronix by Intekx.

88. With regard to the repayment supplements received by Intekx, Mr Hackett relied on a Notice published by HMRC on the internet which in relation to repayment supplements states at paragraph 3.1:

> "Repayment supplement is a form of compensation paid in certain circumstances when we do not authorise payment of a legitimate claim within 30 net days of the receipt of the VAT return". (Our underlining)

This document had been printed off the internet by Mr Hackett on 18 September 2006, following receipt by him on 14 September 2006 of a repayment supplement of £86,953.65 in respect of his trade in period 07/06. Mr Hackett believed that the lateness of the payment was because HMRC had been checking his supply chains and that following the wording of paragraph 3.1 of the internet document, by paying the supplement they were recognising Intekx' claims as 'legitimate'. We have referred in paragraph 31 above to the various telephone calls made by Mr Hackett about this claim.

Intekx' checks on its customers

EC Trading

89. With regard to EC Trading, Intekx had dealt with them prior to the June deals. There is a letter from Redhill in respect of EC Trading dated 16 June, the day following Intekx' first deal with Optronix, but the enquiry must have been made some time previously. As with other Redhill letters, after confirming EC Trading's VAT number it states: "This confirmation is not to be regarded as an authorisation by this Department for you to enter into commercial transactions with this/these traders and any input tax claims you make may be subject to subsequent verification".

90. Intekx produced a letter from EC Trading dated 28 April 2006 from its records. It also had their bank details; the company's shipping address; a generic letter of introduction dated October 2004; a VAT certificate; a copy of the passport of the managing director, Kenneth Olin (whom Mr Hackett never met) and a printout from their website. The document which gave their shipping addresses surprisingly does not list AFI, although it does state: "See Purchase Orders for which shipping address to use" also stated: "D & B rating: AA rated". Mr Hackett took this to refer to its Dun & Bradstreet rating, and accepted that rating at face value without checking it with Dun & Bradstreet. Again, as with Optronix, he obtained no independent evidence prior to trading with them. Mr Hackett claimed that he had seen the company accounts of EC Trading, but did not produce them and in evidence claimed only to have had "some accounting information".

91. In the customer declaration for Optronix in respect of the September deals, Mr Hackett had stated: "We have conducted further enquiries into the background of our customer (EC Trading) and are satisfied that these checks constitute reasonable enquiries as required by the legislation and the notice". When asked what these

further enquiries were, Mr Hackett replied that he had reviewed the documents which he already had from the customer, and the website.

France Affaires International

92. There is no record of any checks by Mr Hackett on France Affaires International, Intekx' customer in the last July deal. Intekx did not include a reference to its own terms and conditions on its invoice to France Affaires, the deal concerned being worth £489,000. This omission was described as an error by Mr Hackett in his evidence.

AFI Logistics

93. Mr Hackett did not visit AFI Logistics ("AFI"), the freight forwarder, and did not carry out any checks on them although he had used the company since 2004 when it first was established. In his evidence Mr Hackett referred to AFI being a nominated partner of both Risk Finance, Intekx' insurers, and Freight Cover, Intekx' previous insurer, and being approved by them. However Mr Hackett provided no evidence to support this claim. The cover note produced by Mr Hackett does not refer to AFI.

94. Intekx used AFI because a supplier it had been using at an earlier time had used AFI, so an account was opened with AFI. Intekx had no written contract with AFI. AFI had been set up in about July 2004 but in 2007 was deregistered for VAT owing £164,000 to the Revenue. The carrier used by AFI, Eagle Logistics, was under the control of Mr Sukhdeep Singh Bassi (see paragraphs 53 and 54 above), who signed both its and AFI's VAT registration form. Eagle Logistics have been registered for VAT since November 2003 and became insolvent in February 2007.

Intekx' Terms and Conditions

95. Since the start of its business Intekx (as TAF) has had terms and conditions on its website. We were shown a printout of the terms and conditions as they were at a date later than any of the deals in question, but the core terms of which had, according to Mr Hackett, remained the same from the start. The terms and conditions on the website related only to Intekx' customers. We were provided with a copy of Intekx' terms and conditions insofar as they related to its suppliers. These were far more substantial than those available on the website. There is no evidence that these were specifically provided to Intekx' customers, other than by reference to them on its invoices.

96. Insofar as its customers were concerned, Mr Hackett's evidence was that the risk lay with Intekx whilst the goods were at the Paris warehouse of AFI Logistique, but Clause 6 of its terms and conditions provided that the customer will insure the goods until paid for, and that it will be the customer, not the freight agent, who will be storing the goods. The terms and conditions also allow the customer to sell the goods at this time.

97. With regard to its suppliers, Mr Hackett understood that Intekx' terms and conditions took precedence over Optronix', despite Optronix' terms and conditions

being on their invoices. Mr Hackett's view was that, because Intekx' terms and conditions were in place on its own purchase orders, and those purchase orders were dated after Optronix's invoice, they were as a matter of law the relevant ones. He believed that Intekx' terms and conditions were adequate for its trading methods, despite the terms and conditions not stipulating when title in the goods being traded passed. The terms and conditions relating to Intekx' customers provide, *inter alia*:

> 7.1 The goods are at your risk from the time of delivery.
>
> 7.2 Delivery takes place either;
>
> 7.2.1 at our premises, or
>
> 7.2.2 at your premises

They do not make clear when risk passes from Intekx to the customer. Despite Clause 6 referred to above, Mr Hackett believed that the risk passed once the customer had paid for the goods.

98. With regard to Intekx' terms of purchase from Optronix, Clause 5.9 of Intekx' terms and conditions provides:

> "Risk of damage to or loss of any goods passes to us on delivery"

99. Mr Hackett believed that Clause 5.9 was clear and in evidence gave his explanation of the clause in the following way: "By allocation the risk passed to us. The ownership didn't pass to us but the risk passed to us." When asked to explain further Clause 5.9 he said as follows: "To my mind the goods were in the warehouse in Southall, they were allocated to us, effectively we took the risk of them and transported them to Paris under our insurance policy."

100. Furthermore it was not made clear in Intekx' terms and conditions to its suppliers in what circumstances Intekx would have the right to return the goods. Mr Hackett when asked about this referred us to Clause 4.1 which provides:

> "If we order goods, then unless otherwise stated the order is deemed to include the supply of all relevant documentation and certification, and of any commissioning of those goods, necessary to enable the Company to use them for their intended purposes."

His evidence as to whether this entitled Intekx to return the goods in circumstances where for example, the wrong charger had been provided, was: "They allocated the goods to us to ship on hold so they knew … that we were shipping them on hold without necessarily having inspected them". When challenged as to how the supplier knew the goods were shipped on hold, Mr Hackett's reply was: "Well, I don't know if they did or they didn't but the commercial realities are that if you have a delivery which is not as required then you simply resolve that by negotiation or you return the goods, you don't pay for them."

Inspections

101. Intekx did not carry out its own inspections of the goods in the relevant deals. It had previously inspected goods it sold, but only when the customer had specifically requested an inspection. Mr Hackett's reply to a question as to why no inspections were carried out by Intekx was: "We didn't do it because that was what we didn't do. That wasn't the business model we were engaged in." Mr Hackett seemed unconcerned to find out whether there were any customs' stamps on the packages or whether the packages had previously been opened, matters which an inspection would have revealed. He also believed that his customer was not committed to the purchase of the goods until they had passed the inspection arranged by the customer, despite the existence of the invoice and the purchase order, and the shipping of the goods having taken place. In his 1st Witness Statement Mr Hackett had stated that in respect of every deal he had retained copies of "shipping, insurance and inspection instructions to the freight forwarder", although in fact no inspection instructions were ever given by Intekx in respect of the deals in question.

102. In 2005 Intekx had on two occasions at the request of a customer ordered an inspection report on, and obtained IMEI numbers for, a quantity of Motorola phones it was selling. In his 3rd Witness Statement Mr Hackett had stated: "IMEI numbers were never discussed or requested by HMRC, any of our customers, our suppliers, our banks, warehouses or insurance companies", which is an inaccurate statement (see paragraph 29 above). Despite being aware, from Notice 726, of the advisability of checking that the goods had not previously been supplied to Intekx, Mr Hackett did not see that there was much risk to Intekx because of the low level of its trading. He claimed to have kept his trading level low because he wanted the business to be "quite small", and this he gave as the reason why no IMEI numbers were ever kept by Intekx . Mr Hackett claimed to the Tribunal that he believed that the purpose of keeping IMEI numbers was for his customers to check in their records whether they had paid for the goods they had purchased. We do not accept that someone with Mr Hackett's experience in the industry would not know that a major purpose of keeping the IMEI numbers was to ensure that the phones which he was buying and selling had not previously been through his company's hands.

Insurance

103. Mr Hackett recognised the need for insurance of the goods, but the documentary evidence provided of the insurance arrangements for Intekx is less than satisfactory. Mr Hackett produced a cargo insurance cover note for the period in question from a company called Risk Finance, but produced neither a policy nor an insurance schedule. Mrs Smith, on behalf of HMRC, had provided evidence that showed that Risk Finance was dormant in 2005 to 2006 and she had been unable to trace FSA authorisation for the Group.

104. Mr Hackett had used Risk Finance after receiving a cold call from a Mr Thornton-Brown. He did not check out Risk Finance beyond looking them up on the Internet. Mr Thornton-Brown had put Mr Hackett in touch with a Mr Charley Miro who worked from an address in Majorca in 2006 but there is an e-mail from him in

2005 which gives an address in York Street, London W1 for Risk Finance. Mr Hackett carried out no checks on Mr Miro and in his own words "took him at face value". He did not query why he was working in Spain.

105. Mr Hackett claimed that Risk Finance had had AFI approved by the insurance company, Fortis Insurance Group, but he provided no documentary evidence of this. The cover note which he produced referred specifically to three other carriers, but not to AFI. That note stated that it did not cover loss arising from "the insolvency or default of the managers, charterers or operators of the vessel". Mr Hackett apparently relied solely on his belief that AFI had been nominated by Risk Finance, and he had not checked out AFI's financial circumstances, or those of its carrier, Eagle Logistics. According to the cover note, the premium had to be paid to a company called Davis Specialist Risks, a company about which Mr Hackett knew nothing, and in respect of which he had made no checks and of which he was apparently unaware.

106. Mr Hackett had never had a policy document, and at the relevant time never tried to obtain one. After having seen Mrs Smith's evidence about Risk Finance, he did ask Mr Thornton-Brown for one, but by that time (2010) Mr Thornton-Brown no longer had the relevant paperwork. Mr Hackett also contacted Mr Thornton-Brown about Risk Finance being dormant and not being FSA-registered.

107. We have seen an e-mail from Mr Hackett to someone called Mani Grewal at AFI Logistics dated 12 December 2005 in which he states that he had not asked for insurance for a particular shipment "as we have our own global cover". We have also seen e-mail correspondence between Mr Hackett and both Mr Thornton-Brown and Charley Miro between 2005 and 2010. We have seen a renewal premium note which appears to relate to Intekx' projected turnover for 2007. It shows an original projected turnover of £15million (for 2006) and an actual turnover in 2006 of £7,579,160. The renewal projection for 2007 is £6million turnover which would generate an insurance premium of £16,500. On the basis of this evidence we are satisfied on the balance of probabilities that Mr Hackett believed that his shipments were insured with Risk Finance, whatever the reality of the situation, and however inadequate his documentation.

Knowledge of Fraud

108. Despite claiming to have read Notice 726 and to have carried out all the checks set out in the Notice, nonetheless Mr Hackett, in his 3rd Witness Statement had stated:

> "Although I obviously cannot comment about the true level of fraud in the market at the time, I was certainly not made aware at the time of the levels of the fraud in the market that HMRC are now referring to."

109. Notice 726, after specifically referring to mobile phones, at paragraph 2.3 states:

> "MTIC fraud is a systematic criminal attack on the VAT system which has been detected in many EU states. In its simplest form fraud, which costs the Exchequer between GBP 1.7 billion to GBP 2.75 billion in

> 2001 and 2002 … Fraud relies heavily on the ability of fraudulent businesses to undertake trading goods with other businesses that may be either complicit in the fraud, turn a blind eye or are not sufficiently circumspect about their trading connections."

110. In his evidence to the Tribunal Mr Hackett said that "… going back to 2004, the average man in the street had never heard of MTIC fraud. I have worked in the computer industry and I had never heard of it." He claimed that at the time of the June, July and September deals he was not aware of the large scale of the fraud. This is evidence which we do not accept, given Mr Hackett's past experience in the computer and related businesses, the evidence of the HMRC officers and also Notice 726 which at paragraph 4.4 has the heading "How can I avoid being caught up in MTIC Fraud" and states:

> "How could I avoid being caught up in MTIC fraud? It is in your interest to carefully check who you are dealing with. In order to help you avoid being unwittingly caught up in a supply chain where VAT goes unpaid this Notice contains examples of reasonable steps you can take to establish the integrity of your customers, suppliers and supplies."

111. When Intekx (as TAF) had applied to bank with the FCIB on 22 July 2005 Mr Hackett filled out a form applying for an account. He signed an undertaking *inter alia* in the following terms: "We will undertake reasonable commercial checks to:

(a) consider the legitimacy of customers and suppliers,

(b) ensure the commercial viability of the transaction, and

(c) ensure that the goods will be as described by our supplier."

In addition he had also undertaken to ensure that the goods did exist, to determine whether the goods were of a type previously supplied to Intekx and also to determine whether or not the goods were damaged. When cross-examined as to whether he had complied with that obligation, Mr Hackett stated that he believed that he had. When asked if this were done by relying (as he had) on his customer to inspect the goods, his reply was "well, we didn't purchase the goods until we were paid for them".

112. The FCIB bank was closed down in August 2006. Mr Hackett was away on holiday for two weeks at the start of August and received notification of the closure whilst he was away. At the same time his account with NatWest bank was closed. He claimed to have been unaware that the FCIB closure was due to fraud and money-laundering until some time after he conducted his deals on 28 September 2006. He claimed to have made few enquiries about the circumstances of either closure other than from the banks themselves, and claimed to have believed that the FCIB had gone into receivership and that NatWest were closing mobile phone traders' accounts, but it had not occurred to him that the bank closures were occasioned by fraud. Mr Hackett had provided a document which he had printed off the new Mantas' website on 11 September 2006 headed: "First Curacao Selects Mantas for Anti-Money Laundering",

a time when he said he was trying to get his money back from FCIB who held £1,200 of Intekx' money. We do not find credible that Mr Hackett did not contact Optronix and others that he dealt with who banked with FCIB as soon as he learned of the closure to enquire whether or not they knew as to why it had closed down. His evidence was that he did not "in particular" ask his trading partners why the bank had closed, which we find not believable in the circumstances, given that Intekx was intending continuing to trade as before, and given that following the closure of the FCIB in September Mr Hackett had opened an account with the Perpetual Wealth and Trust Bank ("The Perpetual"), a bank based in St Kitts which was also used by both Optronix and EC Trading. Mr Hackett also opened accounts with TA Consultancy, UBS and Handelsbank. His evidence was that he learned of all these banks from BFL Financial Services who operated on the IPT website. We find this piece of evidence curious, as Mr Hackett also claimed in evidence that when he learned of the closure of the FCIB he did not check out what was being said by traders on the IPT website. The fee for opening the account with Perpetual was $1,500. It provided its customers with the ability to monitor their accounts live online. Mr Hackett closed that account in October, claiming that his using it was unconnected with Optronix and ECT, that being just a coincidence. HMRC produced an update of a press release published by Dass Solicitors on the internet on 20 September 2006 in respect of a court ruling relating to the closure of the FCIB which said *inter alia*: "It appears that there is enough "reasonable belief" that the FCIB accounts could have been used in the commission of fraud or unlawful activity". Had Mr Hackett been unaware of the reason for FCIB's closure prior to 20 September, and had he genuinely been trying to find out why it had closed, it would have been possible for him to find this information on line with a simple search.

The Respondents' Case

HMRC's Primary Case

113. HMRC's primary case was that Intekx knew that its purchases were connected with the fraudulent evasion of tax. Its case was not put on the basis that checks Intekx could have made, bud did not, would have revealed the fraud, but the fact that certain checks were not made was not consistent with Intekx wanting to protect its commercial interests.

114. HMRC rely principally on the well-known passage from *Axel Kittel v Belgium; Belgium v Recolta Recycling C-439/04 and C-440/04* [2006] ECR 1-6161 in which it was said by the court that the right to deduct input tax may be refused "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". HMRC also relied on the case of *Mobilx Limited v The Commissioners for HMRC* [2010] EWCA Civ 517 for the proposition that knew or should have known" means "knowing or having any means of knowing". We were referred to paragraph 52 where the court said:

> "If a taxpayer has the means at his disposal of knowing that by his purchase he is participating in a transaction connected with fraudulent evasion of VAT he loses his right to deduct, not as a penalty for negligence, but because the objective criteria for the scope of that right are not met … The trader who fails to deploy means of knowledge available to him does not satisfy the objective criteria which must be met before his right to deduct rises."

115. In the alternative, it was submitted by Mr Kerr that Intekx should have known that its purchases were connected with fraud, and again he referred us to the case of *Mobilx* where, having said that the principle does not extend to circumstances in which a taxable person should have known by his purchase that it was more likely than not that his transaction was connected with fraudulent evasion, the court continued to say at paragraph 60 that:

> "… 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."

Intekx' Knowledge of Fraud

116. In determining what it was that the taxpayer knew or ought to have known, Mr Kerr referred us to the principle in the case of *Red 12 v HMRC* [2009] EWHC 2563, which was adopted in the case of *Mobilx* in the following way:

> "… 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."

117. It was accepted that the burden of proof was on HMRC throughout, the standard being the normal civil standard.

118. It had been agreed by Intekx that both the deals which were the subject of the appeal were connected to the fraudulent evasion of tax through their connection with Optronix' fraudulent dealings. Mr Kerr pointed to the evidence as showing that Optrionix was not only a contra–trader in the narrow sense of setting off its output tax loss against an input tax credit, but it was also at all material times not a legitimate trader, but a vehicle for the fraudulent evasion of VAT via the mechanics of contra-trading. He submitted that Intekx' deals in June, July and September were all an integral part of Optronix' organised fraud on the Revenue. For this submission the banking evidence relating to Intekx' June and July deals was relied on in particular.

119. The specific evidence relied on by HMRC as indicating Intekx' knowledge of fraud were the following:

(1) Mr Hackett had a general knowledge of the risk of fraud in the sector having been advised by the HMRC inspectors in person and in correspondence as to its existence;

(2) The information from HMRC that its authorisation of repayments was without prejudice and the letters received from Redhill stating that confirmation of VAT registration was not to be regarded as authority to enter into commercial transactions with the particular trader; in particular the letter of 11 September 2006 which related to Optronix was relied on;

(3) Mr Hackett was aware of Notice 726;

(4) Mr Hackett had given assurances to FCIB which indicated that he knew of the importance of the various checks.

120. In respect of actual knowledge of a connection with fraud, HMRC relied on:

(i) The fact that Mr Hackett was not a reliable or credible witness;

(ii) Intekx' role by itself was compelling evidence that it was a knowing participant;

(iii) The fact that there was unrealistically benign trading environment was not consistent with commercial reality and as an experienced businessman, Mr Hackett must have known the deals were not for commercial purposes;

(iv) Intekx had failed to act prudently, given its understanding of the risk of fraud.

121. In support of his submission that Mr Hackett was not credible, Mr Kerr pointed to the following:

(i) He had said that he had never been made aware of the levels of fraud;

(ii) He said Redhill had approved Optronix as a co-contractant;

(iii) His evidence contradicted that given by Officer Bycroft;

(iv) His actions following his learning of the collapse of FCIB;

(v) Mr Hacckett claimed to be unaware of the risk that goods could be fictitious, whereas Notice 726 specifically enjoins the trader to make reasonable checks to ensure that the goods do exist, and he had given an undertaking on signing up to the FCIB to check on their existence;

(vi) Mr Hackett gave misleading evidence about inspections and made a false claim to having retained copies of inspections;

(vii) Mr Hackett had claimed that IMEI numbers were never discussed or requested, which the evidence showed was untrue.

Intekx' role

122. Mr Kerr submitted that it would not have been rational for the organisers of the fraud to use an unknowing conduit on all the different occasions in June, July and September in which Intekx participated. If Intekx had been acting as a free agent it might have sourced goods from other suppliers, and sold to other customers, in which case it would have made payment to different counter-parties which would have frustrated the direction of the money flow. Mr Hackett claimed to have many enquiries from other traders, but apparently by complete coincidence he only traded with counter-parties who were participants in the fraud, which was not credible.

123. HMRC relied on the fact that in all 17 of Optronix' acquisition deals in 11/06 it sold goods to only 4 broker traders, of which Intekx was one. In all 17 deals the broker traders all sold the goods to EC Trading. It was inherently improbable that all four broker traders were induced to participate as innocent dupes. Although it could conceivably have happened on one occasion that a party was used as an innocent dupe, the circumstances here made it extremely unlikely that that was the case..

Intekx' Trading Environment

124. HMRC viewed the trading environment for Intekx as unrealistic. Intekx added no value, it had no storage or transportation responsibilities and it did not carry any stock. It made no protracted negotiations in respect of its purchases of the mobile phones, and it must be queried why neither its customers nor suppliers had identified a cheaper source, when, given the existence of the IPT, it would have been possible to cut Intekx out. Both Optronix and EC Trading were members of the IPT. It was questioned why Optronix would sell to Intekx when, according to Mr Hackett's own evidence, the market for mobile phones was clearly in Europe.

125. HMRC also queried why Optronix was prepared to take the risk of shipping the goods on 3 October prior to being paid by Intekx on 5 October. The fact that Optronix was prepared to take this risk, having only dealt with Intekx for the first time in June, was not consistent with a genuine market, a fact of which Mr Hackett would or should have been aware. It had been Mr Hackett's evidence that Optronix would have been prepared to take the goods back if Intekx' customer had defaulted on the deal.

Intekx' Trading Model

126. Mr Kerr submitted that the fact that the goods were being physically transited through the UK was at odds with Intekx' previous experience of selling goods directly from a trader in one member state to a trader in another member state, without the goods entering the UK market, with the additional costs and inconvenience which that implied. It had been submitted on behalf of Intekx that the UK was being used as a

trading hub. This was not the case here, as the goods were not just being transported via a UK port, they were imported and sold within the UK. It was HMRC's case that this was irrational and inconsistent with a genuine market.

Intekx' Commercial Interests

127. Intekx did not protect its own commercial interests in that the checks it made were inadequate. This was evidence that Intekx knew that the deals were not for commercial purposes because a trader operating in a commercial environment, and with knowledge of the risk of being involved in MTIC fraud, would want to take rigorous steps to satisfy itself that the suppliers and customers with which it was dealing were legitimate companies trading for commercial reasons. It would want to be satisfied that they were entities with financial substance. It would also want to be satisfied that the freight handlers were legitimate entities which were in business for commercial purposes.

128. The case of *Mahageben & David v Hungary C-80/11 and C-142/11* relied on by the Appellant was confined to its facts, and, it was submitted by Mr Kerr, was of no relevance to the present appeal. In the present case the standard of the checks conducted upon the counter-parties by Intekx fell so far below that to be expected of a reasonably prudent businessman that it was evidence that Intekx knew that the deals were not for commercial purposes but for the purposes of fraud.

The deal documents

129. It was submitted on behalf of HMRC that these were insufficient, there being no evidence of Optronix' own terms and conditions and Mr Hackett had admitted that he had not looked for them, wrongly believing that Intekx' own terms and conditions were adequate. The deal documents were in fact not sufficient to describe important terms of the contract, such as the transfer of risk and title, the terms of payment, or the return of goods. The deal documents did not cater for the reality of the transactions in question.

130. Mr Kerr singled out in particular the lack of any reference to Intekx' terms and conditions being on the website in Intekx' invoice to its customer in the July deal, AFI. The goods being sold in that deal were worth £489,000. He also referred to there being nothing in writing to define Intekx' arrangement with AFI and to the fact that the goods being sold were not specified with any particularity on any occasion.

131. There were no inspections and Mr Hackett did not keep the IMEIs. There was insufficient evidence to show that the goods were adequately insured for Intekx' commercial purposes or that Mr Hackett took basic precautions to satisfy himself that they were. He had relied solely upon the fact that he believed that AFI as transporters were nominated by the insurers, but he had been unable to produce any evidence of this.

Intekx should have known

132. It was submitted that Mr Hackett should have done the following:

(i) He should have questioned why the opportunity to buy and sell large quantities of mobile phones had been presented to Intekx. The company was only incorporated in 2004 and had little trading history in mobile phones, and it added no value. The deals could be undertaken with little effort, infrastructure or capital, save for the input tax, because Intekx' supplier on each occasion required no payment before the goods had been shipped and the customer had paid Intekx. Intekx should have questioned these matters in particular, given its awareness of the prevalence of fraud in the sector.

(ii) Mr Hackett should have questioned why Optronix failed to identify, as he had done, that the demand for mobile phones was in mainland Europe, and why its own customer had failed to identify a source of goods further up the chain.

(iii) Mr Hackett should have questioned why its supplier/customer was not concerned to specify important matters in the deal documents, such as the passing of title, the distribution of risk, and the specification of the goods.

(iv) Why was there such a coincidence in the banking arrangements? All of Intekx' counter-parties were using the FCIB in the Dutch Antilles in June and July and then using the PW Bank and Trust in St Kitts in September.

133. Finally it was submitted by Mr Kerr that Mr Hackett had turned a blind eye to the fact that the opportunities given to Intekx were too good to be true. If Mr Hackett had applied his mind as he should have done, it would have been an inescapable conclusion that the deals were connected with fraud.

The Appellant's case

134. Intekx denied that through Mr Hackett it knew that any of its transactions were connected to the fraudulent evasion of VAT. It was submitted by Mr Morris that a key task of the Tribunal was to assess the character of Mr Hackett and his understanding of business.

135. Whilst it was accepted on behalf of Intekx that there was a connection with fraud in the two deals under appeal, it was denied that the fraud involved Intekx who had been used by sophisticated fraudsters, and was itself therefore a victim of that fraud.

136. Whilst not referring the Tribunal to the specific evidence of the primary facts said by HMRC to be indicative of fraud which had not been particularised in the pleadings, Mr Morris nonetheless submitted that the

Tribunal should confine itself to matters which had been properly pleaded and particularised by HMRC.

137. It was acknowledged that Mr Hackett was aware of MTIC fraud but Mr Morris submitted that he was not aware of contra-trading at the time and had reasonably believed that the key to avoiding being connected with the fraud was to avoid trading with companies which might disappear and default.

138. It was accepted by Mr Morris that Intekx could have done more by way of checks but he submitted that viewed as a whole its actions were not so poor that they indicated a knowledge of fraud. The checks suggested in Notice 726 presented an inherent difficulty for the following reasons:

(i) The nature of the fraud separates the innocent trader from the defaulter so it is very difficult for the innocent trader at the end of a supply chain to become aware of a fraud perpetrated towards the start of the chain, let alone a fraud perpetrated in relation to other goods.

(ii) If checks are made on sophisticated fraudsters which would reveal suspicion or a connection to the fraud, the fraudster would most likely lie if necessary to cover up the fraud, therefore even probing due diligence checks are unlikely to reveal any connection to fraud.

(iii) It is difficult to identify practical checks that traders can undertake to assess the integrity of their supply chain.

(iv) It is not reasonable to expect a trader to act as a fraud investigator or to criticise him for not carrying out investigations which should be carried out by HMRC.

139. It was Intekx' case that there were two main beneficiaries of the fraud: Optronix (the contra-trader) and the parties outside the jurisdiction who received the money from the "dirty" chains. Intekx had been used as an innocent dupe and there were the following advantages to the fraudster in using an innocent broker:

(i) The fraud is complete at the point of sale by the innocent broker. By using an innocent broker, the broker funds the VAT payment. The profit from the fraud is thus not dependent upon HMRC agreeing to the repayment.

(ii) There are no delays occasioned by extended verification.

The fraudsters know it is likely to be easier to deceive traders rather than trained HMRC fraud investigators.

140. The fraudsters and in particular Optronix obtain a massive cash flow advantage which can then be used to perform other MTIC frauds.

141. It was further submitted that Intekx was a prime target to be used in this way for the following reasons:

(i) Intekx had a credibility in the marketplace as a retailer and international trader.

(ii) Intekx had its own funding.

(iii) Intekx had already traded with Easy Trading ApS and France Affaires before it began trading with Optronix.

142. The matters relied on by Intekx to show that it was not a participant were the following:

(i) There was no consistency in the margins achieved by Intekx. If the Appellant had been a knowing participant in the fraud then one would expect a greater degree of consistency;

(ii) Intekx did not make any third party payments;

(iii) Intekx was only engaged in a very small number of deals;

(iv) The repayments that Intekx received were simply re-invested in the company, as can be seen from the bank statements.

(v) Intekx was funded through personal loans from Mr Hackett and re-investing the profit from deals into the business.

(vi) Optronix dealt directly with Intekx' customers, EC Trading, ApS and France Affaires which tended to suggest that Intekx was unknowingly inserted into the chain by the fraudsters for the obvious cash flow benefits. If Intekx had been a party to the fraud then one would have expected the company to have appeared as a regular feature in such chains.

(vii) The criminal investigation in operation VEX did not include Intekx nor reveal any evidence implicating Intekx or its director, Lindsay Hackett.

The Trading Environment and Model

143. Mr Morris pointed to the fact that there was a legitimate grey market trade in mobile phones. In every deal Intekx took a commercial risk, as it was always possible that the customer or supplier would pull out before the deal was concluded and it was Intekx' case that it could have been unable to carry out the contract and would have been liable for any loss suffered. However, the evidence did not bear out this submission. It was also suggested that Intekx was adding value by organising the movement of the phones from supplier to customer in two geographical markets and Intekx, like all intermediate and grey market traders, introduced liquidity into the market. It was claimed that it was easy to change the manual and the charger and there

was nothing inherently suspicious about the goods being imported and then subsequently exported which merely revealed that the UK was a trading hub. We note that no account was taken by Mr Hackett of the cost of such changes.

144. It was submitted by Mr Morris that there was nothing suspicious about Intekx dealing in phones with two pin chargers and European manuals, as the grey market operates by sourcing cheap stock outside of the authorised distribution channels. Intekx had detailed terms and conditions governing its purchases and sales and any queries as to their adequacy merely reveals a difference between commercial law and the reality of commerce. Intekx spent a significant amount on insuring the goods. HMRC had misunderstood the commercial reality of Intekx' business.

Intekx' checks

145. On behalf of Intekx it was denied that the lack of checks on the goods, suppliers and customers meant that Intekx knew of the fraud. There is an inherent difficulty in the checks that are suggested in Note 726 which a company can reasonably undertake if the aim is to uncover a sophisticated fraud perpetrated in a different supply chain concerning different goods. This was because:

(i) The nature of the fraud separates the innocent trader from the defaulter so it is very difficult for the innocent trader at the end of a supply chain to become aware of a fraud perpetrated towards the start of the chain. We were referred to the case of *Hira Company Limited v HMRC* [2011] UKFTT 450 (TC).

(ii) If checks are made on sophisticated fraudsters which would reveal suspicion or a connection to the fraud the fraudster will most likely lie if necessary to cover up the fraud. Therefore, even due diligence checks are unlikely to reveal any connection to fraud.

146. It is difficult to identify practical checks that traders can undertake to assess the integrity of their supply chain. It is not reasonable to expect a trader to act as a fraud investigator or to criticise him for not carrying out investigations which should be carried out by HMRC.

147. Given that anyone in the sector would have known that all such businesses were under intense scrutiny from HMRC, Intekx was understandably and reasonably satisfied that its trading partners were not acting fraudulently.

148. Intekx relied on the fact that the checks it conducted did not reveal any clear indicators that the transactions were connected with the fraud. It only traded with valid VAT registered companies which showed that its checks were effective. It did not receive any warning letters or veto letters which would have put Mr Hackett on notice that his method of trading with those trading partners would be likely to result in his transaction being connected to

a tax loss. It was claimed that Intekx had not received any letters before the deals under appeal which advised him that in previous transactions his trade had been connected to fraud.

149. In his closing submissions, however, Mr Morris acknowledged that Intekx' deal documents were not perfect, and Mr Hackett's knowledge of particular items in his company's terms and conditions and his insurance policy may have left a lot to be desired, but he submitted that this merely reflected the fact that Mr Hackett was a businessman, not a lawyer and he was more concerned with the reality of business and coordinating, securing and effecting the actual deal.

150. The Tribunal was invited to make allowances for the passage of time and prejudicial impact of this on Intekx.

151. Intekx relied on the fact that there was no evidence directly connecting Intekx with other companies in the chains apart from its immediate suppliers and customers.

152. Mr Morris compared the appearance of there being a pre-ordained cut for each participant in the dirty chains with the "clean chains" which do not have the same patterns in respect of mark-ups. He pointed to Intekx' mark-up varying between 4% and 4.50%, which was a sensible mark-up and which did not correlate with Optronix's margin. What varied over the four chains was Intekx' margin and the loss occasioned by Marksman. It was submitted that this variation in the mark-ups made by Intekx suggests that Intekx' profit was not pre-ordained and suggests that Intekx did engage in normal negotiation. Whist nearly every other parties' cut was determined, Intekx' cut always remained an unknown variable. It was suggested that this might explain why Intekx' profit varied and the loss to Marksman varied equally.

153. Mr Morris further submitted that neither the fact that Marksman made a loss in the clean chains nor the fact that Intekx obtained the most significant mark-up in the clean chains showed that Intekx was a knowing participant. Rather this simply showed that Marksman had to first inject the money, and its reward came in the dirty chains when the stolen VAT was siphoned off. It was submitted that the low level of margin would be precious little compensation.

154. The evidence merely suggested that the fraud as a whole would not have been profitable without Intekx being used.

155. It was submitted by Mr Morris that the fraud in question was not primarily about obtaining repayment of VAT from HMRC, it was profitable as soon as Intekx had made payment since this payment enabled the dirty chain to operate without causing Optronix a loss. As such the fraudsters did not have to wait for repayment from HMRC, nor did they have to convince HMRC

fraud investigators that the deals had taken place. The fraudsters left Intekx to bear any risk that it might not receive its repayment.

156. It was further submitted that there was nothing inherently suspicious in Intekx' method of trading, it being no different in the deals in question from its normal method. Mr Morris pointed to the trade with AOC in which title to the goods remained with the AOC until payment was received, and that Intekx had operated back to back trades in relation to its sale of LCD monitors and CPUs. Intekx' method of trading was to minimise its risk of holding on to leftover stock. It did not offer its overseas customers credit in mobile phones or other goods.

157. We do not accept Mr Morris' submission that the fact that there was no clear pattern of mark-up indicated that Mr Hackett was engaged in what appeared to him to be ordinary negotiation. Nor do we accept that this reflected Mr Hackett's previous policy of aiming to secure deals between 4-5% and the fact that it was not always achieved supported the view that the mark-ups and margins were not pre-ordained and contrived. There was in fact no evidence of any specific negotiation as to the price as which Intekx either bought or sold the goods.

158. It was accepted by Mr Morris that the deals were very profitable, but he submitted that, given the obvious international demand for mobile phones, the business was not such that the only reasonable explanation for its success was a connection to fraud. It was suggested that Intekx' business as a whole should be looked at and that from its point of view it had been asked to partake in the particular deals because it had established itself as a credible business in the European market, having achieved in particular a distribution deal with AOC. From Mr Hackett's point of view his company would not have been dealt with by Optronix were it not for the fact that it had achieved a degree of credibility and had the financial resources to do the deals.

159. Mr Morris pointed to the fact that Intekx had already traded with EC Trading ApS and France Affaires before the deals with Optronix, first trading with EC Trading in May 2006 and with France Affaires in March 2005. It was accepted by Mr Morris that the evidence showed that both those companies had serious questions to answer, but it was submitted that that was not apparent to Mr Hackett at the time, It was suggested that introducing an innocent trader into the scheme did not represent a risk to the fraudsters because if Intekx had chosen a different supplier, then Optronix could "easily" have been put off the deal.

160. It was acknowledged by Mr Morris that importing and subsequently exporting goods was not efficient market behaviour, but he submitted that it could not be disputed that the EC was designed to allow for the free movement of goods within Europe, that trade is now global, that the grey market introduced liquidity into that global market and profits arise from market

inefficiencies, and furthermore people were free to conduct business in an inefficient manner if they wished so to do.,

Inadequacy of Intekx' paperwork

161. It was accepted by Mr Morris that Intekx' invoices were not only not perfect but that they unwisely contained scant detail. However Mr Morris referred to the fact that Intekx' invoices in LCD monitors, which had no connection to VAT fraud being all zero-rated triangulated sales, were similarly scant, was evidence that it would be wrong to infer from the few details on the invoices with which we are concerned that Intekx had knowledge of the fraud. It was submitted that Mr Hackett's failure to appreciate the legal risk he was running by not including more detail in his contractual documents did not suggest dishonesty or a wilful blind eye being turned to fraud.

Intekx' checks

162. It was submitted that the Europa system provided a reliable checking system, but we do not accept this, the Europa system only provides confirmation that a particular VAT number is an existing VAT number, nothing more than that. Mr Morris pointed to the fact that Intekx obtained material from Companies House and identification details from the directors. In the case of Mr Spooner, the signature on his passport corresponds with the signature on Optronix' application for a trading account with Intekx and the director's report on Companies House. It was submitted by Mr Morris that Mr Hackett interviewed Mr Spooner about the business, however Mr Hackett's own evidence was that he did not meet Mr Spooner but only spoke to him on the telephone. It was Intekx' case that it did not obtain credit checks because it was not granting credit to any of the companies. This conduct was said to show that Intekx was plainly not engaged in conducting due diligence merely as window dressing and that Intekx only engaged in checks for which Mr Hackett could discern a clear purpose. Intekx' case was that if it had conducted any further checks it would have been highly unlikely that it would have uncovered the connection to fraud.

163. Mr Hackett was said to take comfort from the repayments Intekx had previously received and from the fact that HMRC's policy at the time stated that repayment supplements were only paid where the claim was 'legitimate', and from the fact that Intekx' previous applications for repayments had been met with no questions asked Mr Morris relied on the letter accompanying the repayment in respect of the July 2006 deals and submitted that it and the remittance advice dated 14 September 2006 did not set out that any such payments were made on a without prejudice basis. The latter quite clearly is a different type of document and we do not accept that there was no other letter accompanying those documents. There were in evidence other letters from HMRC which set out that repayments were made on a without prejudice basis.

Insurance cover and lack of inspection reports

164. As far as Mr Hackett was concerned, Intekx did have proper insurance cover in place. The fact that Mr Hackett did not obtain inspection reports and IMEI numbers neither indicated that the transactions were connected to fraud nor did it point clearly to a desire "not to know". Intekx' business was organised so that the customer would only pay once it had inspected the goods and decided it was satisfied that the goods were as ordered. Mr Hackett had assumed that if there were a problem with the goods he would be informed by his customer or he himself would pay for the goods.

The banking arrangements

165. The Tribunal was asked to conclude that the FCIB presented as a legitimate bank and the criminal investigation into the FCIB could not have been foreseen. The coincidence that Intekx and its trading partners used the same bank was therefore not surprising and certainly not so surprising that an inference could be drawn that Intekx must have been a co-conspirator to fraud.

166. Similarly given that the Perpetual Wealth Banking Trust was recommended on the IPT and by BFL Financial Services made it unsurprising that Intekx, Optronix and EC Trading all used that same bank following the closure of the FCIB.

Whether Intekx should have known

167. Mr Morris submitted that despite the fact that this was quite a separate allegation to that principally advanced, HMRC in general had relied upon the same matters in support of this allegation. The Tribunal was thus invited to assess carefully whether HMRC had properly pleaded its allegations of fraud.

168. It was finally submitted that Mr Hackett had acted as a reasonable businessman throughout, and whilst his approach to documentation might be described as rough and ready, it could not properly be said that the only reasonable explanation for the transactions was that they were connected to fraud. Mr Hackett had honestly and reasonably considered each transaction to be a legitimate commercial transaction.

Discussion and reasons for decision

169. We take account of the legislation (as set out in paragraphs 12-14 above) and of the leading European authority of *Kittel*, passages from which are set out at paragraphs 16-18 above. We take particular account of the fact that the burden of proof remains on HMRC throughout. We rely on the agreed Statement of Facts, but also take account when considering Intekx' state of mind (as evidenced by its director, Mr Hackett) of the fact that it was not generally known during the relevant period that fraudsters were operating a contra-trading MTIC scheme as set out in paragraphs 8-11 Whilst we do take account of the length of time since the events in question when considering Mr Hackett's evidence, he himself did not ask us to do so and indeed insisted that his unrecorded recollection of events was more accurate than Officer Bycroft's notes which were made at the time.

170. The leading UK authority is *Mobilx* and we follow Mr Kerr in paying attention to the passages set out at paragraphs 115-117 above. In particular, we bear in mind the passage where the Court of Appeal in *Mobilx* cited with approval the approach of Christopher Clarke J in the case of *Red 12*, which we have set out at paragraph 117 above. Adopting the approach of Christopher Clarke J, we have looked at what Intekx, through Mr Hackett, did and what it omitted to do, at what it could have done and at the circumstances surrounding the two relevant September deals, but also looking at the circumstances of the two July deals which, with one exception only, involved the same parties.. We also take account of what Mr Hackett knew about MTIC fraud at the time.

171. We were invited by Mr Morris to access the character of Mr Hackett and his understanding of business. This we do, and in doing so we take particular account of the following:

(1) Mr Hackett's qualifications and experience (as set out in part at paragraphs 66-68 above).

(2) Mr Hackett's knowledge of:

(a) business
(b) the grey market
(c) trading in mobile phones as from 2004
(d) the need for mobile phones in Europe
(e) the process of triangulation

(3) The prevalence of MTIC fraud given both in Notice 726 and to Mr Hackett by the officers concerned (see also paragraph 78).

(4) Intekx' method of doing business, specifically Mr Hackett's claim that he kept his records in his head (paragraph 32); the inadequacy of Intekx' terms and conditions (paragraphs 96-101); its inadequate description of the goods in which it was trading and failure to be concerned when delivery dates were inconsistent (paragraph 38-39); Mr Hackett's lack of concern about the possible need to change the chargers and the plugs on the phones and his failure to take into consideration the potential cost of such changes; Intekx' failure to carry out proper checks on its customers; its failure to record the IMEI numbers of the phones and the claimed reason for not so doing; its failure to inspect the goods and the inadequacy of Mr Hackett's answer as to 'why not' (see paragraph 102).

(5) On several specific occasions we found Mr Hackett's evidence not to be credible and overall we found him to be an unreliable witness (see paragraphs 27-32, 76, 85, 103 and 11-112).

172. We take full account of the fact that contra-trading was a method of conducting MTIC fraud which was not widely known about at the time of

either the July or the September deals. However, Intekx' method of conducting its trading with Optronix was not such as to protect it from any form of fraud. We find that the fact that Mr Hackett was an experienced businessman makes the methods he employed to conduct Intekx' business all the more inexplicable unless they were designed to cover up the fact that he was complicit in Optronix' fraud. Mr Morris had referred to Intekx' trading method when dealing with AOC and submitted that it was the same as when he was dealing with Optronix in that he had traded back to back and had not paid for the goods until he had received payment from his customer. We heard little else about Intekx' trade with AOC. By itself we do not find the fact that Intekx operated back to back trading when dealing with Optronix is suspicious, I it is the entirety of the system used by Intekx when conducting its trade with Optronix, particularly in the context of the area of trade being known to be rife with fraud, there being uncertainty as to when title in the goods passes and all the other aspects set out in above, which we find gives rise to something beyond suspicion in this case.

173. The key to avoiding being connected with fraud is not solely to avoid trading with companies which might disappear or default, as Mr Hackett had claimed to believe. Even if he did truly believe this, Mr Hackett did not take the required steps to avoid trading with a possible defaulter, such as properly checking out the background of the people with whom he was trading. Although the evidence as to the exact nature of Mr Hackett's relationship with Mr Spooner, Intekx did not have a developed relationship with Optronix, its supplier in all the deals, prior to its first mobile phone deal with Optronix. Mr Morris had submitted that from a commercial point of view all a trader would need to know was whether a customer was willing to purchase the goods at a price which generated a profit. This is simply not the case where mobile phones and other goods involved in MTIC fraud are concerned. It is quite wrong to suggest that when considering whether to engage in business from a purely commercial point of view a trader will not need to consider whether its trade is or is not caught up in fraud, the commercial implications of being so caught up are enormous and potentially can put a trader out of business.

174. Mr Morris asked what checks Intekx could have carried out which would have revealed Optronix' connection with fraud. Whilst it is the case that a sophisticated fraudster will do all in his power to conceal the fraud, the mere fact that phones with non-UK specifications were being imported into the UK from the EU, rather than sold directly into the EU market in a situation where there was no manufacturer or authorised distributor involved, should have at least aroused Mr Hackett's suspicions and led him to question whether the deals were genuine, given his knowledge that the true market for mobile phones was in Europe and also his awareness of the fact that MTIC fraud was widespread and causing such a huge loss to the UK economy at the time. We do not accept his professed ignorance of this last fact, given that it is specifically set out in Notice 726 as costing the Exchequer between GBP 1.7 billion to GBP 2.75 billion in 2001 and 2002, nor his attempt to downplay the size of that loss.

175. The existence of a grey market in mobile phones was one of the agreed facts in this case. However, no evidence was provided on behalf of Intekx about the nature of the grey market, and following a challenge by Mr Morris to the admissibility of his evidence, we did not hear from Mr Fletcher on behalf of HMRC as to his opinion as to the nature of the grey market. Various submissions were made by Mr Morris on the nature of the grey and other markets but without any evidence as to it being produced. We were not asked to take judicial notice of the nature of the grey market. Whilst it was submitted by Mr Morris that a trader would naturally try to cut out middle men in its supply chain to maximise its profits, and equally a trader would value reliable suppliers who had been checked out and who delivered upon the contract as agreed, in the present case there was no evidence that Mr Hackett had attempted to cut out the middle man, and Optronix had not been shown to be a reliable supplier prior to the July deals.

176. Mr Morris had submitted that it was far from clear that a trader who has developed relationships with both its suppliers and customers would consider that the only reasonable explanation for not being cut out of future deals was that the transactions were connected to fraud. However, in the present case Intekx had not got a developed relationship with Optronix, its supplier in all the deals. Mr Morris had submitted that from a commercial viewpoint all a trader would need to know was whether a customer was willing to purchase the goods at a price which generated a profit. This is simply not the case where mobile phones and other goods involved in MTIC fraud is concerned. It is quite wrong to suggest that when considering whether to engage in business from a purely commercial point of view a trader will not need to consider whether its trade is or is not caught up in fraud, given that the commercial implications of being so caught up are enormous, quite apart from the legal ones.

177. Whilst Mr Hackett might in other circumstances be excused for thinking that the fact that he had been in receipt of a repayment supplement in the past meant that HMRC had approved his previous trade with Optronix on the basis of the use of the phrase “legitimate claim” in paragraph 3.1 on HMRC’s online Notice (see paragraph 89 above), even if the phrase did mean what Mr Hackett took it to mean, the most it could in fact mean is that HMRC had to make a repayment because it had not been able to establish fraud at that particular time, given that it was accepted on behalf of Intekx that Optronix' trade in July and September was in fact fraudulent and therefore was not legitimate. It is of course possible, if not probable, that when he came across this phrase in September 2006 Mr Hackett believed that neither Optronix' fraud, nor his part in that fraud had been detected and therefore he could safely proceed with the September deals.

178. It was suggested that Optronix could have been using Intekx as an innocent dupe. Whilst this is a theoretical possibility, Intekx' method of trading and the fact that on each and every occasion in its July and September

deals bar one, Intekx both bought from and sold to precisely the same companies without there being any evidence of Intekx attempting to trade elsewhere causes us to doubt that that was the situation here. Furthermore it would have been a risky strategy for Optronix given the possibility of the chain being broken. It was suggested that introducing an innocent trader into the scheme did not represent a risk to the fraudsters because if Intekx had chosen a different customer then Optronix could easily have put off the deal. This does not seem to reflect the reality of the arrangements made by the fraudsters in this case whereby a large number of parties were involved and a large amount of money circulated at very short intervals of time. It was also suggested that there was an advantage to Optronix in that there would be no delays occasioned by the "innocent dupe broker" (Intekx) being subjected to extended verification. In fact in the present case Intekx was subjected to extended verification after the July deals. The cash flow advantage to Optronix referred to by Mr Morris arose from using a complicit trader with much less risk than there would have been from using an innocent dupe. The evidence suggests very clearly that Intekx was an integral part of Optonix' fraud on the revenue. In all the circumstances of this case, we do not find that Intekx was an innocent dupe.

179. We do not accept Mr Morris' submission that HMRC had inadequately pleaded the primary facts which were indicative of fraud. In this case it was accepted on behalf of Intekx that Optronix' dealings were fraudulent and that Intekx' own dealings were connected with that fraud. There was therefore no need for HMRC specifically to plead the facts indicative of that fraud. In relation to Intekx' knowledge of fraud, HMRC specifically referred in the Statement of Case to various of the matters which they subsequently relied on, including but not limited to such matters as the visits by the officers and the warnings about fraud; the value of the transactions and the necessity to take precautions; Intekx' lack of adequate due diligence; lack of written contracts; failure to keep IMEI numbers and more.

180. We find that not only was Mr Hackett's method of trading sufficient in and of itself to indicate that he had a knowledge of Optronix' fraud, but also the fact that he was willing to purchase phones which he knew had been imported into the United Kingdom and to sell them to traders in Europe without apparently making any effort to find a European source is indicative of complicity in the fraud. Mr Hackett was well aware of process of triangulation and given his belief that there was a large demand for such phones in Europe, could, in the absence of any connection with fraud, have made a larger profit by doing as Optronix had done and sourcing the phones in Europe, thereby cutting out the cost of the importation of the phones to the United Kingdom and the cost of the further parties in the chain.

181. For this and for all the above reasons we find that Intekx knew in respect of its deals with Optronix in September as well as in July that those deals were connected with fraud and also that there is no other reasonable explanation for its purchases from Optronix than that the transactions were connected with the fraudulent evasion of VAT.

182. This appeal is dismissed.

183. 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.

JUDGE J C GORT
TRIBUNAL JUDGE

RELEASE DATE: 21 March 2014