



TC03528

Appeal number: LON/2006/01091 & LON/2007/00612

VALUE ADDED TAX – whether the mobile phones allegedly acquired by and then sold and despatched abroad by appellant had existed and whether they had corresponded to the goods described in the respective invoices – Regulation 14(1) Value Added Tax Regulations 1995 – whether reasonable for HMRC not to exercise discretion under Regulation 29 (2) Value Added Tax Regulations 1995 to allow claim for input tax - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GSM INTERTRADE LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE GUY BRANNAN
MS HELEN MYERSCOUGH**

**Sitting in public at Bloomsbury Square on 24-26, 28 and 31 March, 1 and 4 April
2014**

Hilal Jaffar, Director, for the Appellant

**George Rowell, Counsel, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

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DECISION

Introduction

5 1. These two consolidated appeals are appeals against decisions by the respondents ("HMRC") to deny the appellant's claim for input tax in the total of £712,530. The claim for input tax relates to six disputed transactions concerning the alleged purchase of Samsung Serene mobile phones ("Serene" or "Serenes"). One disputed transaction was alleged to have occurred in the VAT period 02/06 and the other five disputed
10 transactions were alleged to have occurred in the 05/06 period.

2. HMRC denied the appellant's claim for input tax in respect of the above transactions on the basis that the invoices issued by the appellant's suppliers did not meet the requirements of Regulation 14(1)(g) and/or (1)(h) Value Added Tax Regulations 1995 ("the Regulations"). The appellant has appealed HMRC's decisions
15 in respect of these transactions.

3. The issues in this appeal concern whether any mobile telephones or other goods were acquired by the appellant or, alternatively, if goods were supplied to the appellant, whether those goods were correctly described on the invoices issued by the appellant's supplier. For simplicity, in this decision we shall refer to the appellant's
20 transactions as purchases, sales, exports, acquisitions etc. without, in every case, referring to these transactions as being "alleged" or "purported" transactions but without prejudging or having found as fact the issues as to whether these transactions took place or took place as described in the relevant invoices.

4. In this appeal HMRC do not argue that the appellant knew or should have known that its transactions were connected with the fraudulent evasion of VAT. Accordingly, the decision of the Court of Appeal in *Mobilx Ltd & Ors v HM Revenue & Customs* [2010] EWCA Civ 517 is not directly in point in this appeal. HMRC did not accept that the appellant did not know that its transactions were so connected, but argued their case on the basis that what the appellant knew or should have known was
25 irrelevant to the issues in this appeal. Moreover, both parties accepted that the burden of proof lay upon the appellant (unlike the usual type of MTIC appeal governed by the principles in *Mobilx*).
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5. The standard of proof is the usual civil standard i.e. the balance of probabilities.

Evidence and witnesses

35 6. The following witnesses, called by HMRC, produced witness statements, gave oral evidence and were cross-examined:

(1) Timothy Reardon – an HMRC officer who carried out HMRC's investigation into the disputed invoices and who analysed payments relating to these transactions made through the First Curacao International Bank ("FCIB").

40 (2) Judith Clifford – an HMRC officer who gave evidence in relation to HMRC's investigations into the appellant's supplier Future Communications (UK) Ltd ("Future").

(3) Nicholas Parker – an HMRC officer who gave evidence in relation to the criminal trials involving personnel of Future and others.

(4) Jayne Holden – an HMRC officer who gave evidence in relation to HMRC's investigations into the appellant's supplier Infinity Holdings Limited ("Infinity").

5 (5) Thomas Hjannung – an employee of Bang & Olufsen who gave evidence in relation to the distribution of Serenes which were delivered to Bang & Olufsen. Mr Hjannung gave oral evidence by video link. In the course of Mr Hjannung's evidence the video link broke down, but the audio link remained good. With the agreement of the parties we continued to hear Mr Hjannung's evidence by this audio link.

10 (6) Stephen Bishop – an employee of Samsung UK who gave evidence in relation to the manufacture and distribution of Serenes by Samsung.

(7) Roderick Stone – an HMRC officer who gave evidence in relation to the general background regarding missing trader intra – Community ("MTIC") fraud.

15 7. In addition, Christopher Heuston, an HMRC officer, submitted a witness statement in relation to the criminal proceedings in respect of employees of Future, Unique Distribution Ltd, A1 Logistics and Freight Ltd ("A1 Logistics") and Boston Freight ("Boston Freight"). Mr Heuston was not cross-examined.

20 8. For the appellant, Mr Hilal Jaffar ("Mr Jaffar"), owner and director of the appellant, produced four witness statements, gave oral evidence in chief (by way of a statement), was cross-examined and made a further statement (in lieu of re-examination).

25 9. In addition, the appellant put forward a witness statement produced on behalf of Centrum Secretaries Limited, the appellant's company secretary. HMRC objected to this witness statement on the basis that the natural person who wrote the statement was not identified. Moreover, when we read the statement it seemed to us that the statement contained submissions or complaints rather than evidence. Mr Jaffar confirmed that he was not relying on the statement and accordingly this statement was not admitted as evidence.

30 10. The witness statements, exhibits, and other documentary evidence occupied 18 ring binders.

Background

35 11. The appellant was incorporated on 16 March 2001 and its registered office is in North West London. The appellant's sole director and employee at all material times was (and continues to be) Mr Jaffar. It was not in dispute that Mr Jaffar was the controlling mind of the appellant. Mr Jaffar has lived in London since 2001.

40 12. The appellant was registered for VAT on 1 April 2001 with a stated business activity described as "agency for and sales of mobile phones and electronic and radio equipment." At all times material to this appeal the appellant carried on the business of a wholesale trader in mobile phones (albeit that that description is without prejudice to HMRC's contention that, in relation to the transactions under appeal, the appellant did not deal in mobile phones).

45 13. The appellant claims that it purchased 200 Serenes as described in an invoice dated 20 February 2006 issued by a UK supplier, Future. This transaction is referred to as Deal 1.

14. The Serenes were a particular type of mobile telephone. Their production was the result of a joint-venture between Bang & Olufsen and Samsung in which Bang & Olufsen designed the style of the phone and Samsung was responsible for the technology and manufactured it in South Korea.

5 15. We shall describe the manufacture and distribution arrangements for the Serenes in greater detail later in this decision.

16. The appellant claimed input tax of £47,250 in respect of its purchase of the 200 Serenes in Deal 1. This was the VAT shown on Future's invoice to the appellant.

10 17. The appellant subsequently claimed to have sold and exported the 200 Serenes to a German company, Allimpex Handelsgesellschaft GmbH ("Allimpex"). We shall describe Allimpex in greater detail below.

15 18. HMRC allowed the appellant to reclaim the input tax of £47,250. Subsequently, however, when HMRC had reviewed information from Bang & Olufsen and Samsung concerning the manufacture and distribution of the Serenes, HMRC concluded that the goods purchased by the appellant (if any) could not have been Serenes. Therefore, HMRC decided to disallow the claim under Regulation 14(1)(g) and/or Regulation 14(1)(h) of the Regulations. On 28 February 2007 HMRC notified the appellant by letter of its decision to disallow this input tax and subsequently issued an assessment dated 7 March 2007 for the £47,250 of input tax (plus interest of £3,062.83) which it had previously repaid to the appellant. The appellant appealed against this assessment by a notice of appeal dated 16 March 2007.

20 19. The appellant claims that it subsequently purchased a total of 2,316 Serenes from a UK supplier, Infinity. These purchases were made under invoices dated 31 March 2006 (Deal 4), 6 April 2006 (Deal 2), 7 April 2006 (Deal 3), 12 April 2006 (Deal 5) and 13 April 2006 (Deal 6).

25 20. The appellant says that it subsequently exported all these mobile phones at the zero rate of VAT. These export sales were to a French company called Elandour (Deals 3 and 5) and Allimpex (Deals 2, 4 and 6). Accordingly, the appellant claimed a repayment of the input tax it paid to Infinity in the total amount of £665,280.

30 21. On the basis of the same information from Bang & Olufsen and Samsung, HMRC also disallowed the appellant's input tax credit under Regulation 14(1)(g) and/or Regulation 14(1)(h) of the Regulations. HMRC notified the appellant of their decision in a letter dated 10 October 2006 (in relation to the first four invoices i.e. Deals 2, 3, 4 and 5) and in a letter dated 12 October 2006 in relation to the invoice dated 13 April 2006 (Deal 6).

35 22. The appellant appealed against these decisions by a notice of appeal dated 16 March 2007.

40 23. Further information (including the price, quantity, dates of sales and inspections, dates of times and shipment, dates and times of payment, the input VAT, total purchase price including VAT and inspection reports etc) in relation to the six disputed alleged transactions is summarised in Schedule 1 to this decision and this Schedule forms part of our findings of fact.

24. The appellant did not hold stock – it only bought what it could sell. The appellant did not ship "on hold." Instead, the appellant only instructed its freight

forwarder to ship the goods once it had been paid and it did not give credit to its customers, (but was given credit by its suppliers).

25. In relation to all its deals (including, but not limited to, those deals under appeal) in which the appellant acted as the exporter, the appellant dealt only with
5 Infinity and Future as its suppliers.

26. At various points in this decision we will refer to criminal prosecutions in respect of various parties involved in these transactions. We wish to make it clear that we are aware of no such prosecution in respect of the Appellant or Mr Jaffar.

The Serenes

10 27. As already mentioned, the Serenes were the product of a joint-venture between Bang & Olufsen and Samsung in which Bang & Olufsen supplied the design work and Samsung manufactured the product at its factory in South Korea.

15 28. The Serenes were intended by Bang & Olufsen and Samsung to be a high-end and relatively expensive product which would be manufactured in relatively small quantities. Samsung had agreed with Bang & Olufsen that Samsung would sell the Serenes through selected high-end retailers and that Bang & Olufsen could distribute the Serenes in all Bang & Olufsen branded shops and other Bang & Olufsen retailers. There was no limit on the number of Serenes that Samsung could manufacture and sell to its own customers.

20 29. As we shall see, Samsung manufactured a quantity of Serenes and shipped them to Bang & Olufsen in Denmark.

25 30. The Serenes supplied by Bang & Olufsen were slightly different from those supplied by Samsung. The retail units supplied by Bang & Olufsen included an accessory known as a "DECT". This was a desk-top charger and docking port which allowed the data in the memory of the Serene to be shared with the data stored in other Bang & Olufsen products. The Serenes supplied by Samsung to its own customers were not supplied with a DECT.

31. The Serenes involved in this appeal were supplied with European two pin chargers.

30 32. The evidence of Mr Bishop (see below), which we accept, was that the Serenes were intended for the European market. They would work in certain parts of North America (particularly around New York, Canada and certain limited parts of the West Coast). They would not, however, work generally throughout the United States. Mr Bishop estimated that the Serene model designed for the European market would not
35 work in approximately 90% to 95% of the USA.

33. We examined a typical Serene which was exhibited to Mr Bishop's evidence. On the metal hinge (the Serene was a foldout-type telephone) the names of both Samsung and Bang & Olufsen appeared.

Evidence of Bang & Olufsen and Samsung witnesses

40 34. Mr Thomas Hjannung had been the regional financial controller and company secretary of Bang & Olufsen UK Ltd, a wholly-owned subsidiary of the parent Bang

& Olufsen in Denmark. He had been employed by the Bang & Olufsen Group since December 2003.

35. Mr Stephen Bishop was an employee of Samsung Electronics (UK) Ltd ("Samsung UK"), a subsidiary of Samsung Electronics Co. Ltd ("Samsung"). Mr Bishop had over 18 years' experience in the mobile phone industry and has been employed by the Samsung Group since 1998. His job title was "Technical Support and Software Evaluation Engineer." This involved him in dealing with software evaluation, providing technical support to customers, liaising with police, trading standards and Customs regarding counterfeiting and other criminal activities involving mobile phones.

36. The evidence of Mr Hjannung and Mr Bishop formed an important part of HMRC's case. Essentially, HMRC relied on their evidence to show that, whatever, the invoices and other documentation may have shown, the appellant did not purchase Serenes.

15 *Number of Serenes manufactured/shipped by Samsung*

37. It was common ground that the appellant's invoices indicated that it had purchased 3,016 Serenes in the six transactions in dispute.

38. All Serenes were manufactured at Samsung's factory in Gumi, South Korea.

39. In an exhibit to his witness statement, Mr Bishop set out a schedule containing details of the quantities of Serenes which he described as having been manufactured and shipped from Samsung's factory between November 2005 and December 2006. The exhibit comprised a schedule of figures headed "Shipments from Korea" and was based on information supplied to Mr Bishop by Samsung in Korea.

40. Mr Bishop's schedule indicated that, between November 2005 and the end of April 2006, 35,726 Serenes had been shipped from Samsung's Korean factory. Of those 35,726 phones, a total of 28,778 phones were shipped to Denmark. The remaining 6,948 went to other European countries. Schedule 2 to this decision contains Mr Bishop's schedule and we include it as part of our findings of fact.

41. Mr Bishop exhibited another schedule (the "further schedule") which showed the number of Serenes sold by Samsung to third parties. This schedule contained slightly different figures from those contained in the Schedule 2. This further schedule indicated that there were a total of 24,698 Serenes supplied by Samsung to Denmark up to the end of April 2006 (all of which were sent to Bang & Olufsen) rather than 28,778 and that sales up to the end of April 2006 to other European countries totalled 5,105 rather than 6,948. These 5,105 units were supplied by Samsung to European wholesalers.

42. The 5,105 units sold by Samsung up to the end of April 2006 to its European customers were sold, according to the further schedule, in 120 separate consignments to customers in six different countries. The average size of a consignment was approximately 42 to 43 units. For example, the largest consignment in respect of Germany was 205 units and there were only two other customers who received 100 or more units, out of a total of 950 units supplied. In relation to the Netherlands, the largest consignment was 85 units out of a total of 600 units supplied. In France, four customers received 100 units out of a total of 610 units supplied. In Russia the largest two consignments were of 150 units each, with 12 customers receiving 100 units each

out of a total of 2860 units supplied. As regards the UK, Samsung's largest customer received 195 units out of 275 units supplied

43. Mr Bishop had, as already indicated, received the two sets of figures from his head office in Korea – he had not produced the figures himself. He believed that the lower figures in the further schedule represented the total number of Serenes supplied by Samsung to individual customers whereas the larger amounts shown in Schedule 2 were those Serenes that were shipped from the Korean factory to Samsung warehouses in different parts of the world. Thus, for example, the 24,698 figure represented the figure shipped from Samsung's Danish warehouse to Bang & Olufsen and the 28,778 figure represented the amount shipped by Samsung's Korean factory to Samsung's Danish warehouse. The balance between the two figures represented Serenes that remained unsold by Samsung Denmark.

44. We note, however, that the further schedule indicated that an additional 3,650 units were supplied to Bang & Olufsen in Denmark, which might go some way to reconciling the disparity between the figures in Schedule 2 and the further schedule.

45. Mr Jaffar suggested to Mr Bishop that Samsung may have manufactured more Serenes than it shipped on the basis that Schedule 2 merely referred to units that had been shipped by Samsung. Mr Bishop said that he could not comment on whether more units had been manufactured, but that for the 15 years that he had worked the Samsung he did not know of any other information other than the fact that what was manufactured was then shipped.

46. Mr Jaffar did not challenge the accuracy of Schedule 2 or the further schedule but, as we shall see, suggested that it was possible that Samsung may have manufactured and sold additional quantities of Serenes above and beyond the quantities shown in those two schedules. In his own cross-examination Mr Jaffar admitted that this simply amounted to his opinion and that he had no evidence for his suggestion.

Distribution of Serenes by Bang & Olufsen

47. Mr Hjannung's evidence, which we accept, was that by the middle of August 2006, Bang & Olufsen had received around 30,000 units from Samsung. Bang & Olufsen shipped its allocation of Serenes directly from its warehouse in Denmark to Bang & Olufsen's franchised and other selected "high-end" retailers. Bang & Olufsen did not supply wholesalers and large multiple retail chains and they would not supply wholesalers even if they approached Bang & Olufsen. Bang & Olufsen recorded all the serial numbers of the Serenes on receipt in the warehouse.

48. Mr Hjannung said that if a retailer required additional stock, it would order it from Bang & Olufsen's central warehouse in Denmark. The goods would then be shipped direct from that warehouse to the retailer by a third-party freight company.

49. An exhibit to Mr Hjannung's evidence made it clear that by the end of April 2006 only 15,802 Serenes had been shipped by Bang & Olufsen. These units were shipped in small amounts to a variety of retailers in different countries. A total of 3,499 units were shipped to "Expansion markets" such as Russia, Greece, the Ukraine and South America. Mr Jaffar did not challenge the accuracy of the figures produced by Mr Hjannung of shipments by Bang & Olufsen to retail outlets.

50. It was clear from Mr Hjannung's evidence that Bang & Olufsen's distribution of the Serenes was tightly controlled. In the course of the hearing, Mr Jaffar conceded (correctly in our view) that the Serenes, which the appellant claimed to have acquired in the six disputed transactions (3,016 units), did not come from the 28,778 (or 24,698, as per the further schedule) that Samsung shipped to Bang & Olufsen. Mr Jaffar in cross-examination also appeared to doubt whether they had come from the 6,948 (or the 5,105, as per the further schedule) units that were supplied by Samsung to its European customers.

Serenes – Pricing

51. Bang & Olufsen's basic wholesale price of the Serene was £640 in 2006. Various discounts offered to retailers by Bang & Olufsen could reduce the wholesale price of a Serene to £550. Apart from the discounts offered to retailers, the wholesale price of the Serenes offered by Bang & Olufsen remained the same throughout 2006.

52. Bang & Olufsen's recommended retail price for the Serene (with the DECT accessory) was £800 in the UK and €1,100 (approximately £761, applying the exchange rate in April 2006) in Euro-zone countries.

53. Mr Hjannung could not explain why Serenes would be circulating in the grey market at a price per unit greater than the retail price. The Serene did not sell as well as Bang & Olufsen had hoped and there was always a large surplus of Serenes in the company's central warehouse in Denmark in 2006. This stock was always ample to meet the market's demand for the Serene, although if a Bang & Olufsen outlet ran out of stock it would take three to four days for the outlet to receive fresh stock from Bang & Olufsen's warehouse.

54. Samsung's net wholesale price for the Serene was €612 when the product was launched. The expected retail price of the Serene (without the DECT accessory) distributed by Samsung was €1,000 (approximately £692, applying the exchange rate in April 2006).

55. Mr Bishop noted that the retail price of the Serene was highest at the launch date and gradually declined over the life of the model.

56. Like Mr Hjannung, Mr Bishop could not understand why Serenes might have been circulating in the wholesale market for around £1,350 per unit in 2006 (the price paid by the appellant in the transactions under appeal). There was no shortage of supply of the Serenes. Samsung always had sufficient stock to meet demand for the Serene. Mr Bishop's evidence was that the Serene did not sell as well as Samsung had forecast and, therefore, Samsung was left with ample stock throughout 2006. Mr Bishop's evidence was that the excess stock of Serenes would have been disposed of by agreement between Samsung and Bang & Olufsen at approximately around the end of 2006.

57. Mr Jaffar was asked in cross-examination whether he had researched the retail price of Serene mobile phones. He had not done so. He said: "It wasn't in the market. It wasn't in the market to compare with something. It was completely new in the market."

Serenes – launch date

58. The launch date of the Serenes onto the various European markets was originally scheduled to be in October 2005. However, on account of the need for further testing, the European release date was delayed until December 2005. Serenes were not supplied to non-European markets in 2005 or 2006, save for 23 units shipped to the United Arab Emirates, 100 shipped to mainland China, and 235 shipped to Hong Kong. The Serene was launched on the Chinese and US markets in late 2006 and early 2007 respectively. For technical reasons, new variants of the Serene had to be designed for each of these markets. Production of these variants began in November 2006 for the USA in December 2006 for China.

59. Bang & Olufsen started supplying the Serene to shops in the UK in December 2005. However, these were merely production samples which were used for marketing and demonstration purposes and were not sold to customers. Serenes were not sold to Bang & Olufsen customers in the UK before March 2006. Mr Hjannung understood that the distribution by Bang & Olufsen to the rest of Europe worked to the same timetable.

Serenes and counterfeiting

60. Mr Hjannung's evidence was that Bang & Olufsen maintained a database of counterfeiting incidents. The information in the database was derived largely from Bang & Olufsen's retail outlets around the world, from monitoring on-line auction sites such as eBay and from complaints from customers. Mr Hjannung had consulted Bang & Olufsen's legal counsel in Denmark who had access to this database and it was reported to Mr Hjannung that there were no confirmed incidents of counterfeiting of Serenes.

61. Mr Hjannung noted that each Serene unit was shipped to Bang & Olufsen's retailers in the same individual packaging. No Serene handsets or accessories were shipped in bulk packaging.

62. Samsung had systems in place to manage the theft and counterfeiting of its products. As regards thefts, Samsung managed all batch and IMEI numbers in a central database. In the case of theft, Samsung could track the batch numbers and related IMEI numbers. In the case of counterfeits, experts within the relevant Samsung subsidiary would examine suspected counterfeit goods. Samsung was not aware of any theft or counterfeiting of the Serene model.

63. In cross-examination, Mr Jaffar put to Mr Bishop the proposition that the Serene was not a unique product. The main differences between the Serenes and other handsets in the market were the ring-tone and the screen display. Mr Bishop considered, however, that the unique features of the Serene related to its design, particularly the fact that there was no keypad. Menu access was obtained via a rotating pad within the handset. Although none of the technology was particularly advanced, the design concept was very different from other products because of Bang & Olufsen's input.

64. Mr Bishop believed that a consumer would could tell the difference between a genuine Serene and a fake. Part of Mr Bishop's job involved dealing with counterfeiting. He considered that if you held two handsets side-by-side, a genuine one and a counterfeit one, then it was relatively easy to identify which was a counterfeit.

65. Mr Jaffar pointed out some images of a genuine and counterfeit Samsung mobile phone (not a Serene) but Mr Bishop considered that it was necessary to examine the physical product in order to determine whether something was a genuine handset or a counterfeit, rather than examining photographs. It would be necessary, in
5 Mr Bishop's opinion to open up the handset and examine the battery (counterfeits often had thinner batteries), the battery contacts etc. Often the screen technology was very different – a counterfeit would have a cloudier image.

66. Mr Bishop's evidence was that counterfeit handsets were usually sold for less than genuine handsets. He accepted, however, that a consumer would find it difficult
10 to tell a counterfeit from a genuine product without having the two units next to each other.

67. Mr Bishop accepted that it would be technically possible for someone to counterfeit a Serene. He estimated that the costs of producing a moulding would be approximately £20,000.

15 68. Mr Jaffar's oral evidence was that neither he nor any of the appellant's suppliers, customers and freight forwarders would have been able to tell a genuine Serene from a counterfeit Serene.

Samsung and the grey market

69. Mr Bishop's evidence, which we accept, was that Samsung did not sell directly
20 to the grey market. Samsung would only supply distributors with whom it had agreed terms and conditions and to mobile network operators such as Vodafone or 02.

70. Mr Jaffar referred to internet reports that Samsung's chief executive officer had allegedly been charged with fraud by the Korean authorities. We did not, however, regard this as undermining the evidence of Mr Bishop or suggesting that the Samsung
25 records produced by Mr Bishop were in any way unreliable.

The appellant's suppliers

71. In relation to all deals in which the appellant acted as an exporter, its suppliers were Future and Infinity. It used no other suppliers in export deals.

Future

30 72. Future was the appellant's supplier in Deal 1 dated 20 February 2006.

73. The invoice supplied by Future to the appellant recorded a quantity of 200 Serenes at a unit price of £1,350. These mobile phones were purchased by Future on 20 February 2006 as part of a consignment of 280 units from the Danish company Northcom Aps at a unit price of £1,345.

35 74. Ms Clifford, an HMRC officer, gave evidence in respect of Future.

75. Future was registered for VAT with effect from 19 March 2002. Future was one of 25 companies in the Innovative Global Business Group ("IGB Group"). Another company in the IGB Group was a company called Unique Distribution.

40 76. Essentially, Ms Clifford's evidence, which we accept, was that Future was a fraudulent contra-trader. In short, contra-trading is a scheme of fraudulent trading

intended to disguise the VAT fraud by ensuring that a VAT refund is claimed in a different chain of transactions from that in which the fraudulent tax loss occurred. A helpful description is contained in the decision of the VAT and Duties Tribunal decision in *Livewire Telecom Ltd v HMRC* [2008] V&DR 131 (Dr John F Avery Jones CBE (Chairman) and Sheila Wong Chong FRICS).

77. Future carried out its contra-trading activities on a massive scale. In the VAT quarter 01/04 Future's turnover was £18.959 million. In the quarter 04/06 Future's turnover had swollen to £1.174 billion. From 3 January 2006 to 30 June 2006, Future raised 3,140 sales invoices with a net value of over £2 billion. Of these transactions 55.3% were UK standard-rated sales generated mainly from Future's acquisition chains and 44.7% were zero-rated sales generated by Future's broker (i.e. export) deals. Future balanced its standard-rated deals and its zero-rated deals so that in most quarters a very small net VAT liability was payable. Thus, in the period 01/06 the net VAT due was £0.91 (based on outputs exceeding £500 million) and in period 04/06 the net VAT due was £4.47 (based on outputs exceeding £1 billion).

78. Between January and June 2006, Future purported to undertake 244 deals involving the sale of 117,680 Serenes. In other words, Future purported to trade in a quantity of Serenes which was vastly in excess of those shipped by Samsung from its Korean factory.

79. In the period 18 January 2006 to 24 February 2006, Future entered into seven deals in which it sold Serenes to Unique Distribution. These purported sales were for a price per unit of £1,500.

80. The activities of Future, and companies with which it was associated or traded, were subject to a criminal investigation codenamed Operation Inertia. A number of employees of Future, including its beneficial owner and controller, together with employees of other members of the IBG Group (including Unique Distribution) and freight forwarders (including the owner and an employee of Boston Freight and the owner of A1 Logistics) were charged with conspiring to defraud the public revenue and other offences. 15 of the 18 defendants were convicted at the Kingston Crown Court with a number of the defendants receiving custodial sentences ranging from 17 years imprisonment to 1 years imprisonment suspended for two years. The longest sentence was imposed on the beneficial owner and controller of Future and Unique Distribution, Dilawar Ravjani, who received a sentence of imprisonment of 17 years for conspiring with others to cheat the public revenue. A sentence of eight years imprisonment was imposed on Rajesh Gathani, a phone trader for Future, who pleaded guilty to the charge of conspiring to cheat the public revenue.

81. In cross-examination, Mr Jaffar claimed that he had been provided with two samples of the Serenes by Future on a visit to their office in either December 2005 or January 2006. Mr Jaffar said that subsequently he had been given one of the samples to a contact in Dubai. Mr Jaffar acknowledged that he had not seen any of the 200 Serenes that he said that the appellant bought from Future. Mr Jaffar's claim was challenged in cross-examination and was not mentioned in any of his four witness statements.

Infinity

82. Infinity was the appellant's supplier in the remaining five deals (Deal 2-6) under appeal.

83. Ms Holden, an HMRC officer, gave evidence in respect of Infinity.
84. Infinity was registered for VAT in July 2004.
85. The thrust of Ms Holden's evidence was that Infinity was a fraudulent contra-trader.
- 5 86. For the quarterly periods 09/05 to 06/06 Infinity structured its trading so that the net VAT due for each period was minimal. Over this period its declared turnover was in excess of £798 million. No repayments were claimed and the total VAT due was only £2,426. Input and output tax almost cancelled each other out.
- 10 87. For the quarterly period 12/05 Infinity's declared turnover (outputs) was £157,105,154 but its net VAT liability was only £1767.60. For the quarterly period 03/06 Infinity's declared turnover (outputs) was £211,036,648, yet the net VAT due was £76.53. For the period 06/06 Infinity's declared turnover was £343,963,911 and the net VAT due was £471.42.
- 15 88. In the periods 03/06 and 06/06, where chains could be traced, Infinity completed 548 broker deals (i.e. deals where it acted as the exporter selling to an EU customer). Over 480 of these deals were traced back to tax losses and defaulting traders/fraudulent activity. The tax losses in those deals exceeded £40 million. The remaining broker deals were traced back to buffer traders (i.e. intermediate traders) who, by not providing information to HMRC, blocked the tracing of deals further up the chain.
- 20 89. Also in the periods 03/06 and 06/06, Infinity undertook 539 acquisition deals (i.e. where it acted as the importer) in which it sold the goods to a UK broker (i.e. exporter) which then sold to an EU customer, with the brokers submitting large VAT repayment claims.
- 25 90. In summary, in the period 03/06 Infinity undertook 240 acquisition deals and 244 broker deals. In the period 06/06 Infinity undertook 299 acquisition deals and 304 broker deals.
- 30 91. Infinity completed the vast majority of acquisition deals in the first month of the quarter. If it had done nothing else, this would have resulted in Infinity having a large VAT liability to HMRC. Most of the broker deals were then completed over the following two months of the quarter to reduce its liability and, as we have seen, almost completely eradicated any VAT liability due to HMRC.
- 35 92. Between January 2006 and June 2006 Infinity completed over 1000 deals involving mobile phones and 8 deals in respect of camcorders. In all but one of these deals Infinity's mark-up was exactly £2. We agreed with Ms Holden's comment that it seemed hard to understand how such a consistent profit margin could be made in bona fide arm's length commercial trading.
- 40 93. Between January and June 2006 Infinity purported to trade in Serenes. The total number which Infinity purported to trade in was 39,202. In other words, Infinity purported to trade in a quantity of Serenes which was in excess of the quantities shipped by Samsung from its Korean factory.
94. Infinity's associated company, Infinity Distribution, acted as a broker trader and exported mobile phones to EU customers which included Allimpex and Elandour.

Infinity Distribution and Infinity were under common control. Infinity, however, sold to UK broker traders, including the appellant, which then sold to EU customers which included Allimpex and Elandour. We considered this an odd situation. There seemed no good reason why Infinity would sell to UK brokers when it could have perfectly easily exported itself and retained the profit. This suggested that Infinity was engaged in transactions which were not genuine arm's length commercial deals.

Conclusions in relation to Future and Infinity

95. Mr Jaffar did not attempt to challenge the evidence of Ms Clifford and Ms Holden to the effect that Future and Infinity were operating as fraudulent contra-traders. He did not accept, however, that the appellant was aware or was part of the fraudulent contra-trading scheme carried on by Future and Infinity.

96. It seemed to us that the evidence presented by Ms Clifford and Ms Holden, which we accept, was overwhelming, particularly when viewed in the light of the evidence given by Mr Reardon in respect of the circulation of funds through FCIB accounts, which we shall shortly consider. We were in no doubt that both Future and Infinity were at the centre of a massive fraudulent contra-trading web.

97. As regards the quantities of Serenes purportedly dealt in by Future, Mr Jaffar accepted that Future could not have dealt in 117,680 Serenes. He accepted that "maybe most of them" did not exist, "maybe half of them." He put forward no evidential basis for this assertion that half of Future's supplies of Serenes were genuine and that the other half were not. It seemed to us a rather desperate assertion.

98. Mr Jaffar accepted Ms Holden's evidence as regards the number of Serenes purportedly supplied by Infinity.

EU customer – Allimpex

99. Allimpex was the appellant's EU customer in Deals 1, 2, 4 and 6. The evidence in respect of Allimpex was given by Mr Reardon, an HMRC officer.

100. According to a report provided to HMRC by the German tax authorities, Allimpex was registered for VAT in September 2004 and was deregistered in February 2009. The report described Allimpex's type of business as "(Trading partnership dealing in mobile telephones and textiles) [sic] false invoices as a "missing trader"." The report continued: "The firm played an active role in this mobile telephone carousel and money-laundering operations linked to First Curacao International Bank (FCIB) which placed the UK tax revenue at risk in 2006. The report concluded: "The company has been conspicuous since the beginning of 2003 for carrying out bogus and carousel transactions.... The company is a "missing trader.""

101. Mr Jaffar could not recollect when he had first dealt with Allimpex. He recalled meeting two representatives from Allimpex. Mr Jaffar did not ask how many employees worked for Allimpex nor did he ask for references or how long Allimpex had been trading. Mr Jaffar checked that Allimpex had a bank account, were incorporated and were registered for VAT.

102. Mr Jaffar accepted that he had no evidence to refute Mr Reardon's evidence in respect of Allimpex.

EU customer – Elandour

103. Elandour was the appellant's EU customer in Deals 3 and 5.

104. Elandour was registered for VAT in France in October 2005 and was deregistered in May 2008.

5 105. According to three reports provided to HMRC by the French tax authorities, the French tax authorities planned an audit of Elandour because of its "non-compliant behaviour and suspect transaction [which HMRC had reported]." One of the reports described Elandour as a "missing trader." Another report stated that Elandour had been audited in 2006/2007 but that the French authorities "ran up against an
10 obstruction to audit proceeding, as the company adopted a 'no-show' strategy." Elandour was subjected to an assessment procedure and special penalties.

106. Mr Jaffar said that he could not recollect when he had first dealt with Elandour. Mr Jaffar said that he had had two meetings with someone called "Patrick" from Elandour – the first meeting having taken place in Kings Cross in London and the
15 second meeting having taken place at Mr Jaffar's apartment. Mr Jaffar could not recollect the dates on which these meetings took place. He did recall, however, that he had traded with Future before trading with Elandour and Allimpex.

107. Mr Jaffar accepted that Elandour was not a large-scale French wholesaler but rather that it appeared to be a vehicle for a mobile phone fraud.

20 108. Mr Jaffar had checked that Elandour had a bank account, was incorporated and was registered for VAT.

FCIB payments – Mr Reardon's evidence

109. Mr Reardon gave evidence in relation to the flow of funds through various FCIB accounts which related to Deals 2 – 6.

25 110. FCIB was a bank based in the Netherlands Antilles.

111. Mr Reardon had been given access in 2010 to various servers (including the Paris server) which contained computerised information in relation to bank accounts held with FCIB. Mr Reardon analysed this information which we set out as follows and find it as fact.

30 112. The appellant, its customers and its suppliers all held bank accounts with FCIB.

113. In relation to Deals 2 – 6 Mr Reardon traced the chains of payments through various FCIB accounts. His analysis demonstrated that in relation to Deals 3, 4, and 6 the funds started off with Allimpex (the appellant's customer). The funds passed through three essentially circular chains of payments before ending up again with
35 Allimpex. Approximately halfway through one of the three circular payment chains some of the funds were split by a Latvian company called Valdermara Electronics so that a payment from funds originally provided by Allimpex indirectly reached Elandour (the appellant's customer in relation to Deals 3 and 5) and Elandour then on-paid the funds to the appellant . The appellant, having received funds from Elandour
40 on-paid part of those amounts to its supplier, Infinity, and ultimately the funds are paid down the chain to Allimpex. Over 30 of these circular payments took place between 21:30 hours and 23:57 hours on 24 April 2006. A further circular flow of

funds took place between 23:39 hours on 24 April 2006 and 12:12 hours on 25 April 2006. It should be noted that Future took part in one of the payment chains.

114. In Deals 2 – 6, the appellant always received from its customer the amount due in respect of the appellant's supply to the customer. However, the appellant's supplier
5 (Infinity) only received the same amount the appellant received. Thus Infinity appeared to extend credit to the appellant in respect of the VAT element of its supply to the appellant less the profit margin.

115. Mr Jaffar did not challenge the accuracy of the FCIB records in relation to the circulation of payments through the FCIB accounts when he cross-examined Mr
10 Reardon.

116. When Mr Jaffar was cross-examined he accepted, at one stage, that Mr Reardon's evidence in respect of the circulation of payments through the FCIB accounts indicated "[f]or some companies" that the reason for all the companies concerned having accounts at FCIB was that it made it easier to perpetrate a VAT
15 fraud. Later in his cross-examination Mr Jaffar appeared to retract this concession, acknowledging that the payment chains looked a "little bit strange or more strange" then adding "but for me I cannot really confirm that there is fraud going on just looking at figures without comparing with the invoices."

117. Mr Jaffar's evidence that the reason he paid his supplier, Infinity, so quickly
20 from funds paid by Allimpex was that Allimpex would have telephoned him to let him know that he was being paid.

The Freight Forwarders

Inspection Reports

118. Mr Jaffar's evidence was that he did not personally inspect any of the Serenes in
25 relation to the six deals under appeal. Instead, he relied on inspections carried out by freight forwarders on his behalf. In addition, Mr Jaffar relied on CMRs (consignment notes where goods are transported by road) which were stamped by foreign freight forwarders which, he argued, showed that the goods were safely received at the destinations specified by his customers.

30 119. In relation to Deal 1, the appellant used A1 Logistics as its freight forwarder. The foreign freight forwarder, which received the goods on behalf of the appellant's customer, Allimpex, was Boston Freight in Belgium.

120. In relation to Deal 2, the appellant's UK freight forwarder was Aquarius Ltd
35 ("Aquarius") and the foreign freight forwarder acting on behalf of Allimpex was, again, Boston Freight.

121. In relation to Deal 3 the appellant's UK freight forwarder was Aquarius and the foreign freight forwarder acting on behalf of the appellant's customer, Elandour, was a French company called AFI Logistique ("AFI").

122. In relation to Deal 4 the appellant's freight forwarder was Aquarius and
40 Allimpex's freight forwarder was Boston Freight.

123. In relation to Deal 5 the appellant's freight forwarder was Aquarius and Elandour's freight forwarder was AFI.

124. Finally, in relation to Deal 6 the appellant's freight forwarder was Aquarius and Allimpex's freight forwarder was Boston Freight.

125. In relation to inspections, Mr Jaffar said in his oral evidence to the tribunal that it would not be normal to carry out an inspection of 100% of a consignment of mobile phones. Instead, the usual practice would be to inspect a sample of, say, 8 – 15%. In relation to the inspection of the Serenes, Mr Jaffar said that the inspection would be a sealed or closed box inspection (where the Freight Forwarder would be asked to check the condition of the boxes) because the units were brand new and there was no other Serene model in the market.

126. In his fourth witness statement Mr Jaffar contradicted his description of the inspection. In paragraph 58 he mentioned that the freight forwarder would conduct "an open box, condition of phones inspection of the goods." Later in that witness statement Mr Jaffar gave another version of the inspection that would be carried out. He said:

"The Appellant instructs its Freight Forwarders to conduct 100% external box checks on all deliveries. This means that the Freight Forwarders ensure that the correct number of boxes are available and check the model, number, and the condition of the boxes, for example to ensure that there is no damage to the boxes, that seals have not been tampered with etc."

A1 Logistics

127. A1 Logistics was or purported to be a freight forwarder based in Stoke-on-Trent.

128. HMRC exhibited four reports of visits by HMRC officers to A1 Logistics' premises at Whitehurst Farm in Staffordshire. The first report was dated 30 November 2004 added noted:

"Normally no goods are stored on site at Whitehurst Farm although occasionally stock for DVB has to be stored short-term (overnight)."

129. The report also refers to a previous visit made to a warehouse in Cheadle and refers to a conversation with Mr Peter Sellers who, apparently, confirmed that the warehouse unit was not being used to store commodities subject to onward supply.

130. The second visit report was dated 28 November 2005. This report stated:

"Mr Sellers confirmed that he is operating at a Unit [the unit in Cheadle] the stock storage, inspection and dispatch. No stock in the small storage area at Whitehurst Farm (less space available due to purchase of cattle)."

131. The third report was dated 25 May 2006 and recorded that Mr Sellers informed the officer that no stock was currently held. The officer was invited to inspect the "storage shed." The report recorded that there was no stock inside. When asked whether any stock was due, Mr Sellers replied that none was expected. Mr Sellers claimed that there had been some stock in a few days before but it was "in and out the same day." The report notes that Mr Sellers could not confirm what the stock was.

132. The final report was dated 6 June 2006. The HMRC officers spoke to a Mr Bullivant. He confirmed that there was no stock currently held and no stock had been received since the last HMRC visit.

5 133. Mr Jaffar used A1 Logistics because the goods were allegedly being stored by them for Future. He did not enquire why Future was using a freight forwarder based in Stoke-on-Trent. Mr Jaffar told us that he did not know where Stoke-on-Trent was in relation to London.

134. The appellant started using A1 Logistics when it first dealt with Future in 2004. Mr Jaffar admitted that he knew nothing about A1 Logistics before he started using them. His contact at A1 Logistics was a Mr Lee Sellers. He said that he knew Mr Sellers but did not know anything about him.

135. All the correspondence between the appellant and A1 Logistics was with the A1 Logistics address at Whitehurst Farm near Stoke-on-Trent. None of the documents referred to a warehouse in Cheadle.

15 136. After being cross-examined about the fact that A1 Logistics appear to be based on a farm, Mr Jaffar produced a satellite picture which he said was Whitehurst Farm. It was not possible, given the poor resolution of the image, to determine what storage facilities there were at Whitehurst Farm. However, the picture showed a number of sheds or barns that seemed consistent with the type of outbuildings that would be found on a farm, but could equally have been used for some type of storage. It did not, however, strike us as the sort of warehouse facility that would be used by a freight forwarder engaged in international trade.

137. The unchallenged evidence of Mr Parker, an HMRC officer, was that Mr Sellers had been convicted of fraudulent trading contrary to the Companies Act 1985 and was sentenced to 2 1/2 years imprisonment at Kingston Crown Court in January 2012. This prosecution was part of the prosecutions brought as a result of Operation Inertia, mentioned above. Mr Sellers had earlier been sentenced to 10 years imprisonment, having been convicted of offences in relation to the importation of cannabis. The conviction, according to Mr Parker's evidence was in July 2006 and Mr Sellers was released on licence in July 2011.

138. Mr Parker exhibited to his witness statement a document entitled "Proposed basis of plea/mitigation" in relation to Mr Sellers' conviction in January 2012 as part of the prosecutions resulting from Operation Inertia. Mr Parker explained that this document (and another one in relation to Mr Marshall Boston of Boston Freight) set out the basis on which Mr Sellers (and Mr Boston) pleaded guilty. Mr Parker said that the Crown did not accept these documents except for the purposes of sentencing because it would not have been in the public interest to test all the points that were put forward in these documents. It was the potential cost of a lengthy trial to litigate each of the points raised that prompted the Crown to accept these documents solely for the purposes of enabling the judge to sentence the individuals concerned.

139. Paragraphs 5 and 6 of the "Proposed basis of plea/mitigation" in relation to Mr Sellers read as follows:

45 "5. The Defendant's role was to transport mobile phones to the continent on behalf of the various companies identified by the Prosecution, and to carry out or purported to carry out inspections. He did not otherwise control or operate any aspect of the fraud.

5 6. There was always a cargo of phones and on no occasion did any of the Defendant's vehicles travel without any goods. If the actual load did not correspond with the invoice goods, this was not a feature known to him. It is accepted that the Defendant purported to complete partial and full inspections of loads and supplied reports suggesting that such inspections had been completed. In fact, though, these inspections were never properly carried out and the precise nature of the goods, in terms model numbers and the like, was not known or appreciated by the Defendant."

10 140. We regard this as significant evidence, albeit the we recognise that it is hearsay evidence. Nonetheless, we considered that weight could be attributed to those aspects of the plea put forward on behalf of Mr Sellers in so far as it incriminated him. It clearly indicated that A1 Logistics did not properly inspect the goods passing through its hands and that any inspection report produced by it was likely to be worthless.

15 141. Mr Parker said that in the prosecution of Mr Sellers it had been part of the Crown's case that the supply of the Serenes could not have taken place. He accepted in cross-examination that although the crux of the criminal investigation was that Serenes and other types of mobile phones were not available in the quantities purportedly traded by Future (and, therefore, by other companies) it begged the
20 question of what was actually being transported: was it phones or not? Mr Parker could not confirm whether phones were being transported or not. Mr Parker also said that whenever the compliance officers visited A1 Logistics there were no phones found on the premises.

25 142. When the contradictions in his evidence relating to inspections referred to in paragraphs 125 and 126 above were put to Mr Jaffar in cross-examination he insisted that, in relation to the inspection carried out by A1 Logistics, there had been a 10% open box inspection. He said that this was what he had agreed with Mr Lee Sellers, the owner of A1 Logistics.

30 143. Exhibited to Mr Jaffar's witness statements was the appellant's instruction to A1 Logistics to inspect various consignments of mobile phones, including 200 Samsung Serenes in relation to Deal 1. In fact the inspection instruction requested an inspection into many other consignments of mobile phones, totalling over 9,000 units. The document, which was dated "07/03/2006" read as follows:

35 "We are hereby requesting from your company to do the following inspection on the above stock [which included "Samsung Serene 200 units"]

a. General inspection of the product as model and condition

b. Inspection report to be fax [sic] to the number of [the appellant's fax number]."

40 144. Mr Jaffar agreed that this inspection request did not refer to a 10% open box inspection. Mr Jaffar claimed that he had agreed with Mr Sellers by telephone, when he first started dealing with A1 Logistics in approximately 2004, that such an inspection should be performed. Mr Jaffar could remember no further details of the conversation.

45 145. A1 Logistics' inspection report gave the date of the inspection as "17/02/06" i.e. almost 3 weeks before the inspection request referred to in paragraph 143 above. The report contained the following details:

"CUSTOMER NAME: GSM INTER TRADE LTD
TYPE OF STOCK: SAMSUNG SERENE
QUANTITY: 200 PCS
WAREHOUSE ADDRESS:
5 A1 LOGISTICS AND FREIGHT LTD
WHITEHURST FARM
....
NO. OF PALLETS: 1 PALLET
BAY LOCATION: BG 4
10 ORIGIN OF STOCK: CENTRAL EUROPEAN
....
LEVEL OF INSPECTION:
0% **10%*** 50% 100%
STOCK COUNT:
15 0% 10% 50% **100%***
APPROXIMATE WEIGHT: 200 KGS
INSPECTION CARRIED OUT BY: A1 LOGISTICS & FREIGHT
LTD"

*Figures in bold emphasised in original.

20 146. Contrary to the instruction given by Mr Jaffar dated 07/03/06, there was no report on the condition of the goods. Mr Jaffar explained that once the freight forwarder had carried out the inspection and there was nothing negative in the report, he took this to mean that the goods were in good condition.

25 147. The inspection report from A1 Logistics referred to above did not appear to have been faxed to the appellant as there were no fax marks or legends on the report. Mr Jaffar accepted that the inspection report had probably been mailed to him.

148. Mr Jaffar accepted that he received payment in respect of Deal 1 and made a payment to his supplier on 7 March 2006 i.e. the same date on which he sent the inspection instruction to A1 Logistics.

30 149. Mr Jaffar was unable to explain to our satisfaction how the inspection report from A1 Logistics was dated before the inspection instruction was sent by Mr Jaffar.

150. Mr Jaffar accepted that he did not have the A1 Logistics report before he authorised the dispatch of the consignment of 200 Serenes.

Aquarius

35 151. Mr Jaffar started using Aquarius as a freight forwarder on the recommendation of Infinity and was the freight forwarder in the majority of Infinity's transactions in the period April 2006 to June 2006.

40 152. Aquarius was registered for VAT with effect from 1 October 2005 and was deregistered on 30 April 2009. As part of the application to register Aquarius for VAT, Aquarius provided a letter from M Bathia Accountancy from an address in

Leicester dated 11 October 2005 to the manager of the Habib Bank. M Bathia was the Company Secretary of both Infinity and Infinity Distribution from 17 September 2004 to 1 December 2005. We infer that there was a connection between Infinity and Aquarius.

5 153. HMRC officers made a number of visits to Aquarius' premises. In a visit on 16 February 2006, officers confirmed that there were no high value goods in the warehouse.

10 154. In a visit on 9 March 2006, although paperwork was produced for a number of consignments of mobile phones, no goods were seen when the warehouse was inspected.

155. In a visit on 22 March 2006, HMRC officers inspected the warehouse and saw nine boxes containing 960 boxes of Accuchet Active Test Strips. The director of Aquarius, Mr Parekh, stated that he was expecting a delivery of 4,500 mobile phones, model not specified, on behalf of Future.

15 156. In a further visit on 7 June 2006, HMRC officers inspected the premises to see if there were any consignments of goods and observed only a couple of pallets of food-related products. There were no mobile phones on the premises.

20 157. Thus, on four occasions between 16 February and 7 June 2006, no mobile phones were observed by HMRC officers inspecting Aquarius' premises. The date of the final visit on 7 June was important because in the months of May and June 2006, according to the documentation held by HMRC, Aquarius was the freight forwarder for over £134 million of Infinity's phones. On 7 June 2006 Aquarius was purportedly the freight forwarder for six separate deals of Infinity. These deals, at least on paper, involved 9,090 mobile phones with a value of over £3.6 million. According to the
25 paperwork, Aquarius actually dealt with numerous consignments of Infinity's phones every day from 5 June 2006 to 9 June 2006. Nonetheless, on 7 June 2006 no evidence of mobile phones was to be seen in Aquarius' warehouse.

158. Mr Jaffar told us that he had visited Aquarius' premises but his visit was confined to Aquarius' office and he had not gone into the warehouse.

30 159. The appellant sent two instructions to Aquarius dated 25 April 2006 requesting inspection of two consignments of Serenes (1,716 units and 1,100 units). The instructions as to inspection were in the same terms as the instruction to A1 Logistics set out in paragraph 143 above.

35 160. Mr Jaffar's exhibits included two inspection reports from Aquarius. They were both dated 26 April 2006. The first report related to a consignment of 1,716 Serenes and the other related to 1,100 Serenes. Both reports were in identical form. The report for 1,716 Serenes read as follows:

"Inspection Type: Box check Qty: 1716
TYPE OF UNITS: SAMSUNG SERENE
TYPE OF CHARGER: EURO
SPECIFICATION: EURO
CONDITION OF STOCK: GOOD
PRODUCT BOX CONDITION: GOOD

40

Pallets security sealed with Aquarius Security Tape & Security Stickers

CHECKED BY: [illegible signature]

DATE: 26/4/06"

5 161. Apart from the quantity, the report in respect of the 1,100 Serenes was identical.

162. HMRC obtained a number of Aquarius inspection reports from Infinity in relation to the alleged supply of mobile phones in 2006. These were in addition to the two Aquarius reports referred to above. Twelve such reports were exhibited to the witness statement of Ms Holden and purported to be inspection reports in respect of a total of 8,930 Serenes. These Aquarius inspection reports were identical (apart from quantities) to those exhibited to Mr Jaffar's witness statement.

163. These 12 Aquarius inspection reports, obtained from Infinity, all showed that the "box check quantity" was 100% of the phones allegedly sold, all the mobile phones were Serenes with a "Euro" charger and of "Euro" specification. The condition of the stock in the product box was stated as "good" in relation to all the 8,930 phones.

Boston Freight

164. Boston Freight was the freight forwarder used by the appellant's customer in Deals 1, 2, 3 and 6.

20 165. Information obtained from the Belgian tax authorities by HMRC indicated that Boston Freight held documentation, including CMR's, relating to consignments of CPUs (i.e. computer chips) and mobile phones received during the months of January and February. In the main, these consignments had been delivered to their premises by UK logistics companies. The Belgian authorities also obtained copies of invoices received by Boston Freight to their customers. However, Boston Freight claimed that no CMRs or invoices relating to the onward movement of the consignments existed as they were all destroyed "by water leaking through the farm building roof." In addition, Mr Boston claimed that goods were never stored by Boston Freight as the facilities for storage did not exist. He stated that the consignments of mobile telephones and CPUs remained in the delivery vehicles pending onward delivery to clients in Spain or elsewhere in the EU.

166. The report of the Belgian tax authorities continued:

35 "Boston Freight operates from a farm close the frontier with France, and appears to offer logistics services to traders involved in the mobile phone and CPU industry. The representative of Boston Freight has also claimed that as there are no storage facilities at its premises, the goods remain in the vans which have arrived from the UK, before being onward shipped. The Belgian VAT authorities suspect that the goods, which on some occasions may not exist, are in fact immediately returned to the UK in the same vans....

40 The Belgian VAT authorities also strongly suspect that a number of the traders using Boston Freight's services are involved in VAT carousel fraud."

167. The report of the Belgian tax authorities noted the appellant, amongst many others, as one of the UK consignors.

168. As part of Operation Inertia, prosecutions were brought against Mr Marshall Boston, the owner of Boston Freight, and Mr Paul Smith, an employee of Boston Freight. Mr Marshall Boston pleaded guilty to the charge of VAT fraud under the VAT Act 1994 and was sentenced to 2 years imprisonment and was disqualified as a company director for five years. The date of Mr Boston's conviction was 12 June 2012. Mr Boston's subsequent appeal against his conviction was dismissed.

169. Mr Paul Smith pleaded guilty to the charge of being knowingly concerned in the fraudulent evasion of VAT. The date of his conviction was 14 November 2011. Mr Smith was sentenced to 1 year's imprisonment, suspended for two years. Mr Smith was also sentenced to 240 hours of community service.

170. In relation to Mr Paul Smith, Mr Parker's unchallenged evidence was that Mr Smith's part in the fraud was that he facilitated the fraud by stamping up the requisite paperwork that enable traders to present to HMRC that the transactions had taken place.

15 *AFI Logistique*

171. AFI Logistique ("AFI") was the freight forwarder used by the appellant's customer in Deals 3 and 5.

172. AFI was a French company registered for VAT in France on 1 April 1997. It went into voluntary liquidation and was deregistered for VAT in France on 22 October 2007. Information obtained from the French tax authorities indicated that its activities involved telephony, removing protective films in order to inspect goods, recovering goods and acting as a forwarding agent.

173. AFI was associated with a UK company called AFI Logistics UK Ltd ("AFI UK") with which, according to AFI UK's application for registration for VAT, it shared some common partners or directors. The company secretary and operations manager of AFI UK had been convicted in April 2013 of conspiracy to commit VAT fraud.

174. We note that on the CMR in relation a consignment of 1100 Serenes (the total quantity in Deals 3 and 5) sold by the appellant to Elandour dated 26 April 2006, the "Goods Received" box was stamped by AFI "CONTENTS UNCHECKED".

Invoices/purchase orders etc.

175. Exhibited to the witness statements of Mr Reardon and Mr Jaffar, in respect of the deals under appeal, were purchase orders, pro forma invoices, invoices, shipping instructions and inspection reports, relating to the appellant's purchases from Infinity and Future and sales to Allimpex and Elandour, together with CMRs and Euro-Tunnel tickets in relation to sales to Allimpex and Elandour. The documentation referred to the goods as being "Samsung Serene" or "Samsung sgh Serene" or "Samsung sgh Serene Mobile Handset SIMI." The purchase invoice dates, the quantity of Serenes, the purchase price, input VAT, total purchase price including VAT and the sales invoice date and price are set out in Schedule 1.

176. The appellant's standard profit margin was 2.5%. Usually, this profit margin was retained by the appellant from the VAT repayment made by HMRC – obviously no such repayment was made in respect of Deals 2 – 6.

IMEI numbers

177. The appellant did not record IMEI numbers in respect of the telephones in which it dealt.

5 178. IMEI numbers are the unique 15 digit identifying number for each mobile phone. They appear on the outside of each box containing a mobile phone.

179. Mr Jaffar said that he did not record IMEI numbers because it was not a requirement of HMRC that he should do so. Mr Reardon accepted that it was not a legal requirement imposed by HMRC that traders should record IMEI numbers.

Insurance

10 180. In relation to Deal 1, the goods were uninsured when they were shipped on behalf of the appellant to Allimpex. In cross-examination, Mr Jaffar said that Lee Sellers of A1 Logistics had told him at the last minute, on 7 March 2006, that he was no longer able to insure goods and Mr Jaffar did not have time to insure the goods with another company. However, in paragraph 10 of his second witness statement Mr
15 Jaffar said:

20 "Mr Lee contacted me on or around 20 February 2006 and informed me that A1 Logistics were no longer going to offer insurance of the goods that they were storing and transporting. Mr Lee informed me that there had been a change in the law. This meant that I had to try to
25 arrange my insurance for the Appellant to cover the deals that I was undertaking. This resulted in a delay in the goods stored at the A1 Logistics warehouse being shipped to their destination."

181. Mr Jaffar attempted to explain the discrepancy as follows:

25 **Mr Rowell:** That completely contradicts everything you just told us doesn't it?

Mr Jaffar: No, the difference – can I speak?

30 The difference between what you are saying because this is what I have been saying, too many years have passed. This is on 17 February, it is Friday. And Friday most of mobile phone companies is by 12 o'clock they are closed so most of the discussion is happening by phones and confirmation is happening by fax later time. On Friday you will see even with your documents there are several invoices and several purchase orders do not meet because the date is Friday and
35 Monday. When it come to Friday and Monday most of companies mobile phone companies do not trade for many different reasons. That is why when you spoke with me I told you normally what I do is what I do, but when I read this 17 February Mrs Potter, that is why I asked to see the date on the agenda.

40 **Mr Rowell:** Mr Jaffar, can you now help us from your own recollection... as to when this alleged conversation with Mr Sellers took place. Was it on 7 or 8 March, which was the first version of your evidence, or was it on or around 20 February, which is what you have put in this witness statement? When if either of them, is true?

45 **Mr Jaffar:** Regarding for the – I don't know. I know the standard way how I work but now I don't know what to say. But this is how I work. I don't ship without payment. If it is Friday, Sunday, Monday, the date on the documents might be changed three days because you mentioned three days and she mentions three days here. Now, as I said, too many

5 years pass. You are asking me something in 2006 and you are asking me today. Maybe I make my mistake in my last witness statement but too many years pass. I don't return back to documents. I don't fix that. I don't fix things. If I do something like this I will arrange it from long time but I don't do that.

Mr Rowell: Mr Jaffar, you also just told us that it would have taken around 10 days to arrange new insurance?

Mr Jaffar: Yes

10 **Mr Rowell:** If your paragraph 10 here is correct, you would have had time to ensure Deal 1, wouldn't you?

Mr Jaffar: Under stress, no.

182. We did not consider Mr Jaffar's evidence to be convincing and we considered that in this respect his evidence was not truthful.

15 183. As regards Deals 2 – 6, these transactions were insured through a broker called Martinez & Partners and the policy of insurance commenced on 24 April 2006. The policy of insurance contained certain "Security conditions". These conditions contained requirements in respect of all road vehicle movements, which were as follows:

"In respect of all road vehicle movements:

- 20 1. Vehicles are double-manned and or security escorted or
2. The cargo hold of the vehicle is to be equipped with an electronic locking system, which can only be opened by the operations centre of the Haulier. In such cases vehicles can circulate with a one-person crew on condition that the electronic locking system is active during
- 25 the whole transit...."

184. Mr Rowell put to Mr Jaffar in cross-examination that the goods were shipped to AFI Logistics and that they were not the operations centre of the haulier i.e. that the second condition had not been complied with. It did not seem to us clear how this condition was meant to operate but it seemed certainly possible that it was intended to mean that the electronic locking system could be operated remotely by the operations

30 centre of the haulier and did not mean that the goods had to be delivered to that operations centre.

185. The CMRs made no mention of vehicles being double manned and the Euro Tunnel tickets indicated that the crossing was made by only one person. Therefore,

35 the first condition referred to above had not been satisfied. However, in the light of our uncertainty concerning the manner in which the electronic locking system could be opened, we did not consider that Mr Rowell had been successful in his attempt to establish that Mr Jaffar had ignored Aquarius' non-compliance with the insurance conditions because either no goods or low-value goods were being transported. In

40 fact, on 25 April 2006 Mr Jaffar had faxed these conditions to Aquarius and the director of Aquarius had signed and returned a declaration confirming that "all shipments, transits and conveyancers will be carried in accordance with the above terms and conditions."

Due diligence

45 186. We doubt whether the extent of the appellant's due diligence on its trading partners to establish their *bona fides* is relevant for the purposes of this appeal.

187. For the most part, however, the appellant's due diligence in respect of Future and Infinity consisted of obtaining formal documentation such as incorporation details, bank account details, VAT registration details, letters of introduction and VAT registration checks with HMRC etc. None of these, in our view, would have established whether Future or Infinity was a reputable company dealing in good faith. As regards the freight forwarders (who inspected the goods on behalf of the appellant), Mr Jaffar accepted that he knew nothing at all about A1 Logistics before he used them. Mr Jaffar also accepted that he knew little about Aquarius other than what Infinity told him. He had visited Aquarius' office but had not inspected their warehouse.

Counterfeits

188. We have already recorded the evidence of Mr Hjannung and Mr Bishop in relation to counterfeit Serenes. Their evidence, in summary, was that there was no evidence that the Serenes had been counterfeited, despite the fact that both companies had systems to deal with counterfeit products. Mr Bishop accepted the theoretical possibility that it would have been possible to counterfeit the Serenes, but at no stage did he accept that they had been counterfeited.

189. By contrast, Mr Jaffar put forward the possibility that what the appellant bought and sold in the six deals under appeal may have been counterfeit Serenes. He produced some photographs of other another model of a Samsung mobile phone which, he said, showed counterfeit phones alongside genuine phones. However, Mr Bishop's evidence was that it was difficult to tell a counterfeit product from a genuine product from photographs alone and that the physical products needed to be examined side-by-side. Moreover, whatever may be the position as regards other Samsung mobile phones, there was no evidence that the phones in question in this appeal – the Serenes – had been counterfeited. There was, therefore, no evidence whatsoever that the appellant had dealt in counterfeit Serenes.

190. In any event, the burden of proof lies upon the appellant to show that the goods in which it traded were, on the balance of probabilities, counterfeit Serenes. At most Mr Jaffar seemed to suggest that there was a possibility that the goods which his company traded could have been counterfeit products. At no stage, it seems to us, did the appellant produce evidence which would satisfy this burden of proof.

Evidence of demand for the Serenes from outside Europe

191. Mr Jaffar argued that because Bang & Olufsen and Samsung had initially launched the Serenes only in Europe, it was likely that there was a large pent-up demand from customers outside Europe for this new product. Mr Jaffar produced figures relating to the number of tourists from outside Europe who visited Europe. This, according to Mr Jaffar, could explain why the Serenes which he said the appellant bought and sold commanded a price on the grey market considerably in excess of the retail price at which Bang & Olufsen and Samsung were selling the Serenes in Europe.

192. The difficulty with this argument was that there was no evidence whatsoever to support it. Mr Bishop and Mr Hjannung were at a loss to explain why the Serenes should trade at £1,350 in the grey market. Their evidence was that at all times material to this appeal they held stocks well in excess of demand. The Serenes were

not a successful product – the model did not sell as well as Bang & Olufsen and Samsung had hoped.

193. Moreover, according to the evidence of Mr Bishop the Serenes would only work in a limited part of North America (albeit a part which included Washington DC, New York and, we believe, Canada).

194. Furthermore, on Mr Jaffar's own evidence he had not researched the retail price of the Serenes in Europe. Consequently he could have had not have known whether the high purchase price from Future and Infinity was due to demand from outside Europe.

195. There was no evidence to substantiate Mr Jaffar's claim that there was a pressing demand from non-European sources. Accordingly, we find that Mr Jaffar's argument in this regard has no merit.

Bank accounts

196. Mr Jaffar's evidence was that NatWest had summarily closed the appellant's bank account in June 2005 and he produced a letter from NatWest dated 1 June 2005 which evidenced this. This was the reason, he said, why he had opened up an offshore account with FCIB.

197. Whilst we accept that Mr Jaffar's NatWest account was closed at the behest of the bank, we did not accept that this was the reason why Mr Jaffar had to open a bank account for the appellant at FCIB.

198. On Mr Jaffar's own evidence the appellant retained a bank account with Bank of Scotland. In fact, he had both a current and a deposit account with Bank of Scotland. The current account was not closed until 31 January 2007 i.e. after the date of the deals which are the subject matter of this appeal.

199. In his evidence Mr Jaffar said that he did not use the Bank of Scotland for trading, but according to the bank statements produced by Mr Jaffar in respect of this Bank of Scotland current account, the appellant used the account to make substantial payments to Infinity and Future in 2005 and 2006. We now summarise some of these payments. For example, on 28 October 2005 the appellant made a payment of £516,000 to Infinity. A payment of £47,505 was made to A1 Logistics on 4 January 2006. A further payment of £27,170 was made on 6 January 2006 to Infinity. On 11 January 2006 a payment of £250,020 was made to Future and on 12 January 2006 a payment of £246,818.13 was made to Future. At some time between 28 March and 4 April 2006 (the date on our copy of the bank statement was obscured), the appellant made a payment of £450,020 to Future. A further payment of £383,623 was made to Future by the appellant on 4 April 2006, followed by a further payment of £400,020 to Future on 6 April 2006.

200. The letter from the Bank of Scotland dated 31 January 2007 closing the appellant's Bank of Scotland current account opened with the words:

"I refer to the request for the above account to be closed and confirm that this has been actioned."

201. It seemed to us that this wording left it ambiguous as to the source of the request for the account to be closed. Mr Jaffar suggested to us that the initiative for the

account to be closed had come from the Bank of Scotland. If so, the form of words used in the letter of 31 January 2007 seemed to us somewhat unusual.

202. Furthermore, Mr Jaffar produced the appellant's bank statements in respect of an account with Alliance & Leicester Commercial Bank for the period 1 December 5 2005 – 11 December 2006. The debits and credits to this account were relatively small in contrast to those in respect of the Bank of Scotland account.

203. In the light of the above, we felt unable to accept Mr Jaffar's evidence that he had opened the appellant's account with FCIB because the appellant's UK bank accounts were being closed. At all times material to this appeal the appellant appeared 10 to have two UK bank accounts and used one of them (the Bank of Scotland current account) to make substantial trading payments to Future and Infinity.

The evidence of Mr Stone

204. Mr Stone is a senior HMRC officer who has been employed by HMRC and its predecessors since 1974. From 2001 he has been closely involved in HMRC's strategy 15 in combating MTIC fraud. Mr Stone has given evidence in many MTIC-related appeals and has considerable experience of MTIC fraud.

205. In his second witness statement Mr Stone's evidence was that the transactions in this appeal formed part of and were connected to supply chains leading to traders that have defaulted on their liability to account for VAT on the supply of the goods in 20 question. From his experience in dealing with MTIC fraud his view was that the deals in question were part of supply chains which had the hallmarks of supply chains contrived for the purposes of defrauding the public revenue through MTIC fraud.

206. Mr Stone did not, in his evidence, allege that the appellant knew or should have known that its transactions were connected with MTIC fraud. In Mr Stone's view, the 25 connection between the appellant's transactions and MTIC fraud was significant in the context of this appeal. In his experience of MTIC fraud transactions the perpetrators often used dummy or non-existent goods because this greatly reduced the cost to them of setting up fraudulent transactions and they would try to cover their tracks by supplying their customers with false details about dummy or non-existent goods. The 30 link between the appellant's transactions and MTIC fraud explained why the goods recorded on the appellant's purchase invoices were not what it was, in fact, supplied with.

207. Mr Stone had extracted from HMRC's records purported sales of Serenes. He had found 286 separate transaction chains involving the purported sale of 144,655 35 Serenes with a net value of £174,252,735. Mr Stone did not believe that the list was exhaustive.

The evidence of Mr Jaffar

208. We have already indicated that in relation to the question of insurance in respect of Deal 1, we did not regard Mr Jaffar as being truthful. In the light of the evidence 40 just summarised, we felt unable to accept Mr Jaffar's evidence that he opened the appellant's FCIB account because the appellant's UK bank accounts were being closed. In addition we consider that he was untruthful about whether he traded through the Bank of Scotland account. Throughout his two-day cross-examination we

considered that Mr Jaffar's answers were frequently inconsistent and evasive. We therefore had considerable reservations about the reliability of Mr Jaffar's evidence.

The legislation

209. Section 4 of the Value Added Tax Act 1994 ("VATA") provides as follows:

- 5 "(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.
- (2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply."

10 210. Sections 24 – 26 Value Added Tax Act 1994 ("VATA") give a trader a right to deduct input tax from the output tax he/she is liable to pay, subject to such conditions as the Commissioners shall prescribe by regulation. Thus, Section 24(1) of VATA defines "input tax" as:

- 15 "VAT on the supply to him of any goods or services ... being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him."

211. Section 24(6)(a) VATA provides that regulations may provide for VAT:

- 20 "to be treated as input tax only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents or other information as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases."

212. Section 24(6)(a) gives effect to Article 18 of the Sixth Directive, which refers to the documentary requirements which must be satisfied in order to exercise a right to deduct.

213. Section 25(2) of VATA provides:

- 30 "Subject to the provisions of this section, he [the taxable person] is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him."

214. Regulation 13(2) of the Regulations provides that the particulars of the VAT chargeable on a supply of goods shall be provided on a document containing the particulars present in Regulation 14(1).

215. Regulation 14(1)(g) of the Regulations provides that:

- 35 "a registered person providing a VAT invoice ... shall state thereon the following particulars –
- a description sufficient to identify the goods or services supplied."

216. Regulation 29(2) of the Regulations provides:

- 40 "At the time of claiming deduction of input tax ... 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; ... provided that where

the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold or provide such other evidence of the charge to VAT as the Commissioners may direct."

5 217. The foregoing provisions implement, and are to be interpreted consistently with, the Sixth Directive and, in particular, Articles 2.5(1), 17(1), 17(2)(a), 18(1)(a), 22(3)(a) and 22(3)(b) thereof.

218. Article 2 of the Sixth Directive provides, so far as material:

"The following shall be subject to value added tax:

10 1. The supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such; ..."

219. Article 5(1) of the Sixth Directive provides:

"Supply of goods shall mean the transfer of the right to dispose of tangible property as owner ..."

15 220. Article 17 of the Sixth Directive establishes the right to deduct input tax and provides (so far as material):

"Origin and scope of the right to deduct –

1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

20 2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person; ..."

25 221. Article 18 of the Sixth Directive sets out rules governing the exercise of the right to deduct input tax and provides:

"Rules governing the exercise of the right to deduct

(1) To exercise his right of deduction, a taxable person must:

30 (a) in respect of deductions pursuant to Article 17(2)(a), hold an invoice drawn up in accordance with Article 22(3); ...

35 (2) The taxable person shall effect the deduction by subtracting from the total amount of value added tax due for a given period the total amount of the tax in respect of which, during the same period, the right to deduct has arisen and can be exercised under the provisions of paragraph 1.....

(3) Member States shall determine the conditions and procedures whereby a taxable person may be authorised to make a deduction which he has not made in accordance with paragraphs 1 and 2."

222. Article 22(3)(a) of the Sixth Directive provides:

40 "3(a) Every taxable person shall ensure that an invoice is issued, either by himself or by his customer, or in his name and on his behalf, by a third party, in respect of goods or services which he has supplied or rendered to another taxable person or to a non-taxable legal person. Every taxable person shall also ensure that an invoice is issued, either
45 by himself or by his customer or, in his name and on his behalf, by a

third party, in respect of the supplies of goods referred to in Article 28b(B)(1) and in respect of goods supplied under the conditions laid down in Article 28c(A).

5 Every taxable person shall ensure that an invoice is issued, either by himself or by his customer or, in his name and on his behalf, by a third party, in respect of any payment on account made to him before any supplies of goods referred to in the first subparagraph and in respect of any payment on account made to him by another taxable person or non-taxable legal person before the provision of services is completed
10 ... Member States may impose on taxable persons an obligation to issue an invoice in respect of goods or services ... which they have supplied or rendered on their territory."

223. Article 22(3)(b) of the Sixth Directive specifies the details which Member States may require a taxable person to include on an invoice for a supply that he
15 makes. Article 22(3)(b) provides (so far as relevant):

"Without prejudice to the specific arrangements laid down by this Directive, only the following details *are required* for VAT purposes on invoices issued under the first, second and third subparagraphs of point (a): the quantity and nature of the goods supplied ..."

20 224. Article 22(8) of the Sixth Directive provides:

"Member States may impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion, subject to the requirement of equal treatment for domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade
25 between Member States, give rise to formalities connected with the crossing of frontiers."

The case-law

225. We were referred to a decision of the CJEU in *Genius Holdings BV v Staatsecretaris van Financien* [1991] STC 239 where a taxpayer, engaged in
30 assembly and machine-tooling, regularly used sub-contractors to fulfil its orders. The taxpayer deducted VAT charged to it by two of its sub-contractors. This was contrary to Netherlands VAT law which (under a derogation from the Sixth Directive) provided that the taxpayer, as the principal contractor, was required to account to the
35 Netherlands tax authorities to VAT on supplies made by its sub-contractors. The Netherlands tax authorities disallowed the taxpayer's input tax deduction on the basis that it contravened national law. The CJEU held at :

"13. It must be inferred from the changes made to the above-mentioned provisions that the right to deduct may be exercised only in
40 respect of taxes actually due, that is to say, the taxes corresponding to a transaction subject to value added tax or paid in so far as they were due.

...

18. ...It follows that that right cannot be exercised in respect of tax which does not correspond to a given transaction, either because that
45 tax is higher than that legally due or because the transaction in question is not subject to value added tax."

226. Thus in *Genius Holdings* the Court limited the exercise of the right to deduct taxes to an actual taxable supply of goods and services. HMRC argued that, in this

appeal, either no supply of goods had been made or the supply consisted of different goods from those recorded on the invoices.

227. We were also referred to the decisions of the CJEU which concerned the extent to which the laws of Member States could prescribe criteria for a valid tax invoice. Thus, in *Lea Jorion (née Jeunehomme v Belgian State)* C – 123/97 a car dealer was denied a deduction in respect of invoices which contained numerous irregularities, including false addresses and inaccurate description of the vehicles concerned. The invoices did not comply with the national law of Belgium as to the minimum information that a valid tax invoice should contain in order to enable the taxpayer to exercise its right to deduct input tax. The CJEU said:

"14. In order to be entitled to deduct the value-added tax payable or paid in respect of goods delivered or to be delivered or services supplied or to be supplied by another taxable person, a taxable person must hold an invoice drawn up in accordance with Article 22 (3) of the Sixth Directive (Article 18 (1) (a)). Under that provision, the invoice must state clearly the price exclusive of tax and the corresponding tax at each rate as well as any exemptions (subparagraph (b)) and the Member States are to determine the criteria for considering whether a document serves as an invoice (subparagraph (c)).

15. Furthermore, Article 22 (8) of the Sixth Directive provides that "... Member States may impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud ". In doing so, Member States are not required to use the procedure laid down in Article 27 of the Directive. Article 22 (8) is a special provision limited to the specific area of taxpayers' obligations and only relates to the right of Member States to lay down obligations other than those provided for in the Directive.

16. It follows from the foregoing that as regards the exercise of the right to deduction in the circumstances set out above, which are those of this case, the Sixth Directive does no more than require an invoice containing certain information. Member States may provide for the inclusion of additional information to ensure the correct levying of value-added tax and permit supervision by the tax authorities.

17. However, the requirement on the invoice of particulars other than those set out in Article 22 (3) (b) of the Sixth Directive, as a condition for the exercise of the right to deduction, must be limited to what is necessary to ensure the correct levying of value-added tax and permit supervision by the tax authorities. Moreover, such particulars must not, by reason of their number or technical nature, render the exercise of the right to deduction practically impossible or excessively difficult ."

228. Thus, Member States are entitled to impose additional criteria in respect of tax invoices over and above those specified in Article 22 (3) of the Sixth Directive. This was, however, subject to the proviso that the additional criteria must be necessary to ensure the correct levying of VAT and to permit appropriate supervision by the Member State tax authorities. In addition, the additional criteria must not by reason of their number or technical nature render the right to deduct practically impossible or excessively difficult.

229. We were also referred to the decision of the CJEU in Case C-90/002, *Finanzamt Gummersbach v Bockemuhl* [2005] STC 934. In particular, comments of the

Advocate General at paragraphs [73 – 75] in relation to the importance of the correct identification of the supply was noted:

5 "Identification of the taxable transaction is clearly of great practical importance for determining what provisions are applicable. It is evident that, when mentioned, the taxable transaction must be defined correctly in accordance with the categories in the directive, since a different qualification may trigger the application of different provisions of the directive and possibly different tax rates. Definitions which are not accurate in that regard may prejudice the application of the directive and distort competition.

10 ...

15 My view is... that the applicable version of the Sixth Directive allows Member States to require suppliers to indicate their name and address and to identify accurately the nature of the supply, on any invoice used for VAT purposes, and thus to refuse the recipient a right to deduct if those particulars are absent or materially incorrect."

230. In *Jeunehomme* Advocate General Slynn (ECJ 31.05.1988 C-123/87) explained, in a well-known passage, that the burden of proof in the case of an invalid invoice fell on the taxpayer:

20 "An invoice which complies with the rules is the "ticket of admission" to the right to deduct, subject to its subsequently being shown by the tax authorities to be false; if the invoice does not comply, it may be that the taxpayer can prove the genuineness of the transaction and that his supplier accounted for the VAT which he has paid as "input tax",
25 but if the invoice is incomplete in a material respect the onus is on him to establish his right to deduct."

231. We were also referred to the following CJEU authorities dealing with the criteria that Member States specified for valid tax invoices. It is unnecessary to consider them in detail because the propositions established in the above authorities were not questioned:

Case C-85/95, *Reisdorf v Finanzamt Koln-West* [1997] STC 180

Case C-141/96, *Finanzamt Osnabruck-Land v Langhost* [1997] STC 1357

Case C-85/95, *Reisdorf v Finanzamt Koln-West* [1997] STC 180

232. We will also refer to the following tribunal decisions:

35 *Pexum Ltd v HMRC* (2007) VTD 20083;

Micropoint Ltd v HMRC (2006) VTD 19630; *Elite Designs International Ltd v CEC* (2000) VTD 16925;

Senergy (UK) Ltd v HMRC [2006] VTD 19727;

Plazadome Ltd v HMRC [2009] UKFTT 229 (TC);

40 *F1 Promotions Ltd v HMRC* [2010] UKFTT 159 (TC).

233. We were referred to the decision of MacPherson J (approved by the Court of Appeal [1987] STC 360) in *Grunwick Processing Laboratories Ltd v Commrs of*

Customs & Excise [1986] STC 441 where the learned judge held that the burden of proof rests on the taxpayer to show that an assessment was wrong. MacPherson J said at [445]:

5 "At no time do the commissioners have any burden to prove anything before the tribunal. Neither its case nor any aspect of the matter, factually or evidentially, carries any burden imposed on the commissioners. It is throughout, in my judgment, up to the taxpayer company, if it can, to attack the assessment in whole or in part."

10 234. Finally, in relation to the burden of proof in respect of the exercise of HMRC's discretion under Regulation 29 (2) of the Regulations, we will also referred to decision the VAT and Duties Tribunal in *Elite Designs International Ltd v Commrs Customs & Excise* LON/99/635 where the tribunal stated at paragraph [31]:

15 "When Customs and Excise have failed to exercise their discretionary power under the proviso to regulation 29(2) to allow a deduction, the issue on an appeal to the tribunal is whether Customs and Excise in that failure acted in a manner in which they could not reasonably have acted. When considering that question the relevant material is the material that was available to Customs and Excise when it made its decision and it is for the taxpayer to satisfy the tribunal that Customs and Excise failed to act reasonably and properly."

20

HMRC's arguments

235. Mr Rowell , appearing for HMRC, argued that the evidence established that:

- 25 (1) the appellant did not receive a supply of Serenes as described on the invoices issued to it by Future and Infinity;
- (2) if the appellant did not receive a supply of Serenes, it did not receive a supply of any other goods; and
- 30 (3) if the appellant did receive a supply of goods other than Serenes the Commissioners acted reasonably in refusing to exercise their discretion under Regulation 29 (2) to allow the deduction of input tax.

236. Most of the time at the hearing was devoted to issue (1) above. HMRC argued that on the basis of the evidence presented to the tribunal:

- 35 (1) the evidence of Mr Bishop and Mr Hjannung established that insufficient Serenes had been shipped by Samsung to enable the appellant to receive the Serenes which she claimed had been supplied;
- (2) the distribution of the Serenes by Bang & Olufsen and Samsung made it improbable that the Serenes had been acquired by the appellant as claimant;
- (3) the appellant's suppliers were fraudulent contra-traders who purportedly dealt in fictitious amounts of Serenes;
- 40 (4) the pricing of the Serenes made it improbable that they had been genuinely supplied to the appellant;
- (5) there were credibility issues relating to the appellant's customers;
- (6) there were credibility issues relating to the inspection reports and the freight forwarders, A1 Logistics and Aquarius.

237. HMRC argued that on the basis of evidence relating to these matters, taken together, there was an overwhelming inference that the appellant had not received the supplies of Serenes stated on the invoices in relation to which the appellant claimed the right to deduct input tax.

5 238. As regards issue (2), HMRC submitted that because almost all the appellant's evidence had been put forward in support of the contention that the alleged supplies of Serenes had taken place, if the tribunal rejected that evidence it followed that the appellant was left with no proof as to whether any goods were supplied and, if so, what those goods were. In this connection, HMRC noted that the appellant bore the
10 burden of proof in showing that it had received a supply of goods and what those goods were.

239. HMRC argued that the circumstances surrounding the disputed deals indicated that they were part of a scheme of MTIC fraud. They further indicated that the transaction documentation and the payments made could not be relied upon as
15 establishing that genuine commercial supplies had been made. Accordingly, there was no evidence that the appellant had received a supply of any goods if we decided that the appellant had not received a supply of the Serenes as claimed.

240. In relation to issue (3), HMRC's discretion under Regulation 29 (2) was limited: the evidence had to show that the transaction in respect of which the deduction of
20 input tax was claimed actually took place. If the tribunal concluded that the appellant received no supply of goods, there was no right to deduction of input tax.

241. If, however, we concluded that a supply of goods had taken place, Mr Rowell argued it would then be necessary to consider whether HMRC had acted reasonably in the *Wednesbury* sense in refusing to exercise their discretion under Regulation 29 (2).
25 Mr Rowell submitted that HMRC's witnesses had described how they and their colleagues had gathered and considered all the evidence from the appellant, its suppliers, its freight forwarders and from both Samsung and Bang & Olufsen. HMRC's officers had considered all relevant evidence before making their decision and that HMRC's decision not to exercise its discretion was reasonable.

30 242. Mr Jaffar argued that the appellant may have received a supply of counterfeit Serenes. In response to this argument HMRC submitted that the evidence did not support the conclusion that a supply of counterfeit Serenes had been made. In the alternative, Mr Rowell submitted that even if the appellant had received a supply of counterfeit Serenes the appellant's invoices related to purportedly genuine Serenes
35 and not to counterfeit Serenes. In other words, counterfeit Serenes were not adequately or accurately identified on the invoices held by the appellant. Therefore, even if the appellant had received a supply of counterfeits it had no right to deduct input tax on the basis of the invoices which it held.

Appellant's arguments

40 243. Initially, Mr Jaffar argued that there was no evidence that the appellant knew or should have known that its transactions were connected to the fraudulent evasion of VAT. Large parts of his witness statements were directed to this issue.

244. As already indicated, HMRC did not plead that the appellant knew or should have known that its purchases were connected with fraud (although Mr Rowell noted,
45 for the record, that HMRC did not concede that the appellant did not know or should not have known).

245. In relation to the real issues in this appeal, Mr Jaffar relied on the appellant's documentation (including purchase and sale invoices), inspection reports, and payments to show that the appellant had indeed purchased Serenes. He also relied on the fact that Future has sold Serenes to the appellant at £1,350 per unit whereas it had
5 sold Serenes to its associated company Unique Distribution, in a number of transactions, at £1,500 per unit. This indicated, according to Mr Jaffar, that the appellant's deals were different from the fraudulent deals which Future engaged in with Unique Distribution.

246. Furthermore, Mr Jaffar argued that Samsung had produced more Serenes than
10 were shown in Mr Bishop's evidence as having been shipped by Samsung. These additional Serenes were sold by Samsung (we were not clear whether this was directly or indirectly) into the grey market.

247. In support of this contention, Mr Jaffar argued that because the initial launch of the Serenes had been limited to Europe there was demand for the Serenes from
15 outside Europe (e.g. the Middle East, Asia and the Americas) and from non-European tourists visiting Europe. Mr Jaffar submitted that the grey market satisfied this demand with the additional Serenes. Moreover, this non-European demand explained why the appellant was able to buy and sell Serenes in the disputed deals for a price in excess of the retail price of Serenes in Europe.

248. Mr Jaffar also argued that many Samsung mobile phones had been
20 counterfeited. It was, therefore, possible that his supplies were in fact counterfeited Serenes. The Serenes were not particularly technologically advanced and that it would have been possible to counterfeit them.

249. Mr Jaffar argued that there was nothing suspicious in the appellant having an
25 account with FCIB. The appellant did this because UK banks were closing the accounts of mobile phone traders.

Discussion

250. We agree with Mr Rowell's formulation of the legal issues facing the tribunal in this appeal. These were:

30 (a) whether the appellant received a supply of goods (of any description);

(b) if so, whether the identity and/or number of those goods was correctly described on the invoices issued by the appellant's suppliers as required by Regulation 14 (1)(g) – (h) of the Regulations:

35 (c) if not, whether it was reasonable for the Commissioners not to exercise their discretion under Regulation 29 (2) of the Regulations to allow the appellant's claim for input tax deduction in respect of the six deals under appeal.

251. We also agreed that since most of the evidence produced by the parties related
40 to issue (b), it was more convenient to deal with this issue first.

252. HMRC submitted, and the appellant did not dispute, that the burden of proof lay with the appellant on issues (a) – (c). Equally, there was no dispute that the standard of proof was the normal civil standard of the balance of probabilities.

Were the Serenes supplied as described in the invoices issued by Future and Infinity to the appellant?

5 253. The first issue (issue (b)) we need to address is whether the goods (if any) supplied to the appellant were Serenes as described in the appellant's purchase invoices.

(a) The evidence of Samsung and Bang & Olufsen

254. We accept the evidence of Mr Hjannung and Mr Bishop and find it as fact.

10 255. Mr Jaffar accepted that the appellant's Serenes did not come from the allocation of 28,778 units shipped by Samsung to Bang & Olufsen. In our view, Mr Jaffar was correct to make this concession. Mr Hjannung's evidence showed that the distribution of Bang & Olufsen's allocation of Serenes was very tightly controlled. Bang & Olufsen distributed the Serenes from its central warehouse in Denmark in small allocations to retailers. It is highly improbable, it seems to us, that the Serenes in which the appellant purported to deal (or in which it thought it was dealing) could
15 have come from this allocation of 28,778 units and we agree with Mr Jaffar's conclusion that they did not.

256. In cross-examination, Mr Jaffar also appeared to accept that the appellant's Serenes could not have come from the Samsung allocation i.e. the 6,940 units that Samsung distributed in small parcels throughout Europe. In fact, only 5,105 units
20 were shipped by Samsung up to the end of April 2006 to its European customers. In our view it is highly improbable that the Serenes in which the appellant claimed to have dealt came from Samsung's allocation of Serenes. Mr Bishop's evidence was that the Samsung Serenes have been distributed throughout Europe in relatively small parcels. It is most unlikely that anyone could have gathered together the requisite
25 number of Serenes in which the appellant claimed to have dealt.

257. Instead, Mr Jaffar appeared to argue that Samsung had produced more Serenes than were recorded as having been shipped by Samsung in the evidence of Mr Bishop. Mr Jaffar argued that Samsung had sold these additional Serenes into the grey market (it was not clear whether he was suggesting that Samsung did so directly or through
30 distributors) and that the appellant's Serenes came from that additional production.

258. It is true that Mr Bishop's evidence gave figures for the number of Serenes shipped from Samsung's Korean factory. He did not specifically give figures for the number of Serenes manufactured. However, Mr Bishop's evidence, which we accept,
35 was that in the 15 years in which he had worked for Samsung he had not known figures other than those for shipment to be produced. Moreover, if Samsung had produced additional amounts of Serenes – which it was perfectly entitled to do under the agreement with Bang & Olufsen – at some stage these would have been shipped out of the factory and would have shown up in the figures for the amounts of Serenes shipped.

40 259. Whatever may be the truth about Samsung selling surplus production of its mobile phones in the grey market (and we accept Mr Bishop's evidence that Samsung only sold to parties who accepted its terms and conditions), there was no evidence that Samsung had sold the Serenes in the grey market. All the evidence was that the production of Serenes was limited, consistent with Bang & Olufsen's and Samsung's
45 view that the Serenes were a high-end product aimed at a particular segment of the market. In addition, it was plain from the evidence of Mr Bishop and Mr Hjannung

that the Serenes were not a successful product – both Bang & Olufsen and Samsung had plenty of Serenes left over in order to satisfy demand. There would have been no reason for Samsung to manufacture additional numbers of an unsuccessful product.

5 260. We therefore considered that the evidence of Mr Bishop and Mr Hjannung indicated that it was more likely than not that the appellant had not bought Serenes.

(b) The appellant's suppliers: Future and Infinity

261. That conclusion is supported by the evidence we heard in relation to the appellant's suppliers: Future and Infinity.

10 262. The appellant's supplier in Deal 1 was Future. Although Future purported to sell only 200 Serenes to the appellant it is clear from the evidence of Mr Clifford that Future was a fraudulent contra-trader. A number of its officers and employees and those of associated companies were convicted for offences of dishonesty, including tax fraud.

15 263. Between January and June 2006, Future purported to undertake 244 deals involving the sale of 117,680 Serenes. On the evidence of Mr Bishop and Hjannung it was completely implausible that Future had actually dealt in that number of Serenes. Therefore, to cut a long story short, in relation to Deal 1 the appellant purported to buy Serenes from a fraudster who, the evidence shows, was itself purporting to deal in quantities of Serenes which could not exist. We note that Mr Jaffar claimed to have
20 been supplied with two sample Serenes by Future (this claim was first made by Mr Jaffar in cross-examination and had not been referred to in any of his four witness statements). We believe, if Mr Jaffar's claim is correct, that this was the total number of Serenes supplied by Future to the appellant.

25 264. As regards Deals 2 – 6, the appellant purported to buy Serenes from Infinity. We accept the evidence of Ms Holden that Infinity was a fraudulent contra-trader. The careful balancing of inputs and outputs, the consistent mark-ups, the fact that in the period 03/06 to 06/06 a total of 480 of Infinity's broker deals out of a total 580 traced back to missing traders or fraudulent tax losses clearly indicated that Infinity was heavily involved in VAT fraud as a contra-trader. In addition, between January and
30 June 2006 Infinity purported to trade in 39,202 Serenes. It seemed to us impossible, on the basis of the evidence from Mr Bishop and Mr Hjannung, that Infinity could have dealt in that number of genuine Serenes. We find, therefore, that Infinity, like Future, purported to deal in quantities of Serenes which simply did not exist.

35 265. Thus the evidence in relation to Future and Infinity supported the conclusion that the appellant had not been supplied with Serenes in the six deals under appeal.

(c) The appellant's freight forwarders and inspection reports

266. In addition, the evidence before us plainly indicated that the inspection reports carried out by A1 Logistics and Aquarius could not be relied upon.

40 267. A1 Logistics was run by Mr Lee Sellers and was used by the appellant, without any satisfactory due diligence, on the recommendation of the fraudster Future. As we have seen, Mr Sellers was convicted of fraudulent trading. Mr Parker's evidence included Mr Sellers' plea in mitigation. This included the admission:

5 "It is accepted that the [Mr Sellers] purported to complete partial and full inspections of loads and supplied reports suggesting that such inspections had been completed. In fact, though, these inspections were never properly carried out and the precise nature of the goods, in terms model numbers and the like, was not known or appreciated by the [Mr Sellers]."

268. Furthermore, A1 Logistics did not appear to store goods at its premises (other than, perhaps, overnight) which seems an extraordinary state of affairs for a freight forwarder.

10 269. Also, we were not satisfied with Mr Jaffar's evidence in relation to A1 Logistics' inspections. We have noted the contradiction in his evidence in relation to inspections at paragraphs 125 and 126. We have also noted that Mr Jaffar was unable to explain how the A1 Logistics inspection was carried out almost 3 weeks before Mr Jaffar requested an inspection.

15 270. We have, therefore, concluded that the A1 Logistics inspection reports lend no support to the appellant's case that it did buy the Serenes as recorded in the documentation for Deal 1.

20 271. As regards the inspection reports produced by Aquarius in relation to Deals 2 – 6, there was evidently a link between Aquarius and Infinity and Infinity Distribution (see the evidence in relation to Mr Bathia). Mr Jaffar used Aquarius on the recommendation of the fraudulent contra-trader Infinity. Moreover, Infinity used Aquarius in the majority of its transactions. We think it unlikely that a fraudster such as Infinity would have used a reputable freight forwarder when it was engaged in fraud on such a substantial scale.

25 272. On a number of visits by HMRC officers there was no evidence of mobile phones on Aquarius' premises. This was true even in a period when Aquarius, according to the documentation, was supposed to be dealing in very substantial quantities of mobile phones (e.g. on 7 June 2006).

30 273. We recognise that there was no evidence of any criminal convictions of officers or employees of Aquarius. However, in the circumstances, we did not think that the inspection reports produced by Aquarius could be relied upon to indicate that the appellant in fact acquired Serenes from Infinity.

(d) The customers' freight forwarders

35 274. In addition, we have taken into account, as part of the background factual matrix, the evidence obtained from the German (in relation to Allimpex) and French (in relation to Elandour) tax authorities that the appellant's customers appear to be involved in fraud. Furthermore, the freight forwarders of the appellant's customers also appear to have been convicted fraudsters or associated with convicted fraudsters. Boston Freight's owner and one of its employees were convicted of VAT fraud and seem to operate from farm buildings with a leaky roof (which, conveniently, resulted in some of their documentation being destroyed). The company secretary and operations manager of AFI had been convicted of VAT fraud. If there was something amiss with the purported shipments of Serenes in relation to the appeals transactions, these two players were unlikely to blow the whistle.

(e) The FCIB evidence of circular payments

275. In addition to the above, we have taken into account the evidence of Mr Reardon in relation to the payments by various parties through FCIB accounts.

276. It was plain from Mr Reardon's evidence that, in relation to Deals 2 – 6, the funds paid in respect of these transactions were being recycled in a circular fashion through various FCIB bank accounts. It seemed to us this was entirely inconsistent with legitimate arm's-length trading. HMRC, in leading this evidence, did not suggest that the appellant was aware of the circularity of the payment changes. HMRC did, however, submit that Mr Reardon's evidence in relation to the FCIB circular payments indicated that the appellant's transactions were part of an overall scheme to defraud the Exchequer and that, therefore, the ordinary commercial documentation of invoices, purchase orders and inspection reports did not correctly identify the true nature of the transaction or the goods being bought and sold. We accept that submission and we find that the FCIB evidence supports the conclusion that the appellant did not purchase the Serenes as shown on the documentation relating to Deals 2 – 6.

(f) The price for the Serenes paid by the appellant

277. In addition, the appellant paid £1,350 per unit for all the Serenes which it purported to buy in the six transactions under appeal. As an initial point, we simply observe that it is slightly strange that in transactions concluded over a month apart and all of which had different invoice dates (Deal 1 followed by Deals 2 – 6) that the price of the Serenes should have remained constant. Be that as it may, we could see no justification for the appellant paying that price when it was possible to buy a Serene from a Bang & Olufsen retailer for £800 in the UK and €1,100 in the Eurozone or from a Samsung customer for €1,000 (approximately £692).

278. Mr Jaffar argued that this differential in price (which neither Mr Bishop nor Mr Hjannung could account for) could be explained by the fact that the grey market was responding to demand from non-European customers visiting Europe as tourists. Whilst we accept Mr Jaffar's evidence that a lot of non-Europeans visit Europe as tourists, there was no evidence that they spent part of their holiday buying Serenes. Nor was there any credible evidence that the grey market was supplying customers in their home (i.e. non-European) markets. Instead, the evidence of Mr Bishop and Mr Hjannung was that the supply of Serenes exceeded demand.

279. Furthermore, we note that Mr Jaffar had not researched the retail price of the Serenes. It seemed odd, indeed it beggared belief, that he agreed to buy (wholesale) almost £5million worth of Serenes (the price including VAT) when he appeared to have no clue as to the European retail price of those goods.

280. For these reasons, we considered that the price paid by the appellant for the Serenes lent weight to the conclusion that the appellant's deals were not genuine commercial transactions and that this, therefore, supported the view that it was more likely than not that Serenes had not been supplied in these transactions.

281. We accepted the evidence of Mr Stone concerning the link between the appealed deals and MTIC fraud as providing a reason why Serenes were not supplied under the appealed deals.

(g) *Conclusion on Issue (b)*

282. Taking account of all these factors, and looking at the evidence in the round, we consider that it was more likely than not that the Serenes shown on the invoices issued by Future and Infinity to the appellant in relation to Deals 1 to 6 were not supplied to the appellant. Accordingly, we conclude that these invoices did not meet the requirements of Regulation 14 (1 (g) and/or Regulation 14 (1 (h) of the Regulations.

Were any goods supplied to the appellant in the disputed deals?

283. The appellant's main argument under this heading was that if, contrary to its main contention that it had received a supply of Serenes as described in the invoices, no Serenes had been supplied it had received a supply of counterfeit Serenes.

284. The evidence of Mr Bishop and Mr Hjannung was that they were not aware of any counterfeiting of Serenes.

285. In our view, it is highly unlikely that the appellant acquired counterfeit Serenes in the deals under appeal.

286. If large quantities of counterfeit Serenes were in circulation we consider that it would have been highly likely that Samsung and/or Bang & Olufsen would have been aware of that fact. Secondly, there would have been very little incentive for counterfeiters to produce fake Serenes because the handset was not popular with consumers and was a commercial disappointment. The Serenes were aimed at a small high-end segment of the mobile phone market and they were not products that were aimed at the mass market.

287. In any event, Mr Bishop's evidence was that the design of the Serenes was very different from that of a typical mobile phone. It seems highly improbable that counterfeiters would have gone to the effort and expense of counterfeiting such a specialised product which was, in any event, manufactured in relatively limited numbers and which was not in high demand from consumers.

288. We should add that there was no real evidence adduced by Mr Jaffar that the Serenes had been counterfeited. It may well be that other models of Samsung mobile phones have been counterfeited but there was no evidence that Serenes were the subject of counterfeiting.

289. For these reasons, we consider that it is more likely than not that the appellant did not acquire counterfeit Serenes in any of its six appealed transactions.

290. The only other evidence which appeared to support the possibility that the appellant may have been supplied with goods other than genuine Serenes came in the plea of mitigation of Mr Lee Sellers. In that plea, Mr Sellers' representatives indicated that mobile phones had always been supplied. However, the plea went on to admit that no proper inspection had been undertaken and "the precise nature of the goods, in terms model numbers and the like, was not known or appreciated by the [Mr Sellers]."

291. It seems to us odd (and indeed contradictory) for Mr Sellers' representatives to assert that there was always a cargo of mobile phones when they go on to admit that Mr Sellers did not know or appreciate the precise nature of the goods. Whilst we are prepared to accept and give weight to those parts of Mr Sellers' plea of mitigation which serve to incriminate him (on the basis that he was unlikely to overstate

incriminating material) we do not consider it appropriate to give weight to the material in Mr Sellers' plea which was exculpatory.

5 292. Besides the plea of Mr Sellers (and discounting, as we have done, the possible supply of counterfeit Serenes), there was no evidence that anything other than Serenes was supplied to the appellant. At no point did Mr Jaffar attempt to argue that different types of mobile phones or, indeed, different types of products had been supplied to the appellant. His case was that it was Serenes (or possibly counterfeit Serenes) that were supplied. In any event, the burden of proof would have been upon the appellant to demonstrate exactly what was supplied if it was not Serenes or counterfeit Serenes and that burden has not been discharged.

15 293. We do not consider that the making of payments and receipt of payments by the appellant for the deals under appeal can be relied upon as evidence that goods of some kind were supplied to the appellant. Similarly, the absence of complaints from customers cannot likewise be relied upon. On the evidence, we consider that the deals in question were part of a scheme of MTIC fraud, using contra-trading to disguise the fraud, and were not part of legitimate arm's-length commerce. This conclusion remains distinct from the question whether the appellant knew or should have known that its transactions were connected with VAT fraud, a question on which we express no views.

20 294. As noted, we accepted the evidence of Mr Stone concerning the link between the appealed deals and MTIC fraud as providing a reason why no goods were supplied under the appealed deals.

25 295. Accordingly, because we have found that neither Serenes nor counterfeit Serenes were supplied to the appellant, we find that on the balance of probabilities no goods were supplied to the appellant.

The exercise of HMRC's discretion under Regulation 29 (2) of the Regulations

30 296. In the light of our conclusion that the appellant received no supply of goods, the payments made by the appellant to its suppliers (Future and Infinity) could not constitute input tax. In our view, therefore, the HMRC's discretion under Regulation 29 (2) of the Regulations does not apply for the following reasons.

297. Mr Rowell submitted that HMRC's discretion under Regulation 29 (2) was subject to an important limitation viz that the transaction in question in respect of which an input deduction was claimed last actually had taken place. We agree.

35 298. In *John Reisdorf v Finanzamt Koln-West* [1996] EUECJ C-85/95 the CJEU held:

40 31. The answer to the national court's questions must therefore be that Article 18(1)(a) and Article 22(3) of the Sixth Directive permit the Member States to regard as an invoice not only the original but also any other document serving as an invoice that fulfils the criteria determined by the Member States themselves, and confer on them the power to require production of the original invoice in order to establish the right to deduct input tax, as well as the power, where a taxable person no longer holds the original, to admit other evidence *that the transaction in respect of which the deduction is claimed actually took place.*" (Emphasis added)

45

299. The VAT and Duties Tribunal applied *Reisdorf in Elite Designs International Ltd* 16925 interpreting Regulation 29 (2) as follows:

5 "32. The proviso to regulation 29(2) speaks of "other documentary evidence of the charge to VAT". Reisdorf speaks of "cogent" evidence. But that does not seem to us to mean that, where the document produced by the supplier as an invoice is invalid for some technical reason, such as a clear misprint of a number, that there must be some other cogent document. - to act as an invoice. Customs and Excise could in an appropriate case regard the defective invoice itself as cogent documentary evidence where the surrounding circumstances, whether evidenced in a documentary form or otherwise, *clearly corroborate that the relevant transaction occurred.*" (Emphasis added)

15 300. This analysis (that the Regulation 29 (2) discretion was limited to cases where the supply actually occurred) was also accepted by the VAT Tribunal in *Pexum Ltd v Revenue & Customs* [2007] UKVAT V20083. Furthermore, this view was endorsed in a decision of this tribunal, which was not cited to us, (Judge Hellier and Judge Raghavan) in *Future Phonic Ltd v Revenue & Customs* [2013] UKFTT 169 (TC) where the tribunal held:

20 "226. The Respondents referring to Article 17(2)(a) of the Sixth Directive and section 24(1) of VATA say the appellant has no right to deduct input tax because the goods in respect of which it seeks to exercise that right were not supplied to it. They say there is no scope for them to exercise their discretion to accept "such other...evidence" of the "charge to VAT" as the appellant had failed to prove the supplies as described on the invoices from Elite and Synergy took place which meant that no "charge to VAT" arose in the first place.

25 227. The analysis is accepted in other Tribunal decisions for instance the First-tier Tribunal decision of *Plazadome* [27]. At [28] the Tribunal stated:

30 "...The invoice does not itself create an entitlement to input tax but it evidences such an entitlement..."

35 228. In our view the Respondents' contention and the view of the Tribunal in *Plazadome* must be right. The reference to "other evidence" [emphasis added] in Regulation 29 of the VAT Regulations is consistent with this analysis. In the provisions of Article 18 of the Sixth Directive which the regulations transpose, the discretion of the Member State is clearly limited to the requirements set out in the preceding paragraphs of Article 18 which amongst other requirements set out a requirement to hold an invoice drawn up in specified way. The proviso in Article 18(3) only refers to deduction which the taxable person "has not made in accordance with paragraphs 1 and 2". It does not extend to dispensing with requirements in Article 17 which deal with the origin and scope of the right to deduct. It cannot be within the Commissioners' gift to allow a deduction for input tax even though as a matter of fact no supplies were made. Based on our conclusions above on this issue of fact any issue around exercise of the Commissioners' discretion does not arise if no supplies were made."

45 301. We respectfully agree with this analysis and accept Mr Rowell's submission that because we have found that no supply goods took place in respect of the six transactions under appeal no question of the exercise of HMRC's discretion under Regulation 29 (2) can arise.

302. In any event, to the extent that HMRC's discretion was relevant it was limited to a duty under Regulation 29 (2) to consider all the relevant evidence and decide whether the supplies in question were actually made. In our view, HMRC clearly discharged this duty. The witness statements of the various HMRC officers to which we have referred plainly indicate that HMRC gathered a considerable volume of evidence from the appellant and from other parties. HMRC considered this evidence in reaching its decision to deny a deduction for input tax for the six transactions under appeal. There was no evidence that HMRC failed to take account of any material facts or took into account irrelevant facts or considerations.

303. In our view, therefore, HMRC acted correctly in declining to exercise its discretion under Regulation 29 (2). In any event, as we have indicated, because we have concluded that no supplies actually took place in respect of the six disputed transactions, the exercise of HMRC's discretion under Regulation 29 (2) did not arise.

Decision

304. For the reasons given above, these appeals are dismissed.

Rights of appeal

305. 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.

**GUY BRANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 29 April 2014

Schedule 1

Table 1: Details of transactions, shipments and payments: summary of data from commercial documents

Deal No.	Supplier	Purchase invoice date	Quantity	Purchase price per unit	Input VAT	Total purchase price incl. VAT	EC customer	Freight forwarder	Sale invoice date and price	Date of inspection	Date and time of cross-Channel shipment	Date and time of payment
1	Future Communications (UK) Ltd	20/02/06	200	£1,350	£47,250.00	£317,250.00	Allimpex	A1 (UK) to Boston (Belgium)	20/02/06 £276,800	17/02/06	09/03/06, 00.18	In: 07/03/06 Out: 07/03/06
2	Infinity Holdings Ltd	06/04/06	614	£1,350	£145,057.50	£973,957.50	Allimpex	Aquarius (UK) to Boston (Belgium)	12/04/06 £849,776	26/04/06	26/04/06, 09.27 26/04/06, 13.11	In: 24/04/06 21.45.08 Out: 24/05/06 21.45.08 and 21.5 4.01
3	Infinity Holdings Ltd	07/04/06	750	£1,350	£177,187.50	£1,189,687.00	Elandour	Aquarius (UK) to AFI (France)	12/04/06 £1,038,000	26/04/06	26/04/06, 07.52	In: 24/04/06 23.03.00 Out: 24/04/06 23.03.00
4	Infinity Holdings Ltd	31/03/06	602	£1,350	£142,222.50	£954,922.50	Allimpex	Aquarius (UK) to Boston (Belgium)	12/04/06 £833,168	26/04/06	26/04/06, 09.27 26/04/06, 13.11	In: 24/04/06, 21.45.08 Out: 24/05/06, 21.45.08 and 21. 54.01
5	Infinity Holdings Ltd	12/04/06	350	£1,350	£82,687.50	£555,187.50	Elandour	Aquarius (UK) to AFI (France)	12/04/06 £484,400	26/04/06	26/04/06, 07.52	In: 24/04/06, 23.03.00 Out: 24/04/06, 23/03/00
6	Infinity Holdings Ltd	13/04/06	500	£1,350	£118,125.00	£793,125.00	Allimpex	Aquarius (UK) to Boston (Belgium)	13/04/06 £692,000	26/04/06	26/04/06, 09.27 24/04/06, 13.11	In: 24/04/06, 23.24.01 Out: 24/04/06 23.45.00
		TOTAL	3,016		£712,530	£4,784,129.50						

Table 2: Relationship between Deal numbers, CMR notes and inspection reports

CMR no.	Departure Date (Place)	Goods	Freight Forwarders	Instruction to carry out inspection	Inspection report	Driver	Channel Crossing	Vehicle	Deals
	Stoke-on-Trent	Serenes x 200	A1 to Boston	07/03/06	17/02/06	P Bettany	09/03/06, 00.18	DA05NDLK	1
50426	24/04/06 (London)	Serenes x 1400 on five pallets	Aquarius to Boston	25/04/06	26/04/06 (1,716 units)	H Cutland	26/04/06, 09.27	CV55CAU	2, 4, 6 (1716 units)
50427	24/04/06 (London)	Serenes x 316 on one pallet	Aquarius to Boston	25/04/06	26/04/06 (1,716 units)	M Sahdra	26/04/06, 13.11	WU52VUT	2, 4, 6 (1716 units)
50407	24/04/06 (London)	Serenes x 1100 on four pallets	Aquarius to AFI	25/04/06	26/04/06 (1,100 units)	K Smith	26/06/06, 07.52	Y63CVV	3, 5 (1100 units)

Schedule 2 – "Shipments from Korea": extract from exhibit to Mr Stephen Bishop's witness statement

Category	Total	Nov 2005	Dec 2005	Jan 2006	Feb 2006	Mar 2006	April 2006	May 2006	June 2006	July 2006	Aug 2006	Sept 2006	Oct 2006	Nov 2006	Dec 2006
TOTAL	44,176	200	2260	5310	9449	11,007	7500	1620				1142	1888	1200	2600
Netherlands	1020			200	400	200	220								
France	700				500		200								
Germany	1100		150	200	250	200	300								
Denmark	37,028	200	2110	4000	6248	9680	6540	1620				1142	1888	1200	2400
Russia	3358			910	1521	927									
Ukraine	690				450		240								
UK	280				80										200