# TC04249

**Appeal number: TC/2011/09221**

***Value Added Tax - Purchase of Apple iPhones by Appellant through 80 employees who bought small quantities from Apple retail stores either in their own individual names or more usually in false names or without giving any name, and never openly on behalf of the Appellant - Effect of section 47(2A) VAT Act 1994 - Whether HMRC's refusal to accept other evidence, in the absence of valid VAT invoices, to constitute sufficient evidence of the supply of the phones to the Appellant was reasonable - Whether section 47(2A) VAT Act 1994 complies with the provision in Article 14.2 (c) of the EC Directive 2006/112/EC and whether this issue should be referred to the ECJ - Appeal dismissed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**SCANDICO LTD** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE HOWARD M. NOWLAN**
**MRS SONIA GABLE**

**Sitting in public at 45 Bedford Square in London on 3–6 and 13 November 2014**

**Robert Holland of Dass Solicitors on behalf of the Appellant**

**Christopher Kerr, counsel, on behalf of the Respondents**

## DECISION

### *Introduction*

1. This is one of the cases, of which others have already been decided, in relation to the issue of whether the Appellant phone trader was entitled to an input deduction when it had arranged to acquire newly-issued iPhones by engaging approximately 80 employees to buy the phones on its behalf from the Apple retail stores. Since the policy of Apple was to preclude the sale of phones to traders that might on-sell them, Apple generally refused to sell the phones through its ordinary retail stores to phone traders, and limited the number of phones that any individual could purchase to two phones. In order to circumvent this policy, the Appellant provided its employees, normally referred to as "runners", with cash, and instructed each of them to buy two phones on as many occasions as they could manage. Since the phones had only been released in the United Kingdom in the period when they were purchased in the manner described, the phones commanded a considerable premium in various export markets.

2. Sales of the phones to customers outside the UK, whether in or not in the EC, attracted no VAT, and similarly the lesser quantities of phones that the Appellant sold to other UK traders were also not subject to VAT on account of the reverse charge mechanism (imposing the liability to VAT on the purchaser) provided the price for the sale of a sufficient number of phones exceeded £5,000. All of the Appellant's on-sales were in the categories just described. Accordingly, the Appellant sought to recover the VAT that had been charged on all the retail sales by Apple, duly recorded in the till receipts provided by Apple to the individual purchasers, all of which receipts had been handed to and retained by the Appellant.

3. Not that this further point is particularly relevant to the VAT question as to whether the Appellant could indeed recover the VAT that had been charged by Apple, it happened to be the case that, when the 16GB iPhone 4s had been purchased for a VAT-inclusive price of £510, the VAT-exclusive prices at which the phones had generally been sold was again in the region of £510 per phone. Occasionally it was marginally below that figure, but more often it was at or marginally above the VAT-inclusive purchase price. Accordingly, ignoring expenses, the Appellant would have been in a broadly break-even position, were it to fail to recover the VAT, and its profit would have been approximately equal to the VAT if it managed to recover the VAT.

4. The Appellant had been conducting the relevant activity from August 2010, and initially its reclaims for the VAT had been accepted and paid by HMRC. In the months of January and February 2011, approximately 7,000 phones were purchased in the two months combined and in the light of the increased turnover, HMRC subjected the reclaims for these two periods to extended verification.

5. It was accepted by the Appellant that the till receipts provided by Apple had not been valid VAT invoices because they did not contain the required information. As a result, HMRC might, in their discretion, accept other evidence that there had been a taxable sale of the phones by Apple to the Appellant, with Apple having paid the VAT to HMRC, whereupon the Appellant would have been entitled to deduct the relevant input tax. HMRC's decision on three occasions (on 4 November 2011, 18 May 2012 and 30 September 2014) was, however, that notwithstanding the information provided, and the additional information provided to which the second and third decisions related, the Appellant had not

provided records and documentation to establish an audit trail to confirm that it had received the taxable supplies as described on the till receipts. Accordingly the right to deduct the VAT was denied.

***The points in issue in this Appeal***

6. The Appellant's initial contentions had been entirely along the lines that HMRC's decision not to accept the alternative evidence of the claimed supply had been unreasonable. We made it clear at an early point in the hearing, however, that it seemed to us that the simpler basis on which the Appellant appeared to be unable to claim an input deduction was that under section 47(2A) VAT Act 1994 where supplies had been made by Apple to agents for an undisclosed principal, the supplies were deemed for VAT purposes to be by Apple to the individuals who had purchased the iPhones in the Apple stores, with those individuals then being deemed to supply the phones to the Appellant, on whose behalf they had been purchased. None of the individuals had ever intimated that they were buying the iPhones otherwise than on their own behalf, and it was indeed absolutely essential that this was so in order to seek to circumvent the Apple policies that we mentioned in paragraph 1 above. It therefore appeared that since a VAT input deduction could plainly not flow through those deemed transactions involving non-registered individuals, the Appellant's claim had to fail. We should add that the earlier First-tier Tribunal decision of Judge Kempster and Mrs. Tanner, namely *Gold Standard Telecom Ltd v. HMRC,* [2014] UKFTT 577, had decided that section 47(2A) VAT Act 1994 precluded the appellant in that case from obtaining an input deduction on broadly similar facts to those in this case.

7. While HMRC's original decisions had not mentioned the significance of section 47(2A), and virtually no attention had been paid to it during negotiations, HMRC's contentions before us certainly raised the legal issue that section 47(2A) should result in the Appellant's appeal being dismissed.

8. The first issue for us, therefore, is whether section 47(2A) did apply in this case, such that the Appeal should be dismissed on that ground.

9. The second issue assumes that in some way section 47(2A) is inapplicable, and it thus addresses the issue of whether HMRC's refusal to accept the alternative evidence in support of the Appellant's claim for an input tax deduction was unreasonable. It was accepted by both parties that we had to address this issue by looking only to the information that HMRC had on the occasion of each of the decisions, and not for instance by reference to information that emerged for the first time during the hearing. It was also accepted that our jurisdiction in relation to this matter was simply to decide whether we considered the decision to have been reasonable or not, and that if we decided that it had been unreasonable, HMRC should be asked to reconsider the matter in the light of the factors that we might have indicated should have been taken into account, or that should have been ignored.

10. Both parties were also agreed that, in addition to our considering the reasonableness of HMRC's three decisions (most obviously the last of the three), we should also decide independently whether we concluded that there had actually been taxable supplies from Apple to the Appellant, as that was a further and separate pre-condition to sustaining an input deduction. In regard to this issue it was accepted by the Respondents that we could and should address this on the basis of all the information, including that that emerged during the hearing and that we were not restricted, in deciding this issue, to pay regard only to the

information possessed by HMRC when the various decisions, and in particular the third decision, were made.

11. We will refer, in due course, to the respect in which the two issues of the reasonableness of HMRC's decision and whether we conclude that there was a supply by Apple to the Appellant were closely inter-related, and to the circumstances in which we consider that we could altogether disregard the claimed separate issue of whether there had been taxable supplies.

12. Our decisions on those two issues are that on the balance of probability, the Appellant has established that indirect supplies were made to it by Apple, but on the more pertinent issue of whether we considered that HMRC's officer had been unreasonable in claiming that the secondary evidence, in the absence of valid VAT invoices, was sufficient to sustain its claim for input deductions, we decide that the officer's decision cannot be classed as unreasonable. Accordingly on this ground, the Appellant's appeal is dismissed.

13. In the Appellant's closing submissions, the Appellant's representative acknowledged that in the short adjournment between the majority of the hearing and the resumption of the hearing for closing submissions on 18 November, a second decision had been released by the First-tier Tribunal, namely that in *Xpress Telecom Limited v. HMRC*, decided by Judge Poole and Gill Hunter, concluding in line with the *Gold Standard* decision that section 47(2A) VAT Act 1994 applied in cases of this type, and that that provision automatically undermined the Appellant's claim. In view of the Appellant's expectation that we would be inclined to follow both precedents, albeit that they were not binding on us (a very realistic expectation in the light of the indications that we had given from the start of the hearing), three new arguments were advanced, which we regard collectively as the third issue in this Appeal.

14. The additional three arguments were all legal arguments, advanced with a view to contending that section 47(2A) did not preclude the Appellant from sustaining an input deduction in this case. We will not summarise them now but will deal with them in giving our decision. We dismiss two of them without hesitation. The third requested us to refer a question in relation to the Directive provision implemented by section 47(2A) to the European Court of Justice. Our decision is that it is unnecessary to refer this question to the ECJ since the Appeal is in any event dismissed on the ground indicated in paragraph 12 above. That point apart, however, we might very well have been inclined to refer the relevant issue to the ECJ, not so much for the reasons advanced on behalf of the Appellant but because we considered that copy correspondence provided to us by the Respondents, the correspondence being between HM Customs & Excise and the European Commission, provided unsatisfactory answers to the question in issue.

***The evidence***

15. Evidence was given on behalf of the Appellant by Mr. Shabbir Dharas ("Mr. Dharas"), and by a few of the runners and the employees engaged to act as both runners and to be responsible for distributing the cash to be applied in purchasing iPhones to the runners and then to be responsible for collecting the phones from the runners, such people being referred to as "head runners". We will make a few comments about the witness statements and the oral evidence. We will then summarise the facts, and in doing that we will refer to particular evidence given by the different witnesses.

16. English was not the first language of any of the runners and head runners and we should make two observations in relation to this. First it was evident, and conceded by most of the runners and head runners, that their witness statements had been drafted by the Appellant's solicitor. On more than one occasion a witness statement had not been signed. One was said to have been read only on the day before the hearing. It was also far from clear that all the witnesses had fully understood their witness statements.

17. The slight uncertainty created by the general points made in the previous paragraph was illustrated by the fact that most of the witness statements produced by anyone responsible for buying phones described the various ways in which they could acquire phones, and one possible method of booking a purchase of phones was said to be to access the internet after midnight, booking a purchase of phones on Apple's website for collection later in the day at a particular store, and giving the intending purchaser's email address. Where Apple was able to confirm that phones would be available at the indicated store, Apple would send the intending purchaser an email, giving a booking reference and this would assure the recipient that if he attended the relevant store during the day he would be able to purchase the phone or phones ordered. Virtually all of the witness statements recorded that the runners often gave false email addresses when booking phones in this manner which was obviously not feasible since they would not then have received Apple's email and the booking details if the email address had been incorrect. Accordingly each witness whose statement made this ignorant claim had to commence his oral evidence by deleting these references, and by saying that, as the matter was rather complicated and English was not his first language, he had not fully understood what the witness statement meant in relation to this claim, when signing it and saying that everything asserted was true.

18. Notwithstanding the slight doubt occasioned by this point and the feature that language occasioned a few difficulties in understanding the evidence and the responses to cross-examination, we did not conclude that any of the witnesses had been dishonest. One witness, Mr. A M Afzal ("Mr. Afzal") spoke excellent English and gave his evidence clearly and very convincingly.

***The facts***

19. Mr. Dharas and his family owned the Appellant, and Mr. Dharas was a director and effectively the person in total control of the Appellant's business. Mr. Dharas and his family (possibly different members of the family) also owned another company referred to as Rigcharm. Rigcharm is of some relevance to this appeal, as we will mention below.

20. Mr. Dharas had obviously realised that, because Apple launched new iPhones in the United Kingdom before it released them in any other countries, there was great demand in those countries to acquire the newly-launched iPhones, and traders in those countries were prepared to pay a considerable premium in order to acquire such iPhones Whilst there is no great relevance to the profit margin that the Appellant expected to make, we have already mentioned that when the 16 GB iPhones were purchased on a VAT-inclusive basis from Apple stores, the Appellant was generally able to sell them to its customers at a VAT-exclusive amount roughly equal to, or on average at a price marginally in excess of, the UK VAT-inclusive price. The Appellant's customers for the phones presently in dispute were generally foreign customers, located in Dubai, Denmark (though the Danish trader appeared to want the phones to be delivered to Milan) and some were UK traders. As we have again mentioned, none of the sales by the Appellant attracted VAT, either because they were to

non-UK customers, or because in the case of UK customers, the customers were dealers, the price for a consignment of phones sold exceeded £5,000 and accordingly the reverse charge mechanism meant that the Appellant's sale did not attract VAT, the liability for VAT being on the purchaser.

21. Apple wished to prevent traders from purchasing phones in the UK and then exporting them and so it pursued a policy of ensuring that its UK stores did not sell to phone traders, and that they generally sold only two phones to any one customer.

22. In order to circumvent this policy and to ensure that the Appellant could acquire relatively large quantities of phones, the Appellant engaged runners, generally students, to go to Apple stores to purchase phones on behalf of the Appellant. This process had commenced in August 2010 and we were told that the Appellant's claims to recover the VAT, recorded on the Apple till receipts, had been successful during 2010. It was only in January and February 2011 that the larger reclaims occasioned a verification, and then a denial, by HMRC of the Appellant's entitlement to recover the VAT.

***Employee issues***

23. In January and February 2011, the Appellant was employing approximately 80 employees to act as runners, a few of them performing the more responsible tasks, as head runners, of distributing cash to the runners, and then collecting the phones when the runners came out of the Apple stores, carrying both the phones (generally two phones) purchased and the relevant till receipts. About 80% of the runners and the head runners were students, and the great majority were non-UK nationals, being principally from India and Pakistan. Many of them attended Shia religious services and lectures, the significance of this being that several of them were recruited by the religious scholar who gave evidence to us, namely Murtaza Mehdi, who we will refer to as "Murtaza" to distinguish him from his brother, Rizwan Mehdi Khan, who we will refer to as "Rizwan".

24. Each of the employees, including the head runners who were responsible for the distribution of the cash that we will describe below, were given a monthly salary of £390. It was suggested that their services were performed on only about 10 days a month, but no indication was given as to how particular employees might be selected to buy iPhones on particular days, and how arrangements were made for them either to collect cash at the start of the day or go straight to stores where cash would then be handed to them by the head runners. As the Respondents commented, there appeared to be no sanction to stop employees taking their £390, and then failing ever to go to stores to buy iPhones. Allegedly there were also no bonuses or benefits of any kind for having purchased an exceptionally large quantity of phones. There was also no actual documentary evidence of any sort that actually confirmed that employees were even paid the £390 monthly, though it was confirmed by the Respondents that the correct filings had been made for PAYE purposes in relation to the fixed monthly salaries.

25. Two individuals who appear to have been pivotal to the operation were Murtaza and Rizwan. As we have mentioned, Murtaza was a religious scholar, and although he appeared to have spent a very considerable time working for the Appellant, we were told that he was not an employee, and that he was never paid anything. His brother Rizwan was an employee and he was paid but, notwithstanding his pivotal role, he was only paid the standard £390 monthly. Two of the essential roles played by the two brothers related to the

enrolment of many of the runners, and to the distribution of cash and the collection of phones that we will describe shortly.

26. There was somewhat conflicting evidence in relation to the manner in which the runners were engaged. The Respondents made the point that, since relatively poor students would at times be holding quite significant sums of money, one might have expected there to be considerable scrutiny of the honesty of new recruits. In relation to the method of selection, Mr. Dharas said that he only met or knew a small proportion of the runners, and that they were principally engaged by Murtaza, in whom Mr. Dharas had very great faith. Anyone acceptable to Murtaza was acceptable to him. It appeared, however, from the evidence given by the runners who gave evidence to us that most had been recruited by Rizwan. Some had admittedly been members of Murtaza's Shia gatherings, but the majority had been engaged by Rizwan, either having performed similar duties (possibly along with Rizwan) for another phone trader undertaking the identical activities, or simply because Rizwan knew people in the mobile phone industry, and they had performed some role in that industry. Furthermore when Murtaza was taken through a random sample of employees, he conceded that he did not know three out of the five names put to him.

27. We should add that the Appellant's representative asserted that in the Shia community there would be great shame attached to the theft of money, and that we ought not to judge the risk of undertaking few checks on employees from our own standards, as opposed to the standards prevailing in the relevant culture. Mr. Dharas also admitted that there had been a risk in providing cash to numerous individuals who might have the opportunity to walk off with it and disappear but he said that there were risks in all business and in the event there had been no theft or pilfering. He said that the business was a very fast-moving business and that the priority was to have numerous runners available to buy numerous phones so that profits could be made in what might be the short window of opportunity in selling them to traders in countries where the phones had not yet been released.

28. We were also told that until the very end of the period under consideration, employees had not been reimbursed for any expenses that they incurred. Many were travelling around London from store to store (presumably by bus or tube), and some even drove as far as Birmingham, Leicester, Southampton and Milton Keynes in order to buy phones. Occasionally it seems that they were driven in the company car, but generally they drove in a car owned by or available to one of the employees, with generally four of five employees travelling in the one car and sharing the fuel costs. Mr. Dharas said that most of the employees would have had student cards and would have been needing to travel round London in the course of attending their studies in any event. Whatever the explanation, none of the employees were reimbursed for expenses.

29. In his evidence, Mr. Dharas had said that the employees had been instructed not to give their names when buying the phones. The four or five runners who gave evidence to us said that they had not been instructed not to give their names. Indeed 12% of the till receipts referred to the names of employees. No witnesses expressly said that they knew that they should not indicate that they buying on behalf of Sandico, though since this was of the very essence of the operation we imagine that this was obvious to all the runners. Certainly those who had been performing the same role for some other phone trader would presumably have realised that this was important. When asked, all the runners who gave evidence to us did confirm that they believed that they were employed by the Appellant, and that they were buying phones on behalf of the Appellant.

***Obtaining and distributing the money***

30. Although the Appellant banked with Barclays, Mr. Dharas explained that he obtained cash from a money exchange business called Choice Fored ("Choice") based in Paddington. He explained that the Appellant, or the related company Rigcharm, would transfer money to Choice, and then, regardless of which of the companies had made the transfer, Mr. Dharas or, on about two occasions, Murtaza and Rizwan, were able to obtain large amounts of cash from Choice.

31. Mr. Dharas explained that it was unappealing to obtain cash from Barclays because at Barclays cash (even in the very large amounts involved) would only ever be passed over at the normal counters, and since Barclays was not used to providing cash in the large amounts required, he would have had to give several days' notice of the amounts required. Furthermore, he would have been unable to park close to his nearest Barclays branch, which would have increased the risk of somebody having seen the large amounts of cash being handed over the counter, with Mr. Dharas then walking some distance to where his car had been left.

32. The operation at Choice was far more convenient because they held larger amounts of cash, and could obtain cash at far shorter notice. Their rates were also better than those offered by Barclays when dollars or euros were transferred to Choice (following the earlier sale of iPhones to Dubai when payment was made to the Appellant in dollars, and to Denmark, when payment was made in euros). Large amounts of cash were then always handed over in a private room, and finally he could park his car immediately outside the office.

33. We were told that there was no written loan agreement between Rigcharm and the Appellant, though it was claimed that when cash was provided to Choice by Rigcharm, this constituted a loan made to the Appellant by Rigcharm. There was a reference to the fact that £250,000 of the accumulated loans had been repaid in cash, and possibly the balance by transfer, but we were shown no documentary evidence in relation to anything material to any claimed loan or to repayments of any loan.

34. At one time, when HMRC were considering the available funds to purchase iPhones and the number of phones ostensibly purchased, HMRC were questioning whether the Appellant indeed had enough funds to have purchased the relevant number of phones. This, however, was when HMRC were considering only the available funds on the part of the Appellant, and when they were ignorant of the way in which Rigcharm was providing additional funding. Once this became clear to HMRC, HMRC conceded that at all times (taking the funds of both companies into account, and the monies drawn from Choice) there was ample cash (indeed generally excessive cash) available to fund the purchases ostensibly made by the Appellant.

35. When the cash (often in amounts of £20,000 and £30,000 or even more) had been obtained (as we indicated, generally by Mr. Dharas) it was then usually passed to the head runners, very often to Murtaza and Rizwan. There were several people employed as head runners, and although we only had evidence from three or four, there may have been others. While Mr. Dharas generally passed the cash to Murtaza and Rizwan, either at his or Murtaza's house, or at some pre-arranged place, we presume that Murtaza and Rizwan may

then have passed some of it to other head runners. The head runners then passed sufficient quantities of cash (possibly £1,020 or £2,040, being the amounts required to purchase 2 or 4 phones) to each of the runners who was to be seeking to purchase phones on the day in question. Sometimes the cash in these amounts was handed to the runners at one of the head runners' houses, but more often the head runner would have arranged by mobile phone contact to meet a given number of runners outside one of the Apple stores that were known to have available stock, and the cash would be handed over there. When the head runner would not previously have met some of the runners we were told that they would have the mobile phone numbers of the runners, and would ring them to indicate that they were about to arrive at the store and the runners would then be identified by describing their clothing or by waving.

***The purchase of the phones, the method by which head runners knew which runners would be located at particular stores, the Apple receipts and their details, and the collection of the phones and receipts***

36. We were told that once the runners had their allocated amounts of cash, they would enter the stores and generally join a queue to purchase two, or if they were lucky four, phones. Having purchased the phones, and retained the receipts, they would leave the store, generally hand the purchased phones and the receipts immediately to the waiting head runner, and the latter would put them in a rucksack.

37. The receipts that the runners obtained were conceded by the Appellant not to be formal VAT receipts, but were rather till receipts. All of them indicated the Apple store from which the phone had been bought, the date and time of purchase, the description of phone, such as "iPhone 4 Black 16GB", the IMEI number of the phone purchased and a couple of other serial numbers, the price, the VAT charged, and they then had two lines, one headed "Customer", and the other appearing on the receipt when a customer's email address had been given, giving that address. The receipts also indicated whether the phones had been purchased with cash, by credit or debit card or with an Apple gift voucher.

38. None of the receipts in respect of the January and February 2011 purchases included the Appellant's name as the customer. Approximately 12% of them included a name that corresponded to a name on the list of runners said to be employed by the Appellant. Many others had no customer's name on them at all. It was said by some of the witnesses that this was often because the Apple sales staff were in such a hurry to deal with orders, and to reduce the queue of customers, that they did not bother to ask for a customer name. A considerable number of receipts included a name that did not correspond to the names of any of the employees said to be employed as runners by the Appellant. It was impossible to know whether other people than employees had been engaged by the Appellant to purchase iPhones, or whether runners had sub-contracted the role to their friends, or more obviously whether the runners, reluctant to be refused stock if the Apple sales staff recognised that they had already purchased several phones so that they breached the limit of two iPhones per customer, had simply given false names. Similarly, a very few of the receipts included a realistic looking email address of the customer (though again never the Appellant's email address), whilst others contained false email addresses such as "a@a".

39. While most of the iPhones were duly purchased with the cash given to the runners as just described, the receipts indicated that some had been purchased with Apple gift cards, and others had been purchased by credit or debit cards.

40.. One witness explained that the common explanation for purchases with gift cards was that the phones could be purchased by lining up in much shorter queues if gift cards were going to be tendered for the phones, so that the employees would just go into the store, hand over cash to obtain a gift card valid for the appropriate amount and then join the short queue for gift card customers. This was clearly not the invariable explanation for the use of gift cards, because one witness referred to having been handed a gift card for a quite considerable amount, in a multiple of £510, so that when the card was produced for the purchase of two phones, the card thereafter was valid for the balance of its amount after deducting £1,020.

41. Where credit cards were used, they were again never company cards. Some witnesses said that even if they had been handed cash with which to purchase phones, they could obtain one month's free credit by pocketing the cash and paying the equivalent amount on their credit cards. In their case, the question put to them as to whether they had been reimbursed for having used their credit cards was irrelevant because they had of course been given the cash before they had used their cards. Mr. Afzal appeared to be in the other category since he had purchased iPhones with his credit card when buying them at places like Milton Keynes and Southampton, but he did say that he had then been reimbursed.

42. When runners purchased the iPhones by using credit or debit cards, Mr. Dharas appeared never to have asked to see their credit card statements, with a view to illustrating that at least for one of the steps in the transactions, documentation supported the claim in relation to the purchase of the phones. He said, both in relation to credit card statements, and in relation to the retention of receipts from Maina, the freight forwarder, that we will refer to below, that he thought it much more important just to retain the Apple receipts and he assumed that nothing else was required.

***The administration of the purchase arrangements***

43. There were several features to the administration of the above claimed purchase mechanics that we considered were not convincingly explained to us.

44. There appeared, first, to be a total absence of documentation in relation to very large amounts of cash collected from Choice (often in amounts of at least £30,000) and the retention then of records as to how much had been handed to each head runner, and then in turn as to how much each head runner had handed to the individual runners. Mr. Dharas said that he retained all the figures in his head and had no need for paper records. The head runners either appeared to do the same, or else to keep a record of distributions and collections of phones and un-spent money on a sheet of A4 paper which would be thrown away once the day's cash distribution had all been accounted for in the form of either phones or the residue of the cash.

45. We found this apparent absence of organised planning and documentation difficult to understand and difficult to believe. Firstly, in relation to the number of runners that might be expected to be operating on any particular day and in any area, we were not told who would ascertain the availability of particular runners on a particular day or whether they volunteered for duty on the day. They were ostensibly paid the £390 a month, regardless of whether they purchased no phones, a few phones, or countless phones, and there appeared to be no reward for working more hours. Quite apart from that, however, it seemed odd that nobody explained to us whether each head runner might expect any given number of runners

to be waiting at a particular store to buy phones, and to utilise the substantial amount of cash that had been handed to the head runner. We were also told that, on some occasions, runners queueing up at a particular store might find that the store had sold all its stock, and in some cases we were told that the runners would be sent to another store, still holding the cash that the head runner had handed them, where they would hand the purchased phones to a different head runner. There were said also to be occasions when runners might retain cash overnight, when phones had ceased to be available, whereupon of course phones purchased with cash that had been distributed on Day 1 would be handed to a head runner (possibly a different head runner from the one who had handed out the cash on Day 1) on Day 2 when the runner had found some available phones.

46. Another complicating factor was that although we have so far referred to the purchase of 16GB phones at the price of £510, the till receipts indicated that a significant minority of phones purchased had been the more expensive 32GB phones. We obviously accept that it would have been easy to ensure that one particular runner given £2,040 would have performed his role perfectly if he had purchased 2 16GB phones and 1 32GB phone and handed the balance of his initial cash allocation back at the end of the day. When, however, numerous runners might have been operating at a time, some retaining cash overnight, and others confusing the picture with a combination of 16 and 32GB purchases, one would have expected a very careful reporting practice to be instituted.

47. In the event we were given no indication of who encouraged a given number of runners to operate on any day and at which stores; how much money thus needed to be distributed to head runners in order to fund the purchases, and how all the collected phones, and the balance of cash would be recorded at the end of the day, or failing that on the following day. While there is nothing theoretically complicated about any of this, it did seem incredible that the system could work in practice with no apparent administration, no record keeping and no checks on the honesty or reliability of the runners who may or may not have been known to Murtaza.

***The subsequent transportation of the phones***

48. When the phones had been collected by head runners, they were generally taken back to Murtaza's house, and then taken to the premises of the freight forwarder referred to as Maina if the phones were to be exported or to the Appellant's own warehouse if they were to be sold to a UK customer. On some occasions, the phones were simply taken directly to Maina's premises or the Appellant's warehouse.

49. We were shown no documentation to illustrate that the phones had been put into Maina's custody. We were told that sometimes receipts were provided to the person handing in the phones, and on other occasions receipts were not produced. When they had been produced they were handed to Mr. Dharas, but he had not retained them. Phones deposited with Maina were said to have been packed up for export transportation and despatched either immediately after receipt or on the next day. HMRC had been shown a considerable amount of documentation, including invoices issued by the Appellant to its export customers. HMRC believed that they had only been shown one single purchase order from any of the export customers and they initially suggested that that purchase order contained some text that had been redacted.

50. This led to a dispute and an application to produce additional evidence, which we did grant but obviously on the basis that the further evidence would have no bearing on the "reasonableness" issue that we had got to determine because HMRC claimed never to have seen the evidence before the hearing. The Appellant claimed that all the evidence that was produced to us, following this application, had in fact been sent to HMRC at a much earlier date, and that HMRC must simply have lost it. The letter that ostensibly sent HMRC the evidence that was produced during the hearing simply referred to sending "Deal packs", and since we indicated in the previous paragraph that HMRC accepted that they had received copies of invoices and other documentation, it was impossible to tell whether the purchase orders and other documents produced during the hearing had or had not been sent with the letter sending the "deal packs". The one thing that we were able to see, however, was that the clearer copy of the one purchase order that HMRC had conceded they had received illustrated that the poor version that HMRC had said had included some redacted wording did not in fact contain any redactions. Text had simply been typed across a shaded section, and by the time the document had been copied many times, it looked as if there had been redactions. By the time the Appellant had produced the further documentation to supplement the documentation that HMRC conceded that it had originally received and that it had produced for the hearing, it is fair to say that there was reasonably comprehensive documentation to illustrate the sales (ostensibly of the iPhones acquired in the manner described above) and the payment by the customers, in sterling, dollars or euro for those phones.

51. Where phones were to be sold to a UK customer, they were not deposited with Maina, but taken to the Appellant's own warehouse. Leaving aside the issue of IMEI numbers that we will deal with below, they were then packaged up and either collected by the customer or transported by the carriers FedEx (on one occasion) and more usually Interken. The phones were occasionally held in the warehouse, but usually, as with the exported phones, they were despatched very quickly to the customers. Mr. Dharas made the point that prices could fluctuate which made it essential to deliver to customers as soon as phones had been acquired and amassed into suitable quantities.

52. The Respondents attached some significance to the fact that when the case officer visited the Appellant's premises some months after the months relevant to this Appeal, she saw no stock. This seems irrelevant to us since the Appellant made it clear that stock was generally despatched immediately after acquisition, so that it may well have been usual for there to be days when no stock was held in the warehouse.

***IMEI numbers***

53. We have already indicated that each Apple till receipt gave the IMEI number of the phone that had been purchased. We were shown three lists of IMEI numbers, produced by the Appellant, in which the lists of numbers did correspond to the IMEI numbers on the Apple till receipts. These lists of numbers had apparently been attached to the invoices, or some of the invoices, evidencing the onwards supply of the iPhones to customers. There was, however, no indication that the three lists had been produced electronically by scanning the numbers of phones, for instance at Maina's depot or in the Appellant's warehouse, and it was theoretically possible that the lists might simply have been produced by going through the till receipts and typing out each of the IMEI numbers on those till receipts.

54. The Appellant's claim was that two of its employees, who worked in the warehouse and dealt with the documentation of sales to customers did scan the phones held in the warehouse, i.e. usually those destined for domestic sale. These two employees were paid considerably larger salaries than the runners and head runners who were paid £390 a month. The two employees in the office and warehouse were not available to give evidence because one had left the UK, and the other had now set up in business on his own, having apparently fallen out with Mr. Dharas. The result of these two individuals being unable to provide evidence is that we cannot say that they did actually scan the phones that were in the warehouse or that the lists shown to us were produced electronically, as opposed just to being copied out, as we remarked above. Moreover, and very relevantly, the phones taken to the warehouse were said to be generally those in the minority category destined for sale to domestic customers, and not those taken straight to Maina's warehouse for despatch overseas.

55. We were also shown an invoice from Interken for the service of scanning IMEI numbers, but it was not accompanied by any list of the numbers for anyone to verify that the items scanned had been included in the phones purchased from Apple for which the till receipts were held.

56. It seems that Maina did not perform any scanning services, but it was said that the recipients in Dubai did scan the IMEI numbers of the phones on arrival in Dubai. We were not shown, however, any list of numbers produced by any such exercise, and so could not conclude that any of the IMEI evidence definitely established that the phones (either those said to have been scanned by the two employees in the warehouse, or those scanned by Interken or those said to have been scanned by the customer in Dubai) were definitely the same phones that the runners had purchased from Apple.

57. The particular point that was not clear to us in relation to IMEI numbers was how it was suggested that the Appellant obtained lists of IMEI numbers derived from a scanning exercise in the case of the phones that were exported, and then attached those lists to sales invoices. In the case of the exported phones, there was never a suggestion that these had been brought to the Appellant's warehouse and scanned by the two relevant employees, because all or at least the vast majority of the phones for sale overseas were said to have been taken straight to Maina's warehouse. The feature that Interken provided an invoice in relation to scanning, without providing the numbers, with most of Interken services relating to the onward distribution of phones to UK customers did not appear to explain how the phones taken straight to Maina's warehouse for virtually immediate despatch to overseas customers could have been scanned, and the scanned lists provided to the Appellant for them to be attached to the sales invoices.

***The significance of the role played by Rigcharm***

58. We have already mentioned that Mr. Dharas and members of his family owned another company, Rigcharm, and that the two appeared to be operated together in several respects.

59. We understood that Rigcharm had been trading for many years and that it had built up considerable retained profits. We were also told that it had been involved in MTIC trading in 2006; that HMRC had denied its claim for input tax on *Kittel* lines; that Rigcharm's appeal to the First-tier Tribunal had been dismissed, but that Rigcharm had a pending appeal against the First-tier decision to the Upper Tribunal. This background, coupled with the fact that both the Appellant and Rigcharm were trading in what HMRC regarded as a trade sector

carrying high risk to the exchequer, was a factor of some significance in relation to the initial decision to open the process of extended verification in relation to the Appellant's returns for January and February 2011. As we mentioned above, the increased turnover was certainly another, perhaps more material, consideration in the decision to undertake extended verification.

60. The Appellant's representative criticised the case officer for having approached her consideration of whether to concede a deduction for input tax on the basis of alternative evidence (distinct from a valid VAT invoice) with the mindset of challenging an MTIC trader's claim for input tax. We agree that to some extent this criticism was understandable, and we also note that this case appears to be one where there is at least some risk, not that HMRC will give an unwarranted deduction for undeserved input tax, but rather one where, in the broadest sense, VAT will have been charged on supplies of the phones (by Apple) and never recovered when the phones were exported. We are certainly not saying that that latter result would be incorrect in this case, but saying simply that if (as we will do) we dismiss this Appeal, the Appellant may understandably feel marginally aggrieved, and had we felt able to allow the Appeal, we do not consider that HMRC could have felt, as with an MTIC case that they failed to challenge successfully, that there had been a successful raid on the exchequer.

61. Aside from these background considerations that may have marginally influenced the case officer's approach to the decision that she had to make, Rigcharm's other significance in relation to this Appeal was as follows.

62. First, as mentioned above, it made available cash to Choice for use by the Appellant. There may have been a loan between the two companies, but this, and any repayment of it, were not documented.

63. Secondly, in the onward distribution of goods, Rigcharm was invoiced by FedEx for the one domestic delivery for which FedEx was responsible. We were told that this was because only Rigcharm had an account with FedEx. Mr. Dharas appeared not to know whether the Appellant had been cross-charged by Rigcharm for meeting the transport cost of goods ostensibly being supplied by the Appellant. In a similar fashion, Rigcharm paid for 170 continental charges for iPhones wanted by the Danish customer of the Appellant, namely AlfaCom. Again this might have been a quite distinct transaction in which Rigcharm both bought and sold and was paid for the chargers, or it may have been bearing the cost of this purchase, effectively on behalf of the Appellant. The position was not clarified.

64. Finally, we were told that in about August 2011, Rigcharm itself commenced a similar activity of arranging for runners to acquire iPhones, and then exporting them on a VAT-exclusive basis.

65. The Respondents did not contend that the whole of the activity in the period of January and February 2011 was effectively undertaken by Rigcharm and not by the Appellant at all but it was certainly suggested that when in a vague and undocumented way, Rigcharm had provided much of the funding for the purchases and it had also been invoiced for some of the more minor costs material to the onward distribution of the iPhones, there was some uncertainly in relation to precisely what Rigcharm's role had been.

***The contentions on behalf of the Appellant***

66. In the Appellant's opening submissions, virtually no reference was made to the issue that section 47(2A) VAT Act 1994 appeared to undermine any claim by the Appellant for an input deduction. There was no re-submission of the contention that had been advanced by the same representative and rejected by the First-tier Tribunal in *Gold Standard Telecom Limited v. HMRC* [2014] UKFTT 577 (TC) to the effect that employees acquiring goods for their company did not rank as agents, such that section 47(2A) was inapplicable,. It was simply contended that Apple had charged VAT on its supplies, and the purchases had been made on behalf of the Appellant.

67. The principal contention was that, since the Apple till receipts evidenced that VAT had been paid, and indicated the IMEI numbers of phones, and there was a strong indication that all the acquired phones had been on-sold in documentation, such as invoices, produced by the Appellant, to the various non-UK and a few UK traders for consideration exceeding £5,000, it followed that the Appellant had acquired the relevant phones, such that there was no realistic doubt that there had been a material supply to the Appellant. No VAT was owing in respect of the on-sales, and accordingly the input tax should have been deducted, and it was unreasonable of the case officer not to have accepted the alternative evidence of the supply in the absence of valid VAT invoices.

68. In the Appellant's closing submissions, the three further contentions that we referred to in paragraphs 13 and 14 above were raised. Since the Respondents had had no opportunity to consider the further points, we directed that both parties should advance further written submissions on the new points raised by the Appellant. We address these in giving our Decision.

***The contentions on behalf of the Respondents***

69. Although HMRC's case officer had paid little attention to the potential significance of section 47(2A) VAT Act 1994 in her own consideration of the Appellant's claim for input deduction, the Respondents' case certainly contended that that section precluded the Appellant from entitlement to any input deduction.

70. Addressing the issue of whether the case officer's refusal to accept alternative evidence, in place of a valid VAT invoice, to substantiate the Appellant's claim for an input deduction (effectively on the basis that the contention in relation to section 47(2A) was wrong), the Respondents contended that the case officer's three decisions had been amply justified and that it could not now be said that her decisions had been unreasonable. There had been absolutely no documentary evidence to confirm the chain of transactions from the point at which cash was drawn from Choice to the point when allegedly the same goods were despatched to customers. None of the steps, including the distribution of cash to the head runners, the further distribution of cash to the runners, the identity of the vast majority of the people who had actually purchased the phones, the collection of phones and the deposit of the majority of the phones with the freight forwarder, had been documented in any way. Although the IMEI numbers had been clearly recorded on the Apple till receipts, nothing confirmed that those phones with those IMEI numbers were held by the Appellant and subsequently on-sold to the various purported customers. While there was considerable reference to the phones being scanned, either at the warehouse by two employees who gave no evidence, or by Interken or the Dubai purchaser, there was still no confirmed print-out of

scanned IMEI numbers to confirm that any phones acquired by the Appellant were the phones purchased by the runners from Apple.

71. There were also distinct oddities in the claimed summary of facts that led to further doubt. We will refer to some of these in giving our decision on the relevant points.

72. In relation to the Appellant's late contentions that section 47(2A) failed to reflect the provision in Article 14.2(c) of the Directive, and that we should refer this issue to the European Court of Justice, we will deal with this in our Decision below.

***Our Decision***

***Section 47(2A) VAT Act 1994***

73. As we indicated at a very early point in the hearing, we decide that this Appeal is governed by, and must be dismissed in the light of, the provision in section 47(2A) VAT Act 1994. That provision states that:

> *"(2A) Where, in the case of any supply of goods to which subsection (1) above does not apply* [it being common ground between the parties that subsection (1) did not apply] *goods are supplied through an agent who acts in his own name, the supply shall be treated both as a supply to the agent and as a supply by the agent."*

74. In the present case, when the runners purchased iPhones, they always acted "in their own names". Whether or not they specifically revealed their names or their genuine names, they were plainly the ostensible purchasers so far as Apple was concerned. It was the essence of the plan, designed to defeat Apple's policy of not selling iPhones to phone traders and not selling more than two to any purchaser, that no runner would reveal that he was in fact buying phones for his undisclosed principal.

75. We entirely agree with Judge Kempster's analysis in the *Gold Standard Telecom* case that employees who are authorised to make purchases on behalf of their employer, and who are either instructed not to reveal that they are buying on behalf of their employer, or who in fact make the purchases entirely as if on their own behalf, do constitute "agents acting in their own names".

76. We accept that, as a matter of general English law when an agent for an undisclosed principal enters into a contract, or buys goods, on behalf of his principal, the contract and the purchase is made by the principal. Admittedly, if the principal fails to meet its obligations under the contract, the agent for the undisclosed principal is also directly liable to the counterparty, but this does not change the fact that if the agent has, for instance, paid for the goods at the time of purchase, once they have been purchased, that purchase has been made by the principal, and the goods belong to the principal.

77. For VAT purposes, however, the analysis is changed by the deeming provision of section 47(2A) VAT Act 1994. That sub-section provides that *"the supply shall be treated both as a supply to the agent and as a supply by the agent"* for VAT purposes. The *"shall be treated"* notion indicates that there is a statutory fiction, naturally with the fiction modifying the strict legal analysis. The resultant position makes pragmatic sense in the context of VAT in that the counterparty (Apple) could not indicate that the supply was made

to anyone other than the agent, since no other party would be known to the counterparty. Accordingly, but for the fiction, the agent would be unable to claim an input deduction because he would not own the goods purchased, albeit that the VAT invoice would have been in his name where a valid VAT invoice had been issued. Equally the principal would be in the reverse position of owning the goods but of not having a VAT invoice in his name.

78. While we entirely agree with the two earlier Tribunal decisions to the effect that section 47(2A) applies whether the agent for an undisclosed principal is or is not an employee of the principal, and while the following point was not raised by either party, we consider that we should air the issue of whether the above analysis is in any way affected by the point that employee services are not treated as independent services, or as services (to use UK statutory terminology) provided in the course of a business, such that they are not subject to VAT. The question that we pose is whether there is any conflict between this status of the services provided by the employee to the employer and the application of the deeming provision in section 47(2A). It appears to us that there is no conflict and that this is best illustrated by the following example, modifying the facts of the present case.

79. Assume that one particular runner in the present case had either purchased and sold (on the deeming notion of section 47(2A)) goods to a value in excess of the registration threshold, or assume that the same runner, below the threshold, had sought voluntary registration. It seems to us that, notwithstanding the basic principle that the services rendered by the employee to the employer are not subject to VAT, such that no VAT would be chargeable on the employee's salary or commissions, this would not affect the activity, and indeed the business activity, deemed to occur under section 47(2A), namely the deemed purchase of goods from the counterparty and the deemed sale to the principal, i.e. the employer. It seems to us that if the goods were bought for £100, with the employee being given the cash of £100 or being reimbursed £100, whilst at the same time the employee received salary or commission for his agency service of £10, the VAT analysis would be as follows. The VAT would flow through the registered agent, on the basis that he had a deemed business of buying and selling for £100. No VAT would be charged in respect of the employee's salary or commission. The position would thus vary in contrast to that where the agent was not an employee but a VAT-registered independent agent, still acting in his own name. In that situation, the commission would be subject to VAT, with the result that the agent would make the same deemed supply for £100, and make an actual supply of agency services for £10 (so paying net VAT on £10, equal to its realistic profit). Correspondingly the principal would claim an input deduction for both the £100 and the £10, reflecting the fact that it had bought goods, indirectly via the agent for £100 and had received taxable services for which it had paid £10.

80. While none of this had been aired during the hearing, it does appear to us that there is no tension or conflict between the deeming notion of section 47(2A) when the agent happens to be an employee, and the basic principle that employee services are not regarded for VAT purposes as independent services or services in the course of business.

81. We will deal now with the first two of the additional three contentions raised in his Closing Submissions by the Appellant's representative, to which we referred in paragraphs 13 and 14 above.

82. The first was that section 47(2A) was a deeming provision, which indeed it is, and that we should confine its application to the situation to which it is principally directed, and be very slow to extend the application of the deeming provision to remote situations not particularly contemplated by the particular statutory provision.

83. We simply fail to understand this contention since it is absolutely obvious that the present situation is the precise situation to which section 47(2A) is actually directed. There are many examples where there is a cogent case for suggesting that a deeming provision should not apply in some remote situation. The present case is not remotely in that category. If we sought in this case, and on the present facts, to restrict the application of the provision, we would in effect be deleting sub-section 47(2A) from the statute.

84. The second point raised by the Appellant in closing submissions was the claim that section 47(2A) should not be construed so as to occasion unfair hardship, reference also being made to the need not to breach the fundamental requirement of VAT law that in transactions between registered traders there should be neutrality, with the supplier's liability being matched by the trading customer's input deduction, all so that the cost of VAT was ultimately borne only by the end consumer.

85. We reject this point firstly because we cannot simply ignore the plain wording of section 47(2A). This point conclusively results in this second contention being rejected.

86. Beyond the conclusion just reached, however, we note that while it is one of the basic principles of VAT law that there should be neutrality in transactions between VAT-registered traders, it is not a principle of VAT law that there should be neutrality, with input tax flowing through the transactions when the chain of transactions is from registered person to non-registered person, and then back to registered person. That would be clear to anyone in the actual situation where a private individual might buy a product from a VAT-registered trader, thereby suffering the cost of VAT, followed by a sale of the product by the individual either immediately or after an interval to another VAT-registered trader. Absent any provision in relation to dealing in second-hand goods, the acquiring trader in that chain would plainly not be entitled to any input deduction, since the supplier to the second trader would not have been liable for, or have paid VAT, in respect of the second sale.

87. An objection might be taken, in the context of pursuing the neutrality argument, that as the Apple sales in this case were to the Appellant (assuming all the witness evidence to be accepted) when applying ordinary English law to the transaction, as opposed to the deeming provision of section 47(2A), there was still a breach of the principle of neutrality since it would have been the very feature of deeming the transaction to involve a sale to the agent and by the agent that would occasion the block on the deduction of VAT when the agent happened to be a non-registered person.

88. We are not persuaded that this contention is valid. Particularly if section 47(2A) is in conformity with the relevant Article in the Directive, and in any event because the section addresses an obvious VAT difficulty that arises in the case of transactions through an agent for an undisclosed principal, the deeming notion of section 47(2A) is entirely sensible. Without it, the agent, whose name would have been indicated on the VAT invoice would never have acquired or owned the goods being acquired, whilst the actual acquirer, the principal, would not have been identified as the purchaser on the VAT invoice. When, thus, section 47(2A) achieves a perfectly sensible result, and it facilitates the flow through of the

input deduction when the agent is a taxable person, we cannot treat the deeming notion of section 47(2A) as offensive because it breaches neutrality. In the case of all registered agents, it will have the opposite effect. It will be irrelevant where the agent discloses that he is acting for a named principal. It only has the effect of blocking the input deduction in this case, where the agent is both non-registered and chooses to or has for some reason to act in his own name. It also seems to us that, had the individuals sought voluntary registration, they would almost certainly then have been registered and the problem would have been avoided. As assumed in paragraph 79 above, the contention would have been that, although they would not properly have been registered, when regarded simply as employees rendering employee services, the effect of the section 47(2A) will have been to deem them to be acquiring and supplying goods, and in that regard they should have been registered, had they applied for voluntary registration. When they were not registered, we conclude that there was no breach of the neutrality principle, quite apart from the conclusive fact that section 47(2A) is clearly worded, and its effect in this case cannot be eliminated by some interpretation designed to respect the neutrality principle.

89. We will deal with the contention that section 47(2A) failed to reflect the provision in the Directive, namely Article 14.2(c) after dealing with the issue of whether the HMRC decision not to accept alternative evidence of the supply of the goods by Apple to the Appellant, in the absence of a valid VAT invoice, was a reasonable decision or not.

***Whether the HMRC decision was reasonable or not***

90. We must address this question by assuming that section 47(2A) did not for some reason apply, and that the fundamental reason geared to that provision for denying the Appellant its claim for input tax should be disregarded.

91. The Appellant accepted that the Apple till receipts were not valid VAT invoices, the result of which was that the Appellant could only sustain its claim for input tax if the Appellant could provide sufficient secondary evidence to establish the entitlement to the input deduction, such that rejection of that evidence by HMRC would be unreasonable.

***The two different issues***

92. We should first address the point that both parties contended that we should reach two decisions. Ignoring the order, one was the issue of whether we concluded that there had been a taxable supply by Apple to the Appellant, the Appellant acquiring the goods for the purpose of its business. Both parties accepted that we should address this issue on the basis that it was a matter for the Appellant to establish, and that the burden of proof was the ordinary burden geared to the balance of probability, and that in reaching the decision on this issue we could and should pay regard to all the evidence. In other words, in contrast to the second issue that we would clearly have to judge by reference to the information available to the case officer when she made each of her three decisions, we could, in relation to this first issue, pay regard to all the evidence and information given during the hearing.

93. The second issue that we should address was the issue of whether the case officer's refusal to concede the Appellant's claim for an input deduction on the basis of the "other evidence furnished", in the absence of a valid VAT invoice, was unreasonable.

94. We do of course accept that, as a substantive matter, there are two relevant issues. In order to sustain a claim for input tax, a trader must establish that there has been a taxable supply of goods by a registered person in the UK, with the goods being acquired for the purposes of the business conducted by the acquirer. In addition to that, in the ordinary case, the claimant must produce a valid VAT invoice, giving all the required particulars, to evidence the supply. And where there is no valid VAT invoice, the claimant should either be asked to return to the supplier and obtain one or, failing that, if the claimant can produce other convincing evidence supporting the supply, then HMRC could and should accept that evidence unless it was reasonable for them to reject it.

95. In deference to the request by both parties, we will reach a decision in relation to both the issues that we have indicated, though we actually consider that the question of whether we now conclude, on the basis of all the evidence, that there was a taxable supply, is not particularly relevant to this decision.

96. The two issues are both inherently inter-related, though materially different. They are inter-related for the obvious reason that, when HMRC are considering the alternative evidence proffered in the Appellant's efforts to sustain an input deduction, the fundamental issue on which they may or may end up being satisfied is principally whether there was a taxable supply of the iPhones by Apple to the Appellant for the purposes of its business. The question is whether the evidence is sufficiently robust but nevertheless what the evidence is designed to establish is precisely the issue of whether there was a taxable supply from Apple to the Appellant.

97. The very substantial daylight between the two issues relates largely to the burden of proof, and how to apply the test of reasonableness. This is immediately illustrated by our indicating that we do decide that the Appellant has established, on the balance of probability, that the iPhones in the present case were acquired from Apple by the Appellant, through the activities of the runners, and those iPhones were then despatched either to overseas customers or to domestic customers where the reverse charge mechanism meant that the Appellant was not itself liable to account for VAT. Of course we conclude that the Appellant is not entitled to any input deduction on account of the provision in section 47(2A), but if we could have ignored that provision, we would have concluded that the appropriate supply from Apple to the Appellant had taken place.

98. Illustrating the daylight between the two tests, however, we also decide that we cannot categorise the case officer's refusal to accept the limited evidence furnished to her as adequate secondary evidence, as having been unreasonable.

99. The conclusion just given governs the outcome of this case, and there is no significance so far as this Appeal is concerned to the fact that on the balance of probability we are persuaded that the iPhones sold to the runners on behalf of the Appellant were the subject of a taxable supply by Apple, and that section 47(2A) aside, there would have been a supply to the Appellant. The Appellant's representative suggested that if we reached this conclusion, the Appellant would be able to revert to HMRC, asking them to reconsider the input deduction issue. That may or may not be so, and is of no concern of ours. The only observations that we would make are that section 47(2A) still appears to bar the entitlement to an input deduction and, quite apart from that, our conclusion on the supply issue does not necessarily mean that it would cease to be reasonable for HMRC to reject the alternative evidence.

100. Albeit that we consider that we have largely established that the issue that both parties asked us to address of whether there had indeed been a supply is largely irrelevant, we will now deal with each and give our reasons.

***Whether there was a taxable supply to the Appellant, ignoring section 47(2A)***

101. The issue as to whether we accept that the Appellant has demonstrated, on the balance of probability, that the iPhones had been supplied by Apple to the Appellant, via the role of the runners, is itself a reasonably balanced question.

102. The evidence contained a number of troubling oddities. It was hard to accept that each employee was paid a very modest flat-rate salary, regardless of whether he collected countless phones or barely any at all. Equally it was decidedly odd that Murtaza worked for no reward, and while his religious activity may have explained that, it was even odder that Rizwan appeared to perform a pivotal role, engaging many of the runners, being largely responsible for the distribution of cash to the runners, purchasing many phones himself, and transporting phones either to Maina or the Appellant's warehouse, yet he only received £390 a month. We barely believed this and considered the implicit claim that nobody received other undeclared cash commissions improbable.

103. We equally found it very hard to believe that, absent a few destroyed sheets of A4 paper, nobody was said to have kept any records of how very large amounts of cash were distributed, and then the balance and the phones collected. When returns might have been made on the day the cash was distributed, or on the following day, either to the original head runner or to a different head runner, and when cash might have been spent on 16GB or 32GB phones, there appeared to have been such an opportunity for chaos that we found the alleged absence of documented administration very hard to accept.

104. Quite apart from the commission type point made in paragraph 102 above, we found it difficult to understand how the arrangements could work unless somebody arranged and ensured that given numbers of runners would operate at given times and at different stores. Nothing in this regard was explained to us.

105. We are also troubled that every step in the movement of money and phones between the cash being withdrawn from Choice, and phones being exported is dependent on witness or oral evidence, absolutely unconfirmed by any documentation. Notebooks detailing instructions to runners, lists of money distributed, credit card statements, receipts given by Maina on deposit of phones in their warehouse, and properly documented evidence in relation to the scanning of IMEI numbers was all absent. The witness evidence was also less than perfect. Admittedly those runners who gave evidence did all say that they thought they were working for the Appellant; that they were handed cash generally in multiples of £510, and they walked into the stores, generally did not give their names because they were not asked for them, and then walked out and handed the phones to the head runners. It did, however, seem, and it was conceded, that Mr. Dharas' solicitor had drafted the witness statements, and although they were said to have been read by the witnesses before the hearing, none had spotted the impossible claim that they had booked iPhones over the internet by giving fake email addresses such as "a@a". Each one had to correct this glaringly obvious error when otherwise confirming their statements.

106. It is possible that some of the barely believable evidence summarised in paragraphs 102 to 104 may result from the reluctance to reveal detail that would not have had a direct bearing on the fundamental issue of whether the phones were acquired broadly as suggested. It is, for instance, possible that undeclared bonuses may have been given to runners, and particularly head runners, for greater contributions, and it is possible that records that no longer exist would have revealed this. We are certainly not suggesting or speculating that this was so. All that we are saying is that we labour under the impression that we have not been given an absolutely full account of what exactly happened, on account of several bewilderingly odd suggestions as to how the activity had been undertaken.

107. Having aired all those doubts, we are still inclined to accept, on the balance of probability, that on the fundamental issues the evidence was true. While the Appellant's business model, one designed to circumvent Apple's sales policy and to exploit the understandable demand for new models of iPhones in countries where they had not been introduced, may not have been a particularly laudable activity, the business model did make sense. Other reported cases illustrate how several operators were seeking to undertake the same activity as the Appellant, and we find it entirely credible that phones purchased in the UK at a VAT-inclusive price might have been sold to customers in jurisdictions where the phones had not been released at a considerable premium.

108. We also note that HMRC themselves accepted that the cash withdrawn from Choice was always more than adequate to fund the purchases ostensibly made, and that the Appellant's bank accounts illustrated receipts that basically matched the invoice prices at which phones had ostensibly been sold to the customers.

109. While we may have found that the witness and oral evidence was less than perfect, we accept that it did consistently paint the same picture in relation to the activity of the runners and the head runners. We find it very difficult to doubt the broad reality that the runners operated as they did; that cash was turned into phones, and that the phones were then exported or sold domestically virtually immediately in order to meet the demand. We are also inclined to accept that the export customers had greater demand than could be met.

110. We also pay some regard to the fact that we find it very difficult to envisage some other state of affairs that might have existed in which the VAT analysis would have varied from the one contended for by the Appellant, again leaving aside the section 47(2A) point. The Appellant did plainly hand to HMRC all the till receipts (not apparently bundled up in an ideal fashion), but there is no doubt that the Appellant had all the actual till receipts, evidencing the purchase of the phones. It is inconceivable that runners could have stood outside the stores, seeking to persuade other more genuine customers who had just acquired their phones to hand over just their till receipts to the runners. It also seems inconceivable that the till receipts could have been "used twice". Passing reference was made to this during the hearing. Had the till receipts been collected in the first place by the runners for a quite different company, which had reclaimed the VAT satisfactorily on exporting the phones, and had the receipts (without phones) been sold to or passed to the Appellant to facilitate a fraudulent recovery of VAT, there would necessarily have been a very long delay between the dates on the receipts and the dates when the present Appellant would have ostensibly exported phones. The original company purchaser, in other words, would surely have had to retain the receipts itself until its repayment claim had been met, and since that would have taken at least a month, and probably much longer, it seems inconceivable that the till receipts could have been used twice.

111. On balance, therefore, we conclude, and we repeat that we find this conclusion irrelevant, that the iPhones were purchased on behalf of the Appellant as the Appellant contended, through the activity of the runners.

***The issue of whether HMRC's refusal to accept alternative evidence was reasonable***

112. It is the Appellant's responsibility to sustain its claim for an input deduction, and the primary evidence required to be produced to support such a claim is the production of a VAT invoice. Where the Appellant does not have that invoice, and cannot obtain it, HMRC is given a discretion to accept other evidence, but when it is the Appellant that has failed to produce the primary evidence, HMRC are certainly entitled to be cautious in accepting the other evidence.

113. The Appellant's representative was critical of HMRC's case officer, who had indeed dealt herself with a number of MTIC enquiries, for approaching the present case with the mindset of an MTIC officer challenging an MTIC case. We entirely accept that there was no remote indication that in this case there was any fraud against HMRC. Indeed, while the result flows naturally from the provision in section 47(2A), the Appellant is otherwise entitled to be somewhat aggrieved by being unable to reclaim the VAT in this case. After all, Apple plainly accounted for VAT, and on the assumption that the phones were either sold to non-UK customers for delivery abroad or that the sales to domestic customers were subject to the reverse charge mechanism, the VAT would ordinarily have been due to be repaid. Accordingly in this case, the results are reversed in comparison with those of an MTIC fraud. HMRC will have charged VAT on goods that will have been exported when no VAT should have been retained.

114. While thus this case had no features of an MTIC fraud, the case officer was certainly entitled to be extremely cautious in view of the fact that the related company Rigcharm had lost its appeal to the First-tier Tribunal in relation to transactions undertaken in 2006. It is irrelevant that Rigcharm had a pending appeal to the Upper Tribunal. The case officer was certainly entitled to be highly cautious in the light of Rigcharm's past conduct, and it is that conduct, rather than the feature that the present case itself had any of the characteristics of an MTIC case, that justified that caution.

115. It is now worth considering precisely what the case officer decided in this case. The three decisions were on broadly the same basis, and we will quote from the first. This explained the reasons for the refusal of the input tax claim as follows:

> *"A taxable person has the right to deduct VAT incurred on goods and services that form a cost component of their taxable supplies. A business will only have incurred input tax if* ***all*** *of the following conditions are met:*
>
> - *there has actually been a supply of goods or services;*
> - *the supply took place in the UK; the supply was taxable at a positive rate;*
> - *the supplier was a taxable person at the time of the supply i.e. someone who was registered, or who was required to be registered, for VAT;*
> - *the supply was made to the person claiming the deduction;*
> - *the recipient was a taxable person at the time the tax was incurred or the tax was eligible for relief under Regulation 111;*

- *the recipient intends to use the goods or services for the purposes of his business.*

*It follows that input tax may be allowed only where the above conditions have been met, whether or not a valid VAT invoice is held.*

*As discussed at my visit to your premises on 10th May 2011, Apple till receipts which you have provided to support the claim to input tax do not constitute proper tax invoices because they do not contain all of the required information. Each iPhone purchased is in excess of £250 (inclusive of VAT), which is the limit for which a simplified VAT invoice can be used in relation to claim input tax deduction; so proper documentary evidence in relation to these supplies is not held by [the Appellant]. However, as [the Appellant] has not produced any records or documentation that enables HMRC to examine an audit trail to confirm that it had received the taxable supplies as described on the till receipts, it has not incurred the right to deduct in the first place."*

116. The case officer's decision was thus essentially that *"as [the Appellant] has not produced any records or documentation that enables HMRC to examine an audit trail to confirm that it had received the taxable supplies as described on the till receipts, it has not incurred the right to deduct in the first place."*

117. The Appellant's representative contended that the case officer's decision had been that there had in fact been no relevant supply. We disagree with that. As she said when questioned during the hearing, she did not reach any decision either to the effect that there had or had not been a taxable supply from Apple to the Appellant. Her decision was essentially in relation to the burden of proof, namely that in the absence of an audit trail, in other words any documentary corroboration whatsoever of the oral claim as to how the phones had been purchased and delivered to Maina or the Appellant's warehouse, she was not satisfied that it was appropriate to accept the alternative evidence of the supply.

118. The question for us, accordingly, is whether we consider that the case officer was unreasonable in reaching that conclusion.

119. The first point to make is that we consider, and we are following authorities in saying, that there needs to be something quite seriously deficient in the officer's conclusion before we should conclude that it was simply unreasonable. The question is not whether we might have reached a different conclusion. The prime responsibility for addressing whether alternative evidence should be accepted in place of a valid VAT invoice falls to HMRC not the Tribunal, and it is right that we should be cautious before challenging HMRC's decision. It is, after all, the responsibility of all taxpayers to ensure that there are valid VAT invoices in the first place, and the provision enabling HMRC to accept other evidence is a fall-back approach when the best evidence is not available, and it is perfectly acceptable for HMRC to insist on some documentation to support a purely oral claim in relation to the supply, particularly when certain aspects of the asserted method of trade do raise legitimate doubts as to the credibility of the oral claims.

120. Before listing the reasons why we consider that the case officer's decision was perfectly legitimate, we might first criticise her, not only for not addressing the fundamental fact that section 47(2A) undermined the Appellant's claim on that simple basis, but for

apparently suggesting to the Appellant that he should seek (as he did allegedly on several occasions) to obtain actual VAT invoices from Apple. We consider that had such invoices been obtained in the name of the Appellant, they would have been fundamentally flawed. Once the sale transactions had actually taken place, with section 47(2A) deeming Apple's sale to have been to each of the runners, it would have been quite improper for Apple to provide, or indeed for the Appellant to accept, or for HMRC then to pay any regard whatsoever to, VAT invoices that would not reflect the transactions that had taken place.

121. We turn now to the reasons for saying that we cannot class the case officer's decision in relation to the adequacy of the evidence as unreasonable.

122. We first record that, although we have reached the decision that the Appellant has established, on the balance of probability, that the supplies did all take place as asserted, our decision itself was quite finely balanced. In part we based our decision, not so much on the cogency of the Appellant's case, but on the proposition that when the Appellant held and furnished to HMRC what were plainly the actual original Apple till receipts, it was difficult to conceive what alternative transactions might have taken place than those asserted by the Appellant.

123. We agree with the Respondents that there was no documentary evidence in relation to the transaction steps between the cash being obtained from Choice, and invoices purportedly selling the iPhones to customers, except for the till receipts. We accept that some of the steps might inherently not have required documentation and that it would be unreasonable to insist on documentation where there was plainly no need for any. However, it seems odd that there was no documentary evidence from Maina that had been retained to illustrate how and when phones had been deposited with Maina. Had quantities of 16GB and 32GB phones been recorded as having been received by Maina at times shortly after the dates on matching till receipts, this would have been highly relevant. Had there been any record of the phones held in the Appellant's warehouse, this would again have been relevant. Had the two employees who ostensibly scanned the iPhones held in the warehouse kept daily records of the printouts of the scanning results, confirming therefore both the presence of the phones in the warehouse, and acquisition dates and details, that, alongside similar evidence from Maina, would have confirmed that the purchases evidenced on the till receipts had all turned up, as claimed, and this would have been highly relevant.

124. As a somewhat distinct point, the IMEI evidence given to us was highly unsatisfactory. We are told that the two employees scanned the IMEI numbers and we saw an invoice from Interken for scanning. Nobody ever produced evidence that provided a list of scanned numbers, recorded at some given date, that corresponded with the purchases from Apple.

125. We accept that when cash was distributed to the runners, there would not naturally have been written receipts, but we still found much of the evidence unsatisfactory in relation to the basic arrangements involving the runners. Nobody explained how a given number of runners were assembled on any particular day and at any particular store to receive the cash from the head runners. Nobody explained the highly improbable feature, which we find very hard to believe, that all the employees, including pivotal ones such as Rizwan, received just the £390 a month, with the result that there appeared to be no incentive to be diligent in trying to purchase phones. We also find it quite incredible that very sizeable amounts of cash were distributed to runners, and that on occasions those runners would end

up buying 16GB and 32GB phones, moving to another store with the cash they had been handed, and possibly holding the cash overnight, producing phones and any balance of cash to some different head runner. Allegedly all of this was achieved without any planning and documentation apart from a few bits of A4 paper, held by and then destroyed by the head runners. It is difficult to believe that some overall planner did not both arrange and then coordinate a duty roster for runners, all the detail about cash distribution and then the hopefully matching end results of the phones collected and the balance of cash returned.

126. Rigcharm's role also cast doubt on whether the Appellant was the relevant trader, or indeed the sole trader in the January and February periods. Rigcharm provided much of the cash, without documentation. There was minor but unsatisfactory evidence that part of a claimed Rigcharm loan had been repaid, but no clear information about the balance of the loan. Rigcharm paid several invoices in relation to the onward distribution of phones. The vague terms on which the two companies operated made it perfectly possible that Rigcharm acquired those phones for which it provided the cash, and that even if all the onward invoices were provided by the Appellant, the Appellant might have been acting on behalf of Rigcharm in distributing the phones to customers, in just the way that Rigcharm might have lent money to the Appellant, with the Appellant alone trading.

127. Some of the phones were delivered to UK customers. Nobody thought to see whether those customers could confirm the purchase of phones from the Appellant, ideally also providing a list of IMEI numbers of the acquired phones.

128. Finally, when the case officer reached each of her three decisions, she had only one purchase invoice from any customer for the onward sale of phones. Mr. Dharas asserted that all the further required contents of deal packs had been supplied to HMRC and that they must have lost the missing items. The covering letter that sent the deal packs did not remotely identify what was sent to HMRC and Mr. Dharas himself prepared for the hearing without noting that the documents produced by HMRC failed to include the considerable number that were missing, and that the Appellant thus asked to produce on the second day of the hearing. We attach relatively little significance to this point because the case officer did make clear that the steps in the transactions that caused her the most difficulty were those in relation to the acquisition of the phones, rather than their alleged onwards distribution to customers, but it still remains the case that we still consider it reasonably likely that the Appellant had in fact failed to produce all the originally missing documents to HMRC for consideration by the case officer.

129. Our decision is that, when HMRC were considering the adequacy of secondary evidence, and there were all the gaps and uncertainties in the evidence that we have now listed, and no documentary evidence to confirm any audit trail of the goods, we cannot conclude that the case officer's three decisions were in any way unreasonable.

***The challenge that section 47(2A) was not in conformity with Article 14.2.(c) and that we should refer the case to the ECJ***

130. As we indicated above, the Appellant contended for the first time in its closing submissions that section 47(2A) VAT Act 1994 failed to comply with the relevant wording in the Directive, and that we should either interpret the relevant sub-section in conformity with the proper meaning of the Article, or strike out the relevant sub-section altogether, or finally refer the proper meaning of the provision in the Directive to the ECJ.

131. It is worth now quoting both provisions. The relevant provisions in the Directive are contained in Article 14.1. and 14.2.(c) as follows:

> *"1. "Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner.*
>
> *2. In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:*
>
> > *(a) …*
> >
> > *(b) …*
> >
> > *(c) the transfer of goods pursuant to a contract under which commission is payable on purchase or sale."*

Section 47(2A) provides that:

> *"Where … goods are supplied through an agent who acts in his own name, the supply shall be treated both as a supply to the agent and as a supply by the agent."*

132. The Appellant contended, and it is hard to dispute, that the wording of the two material provisions is very different. Indeed Judge Wallace addressed this very issue in the case of *Express Medicare Ltd v. The Commissioners of Customs and Excise*, 2000 WL 33281295, and said that one day a Tribunal would have to grapple with whether the domestic provision did or did not correctly apply the Directive. Fortunately for him, he was able to ignore the issue in the *Express Medicare* case though he did discuss the terms of the French version of the same Article in the Directive, and make a number of observations in relation to the relevant subject.

133. The Appellant's contention was that we should either interpret section 47(2A) to require the principal of neutrality to be respected (effectively by deeming the supply by Apple to be made to the taxable Appellant), or we should strike section 47(2A) out altogether, and in substitution we should say that the provision in the Directive had to be interpreted to preserve fiscal neutrality.

134. Several matters appear quite clear to us.

135. First, the wording of the provisions is very different, and it is difficult to dispute the Appellant's contention in that regard. Indeed they are so different that it is only because both parties and several other indications lead to the same conclusion that we are persuaded that section 47(2A) is seeking to implement the provision in Article 14.2.(c) at all.

136. As we have already indicated, we consider the wording of section 47(2A) to be so clear that it is quite impossible to interpret it so as to conform it to any suggestion that the Directive requires the sales by Apple to be made directly to the Appellant.

137. We also consider it quite impossible to strike the provision in section 47(2A) out both because we doubt whether we have jurisdiction to do that, and in any event we find the

interpretation of Article 14.2.(c) to be so obscure that any notion that we can give direct effect to the clear meaning of the provisions in the Directive is totally irrelevant in this case. In terms of Article 14.2.(c) being obscure, it seems not to indicate whether its application is dependent on commission being charged, it makes no direct reference to the agent acting in his own name, and although it deems something to be a "supply of goods", when the crucial issue is by and to whom the supply or the supplies should be treated as being made, it rather fails to address the crucial point by ignoring those essential points.

138. The Appellant did not particularly suggest what the English version of Article 14.2.(c) actually meant, or indeed what the generally accepted English translation of the French version of the provision actually meant. At this point we should indicate that the broadly accepted strict translation of the French version of the Article was as follows:

> *"There shall equally be regarded as a supply (of goods) in the sense of paragraph 1 (the transfer of the right to dispose of goods as owner) … (c) where the transfer of goods is effected by virtue of a "contrat de commission" for purchase or sale."*

Essentially the Appellant's contention was that, whatever the provision in the Directive meant it should be construed so as not to undermine fiscal neutrality. We have already indicated that the domestic statutory provision only undermines fiscal neutrality in an indirect sense. In other words, once the transactions with the agent for the undisclosed principal are treated as being supplies to and by the agent, then there is no breach of any principle of neutrality when the principal fails to secure an input deduction on a purchase from a non-registered agent. In an indirect sense there may still be said to be some offence to the principle of neutrality when, in English law, the supply is actually made by Apple to the Appellant, whereupon if the VAT analysis followed that legal reality and the Appellant was denied an input deduction, one might then say that the principle of neutrality had been infringed. We have again already indicated that we are not persuaded by this contention, and this basis for contending that any principle of neutrality has been infringed.

139. Section 47(2A) was obviously designed to deal with the difficulty, mentioned above, that absent this provision, the supplier's invoice (Apple's invoice in this case) would inevitably have identified the agent as the purchaser, yet the goods would have been acquired under English law by the principal. Two possible approaches could have been followed. Either, as was adopted by section 47(2A), the chain of supply could have been deemed to be to and by the agent, so that it could match the obvious invoicing chain. Alternatively, leaving the supply to follow the strict legal position, the statutory provision would have had to attribute the invoice in the name of the agent for the undisclosed principal to the principal. Manifestly the first route was adopted, and in many cases that will produce a perfectly acceptable result. Agents will often be VAT-registered, and indeed they could theoretically have been VAT-registered in this case had the Appellant realised that that was the way in which to avoid the problem under section 47(2A), rather than to make all the runners technically employees in the apparent expectation that they might stop them ranking as agents for an undisclosed principal.

140. Since the legislative route chosen was perfectly sensible, and one that would match the invoicing reality, and have no untoward consequence when the agents for undisclosed principals were themselves VAT-registered, it seems difficult to conclude that there is any offensive breach of neutrality in the present case. The vast majority of agents for undisclosed principals will be VAT-registered, and the circumstances in which employees

might act otherwise than in the name of their employing company must be both rare, and presumably accounted for by some need to conceal reality, as in the present case. Quite apart, however, from the weak case for saying that section 47(2A) does actually breach neutrality, we revert to the points that section 47(2A) is drafted in an entirely clear manner and we cannot distort its interpretation in this case. Furthermore this whole contention in relation to neutrality rather ignores attention to any claimed meaning of either the English or French versions of the Directive provision. Instead, the contention is rather along the lines that the provision in either language is far from clear, and so we should simply interpret it to avoid any breach of neutrality.

141. We turn now to the effort to construe Article 14.2. (c).

142. In this context, we were sent three highly relevant documents by the Respondents.

143. The first was a list of questions that HM Customs & Excise had addressed to somebody presumably in the Commission, and the answers given to the questions. They date from October 1983. Only question 6 was relevant, and the question and answer were as follows. We have modified the reference to the Directive Article to refer to the current but completely unchanged present Directive Article. We should also refer to the fact that in 1983, the UK had adopted a dispensation from the requirement to treat supplies of goods through a commission agent as necessarily being treated as supplies to and by the agent. In 1983, Customs & Excise could treat the supplies as made either to the principal or to the agent and then by the agent to the principal. That domestic provision has now of course been changed, in that section 47(2A) requires supplies of goods to be treated as supplies to and by the agent, and the earlier choice has been deleted. The text of the exchange was as follows:

> *"What is the exact purpose of Article [14.2. (c)] …… ?*
>
> *The purpose of these two provisions is to deem, for VAT purposes, that supplies made through an agent who acts in his own name are to be regarded as supplies to and by that agent. It therefore serves the same purpose as Article 32(4)of the UK Value Added Tax Act 1983 except that in the Sixth Directive the deeming provision is mandatory."*

144. We have three observations to make in relation to this exchange. Firstly, it is hardly surprising that the question had to be asked because the meaning of the Directive Article was fairly obscure. Secondly, were this response authoritative, it would be conclusive in the present case. Thirdly, the answer is not one given by the ECJ, and so is hardly binding. Furthermore, the clarity of this answer, given in 1983, appears to be undermined by the exchange of letters in October 1992 and March 1993 to which we now turn.

145. The letter of questions to the Commission sent by HM Customs & Excise in October 1992 was principally addressing another related provision, but it then turned, in the following paragraphs, to re-raise the meaning of what is now Article 14.2. (c). We will again amend it to refer to the current identical provision. The UK letter was in the following terms:

> *There is a related matter upon which we should also welcome your views, although I would stress that it is not so pressing, and should not be allowed to delay your response to the question referred to above. Article 14.2. (c) does not use the*

*expression "in the name and for the account of", but seems also to concern transactions entered into by intermediaries. The official English version of this provision translates the phrase "en vertu d'un contrat de commission a l'achat ou a la vente " as "pursuant to a contract under which commission is payable on purchase or sale."*

*The reference to "commission", therefore, is to the remuneration (usually taken to be a percentage of the contract price for the goods) received by the intermediary from his principal as consideration for his services. Is it possible that this should refer instead to a commission such as would be held by a "commissionaire", which we understand to be a particular type of intermediary who normally acts in his own name? This concept is unfamiliar to UK jurists, so it would not be too surprising if the English language version were to be inaccurate.*

*Is the underlying purpose of Article 14.2. (c) to convert the supply of the "commissionaire's" services into a supply of the goods purchased or sold, irrespective of how his remuneration is determined? If so, does this apply only where the intermediary will not have bound his principal in the transaction?"*

146. Beyond the fact that HM Customs & Excise were understandably again questioning the meaning of Article 14.2. (c), it is worth noting that the question in the last sentence just quoted is highly material. It seemed to be accepting that in countries where Roman or civil law principles applied, and agents for undisclosed principals were treated under the general law as buying and selling, then VAT would reflect the resultant two transactions. It then implicitly asked whether Article 14.2. (c) would be inapplicable where English law applied and the agent for the undisclosed principal was still treated as a matter of general law as binding his principal, such that a sale of goods was a sale directly to the principal.

147. The response from the Commission unfortunately appears to us to be very far from clear. The paragraphs were not numbered and we are only quoting some of them, but to enable us to refer back to the paragraphs, we have added numbering. The relevant paragraphs were as follows:

*"1. Regarding the VAT treatment applicable to taxable persons involved in a transaction "for another", it is necessary according to the legislator's intention, to make a distinction, which is common to all legal systems of Roman inspiration, between direct and indirect representation. In both cases, the intermediary acts for or on account of another person.*

*2. In the first case, the legal and economic consequences, whether active or passive, of a contract (a sale for example) fall directly upon the principal. The intermediary is not the seller, and the principal bears all the consequences and obligations of the sale, such as the provision of a guarantee. For the purposes of VAT, the "direct" intermediary (acting in the name and on account of another) will only be subject to tax on his remuneration, the principal being taxed on the price paid by the purchaser, less the intermediary's remuneration.*

*3. On the other hand, in the case of indirect representation (the intermediary acting in his own name, even if, as in the previous example, on account of another), the effects of the contract fall upon the intermediary. He must transfer to the principal*

*the advantages of the contract and he has the right to make him bear the obligations. It is this case which corresponds to the provisions of Article 14.2. (c), on the interpretation of which you also question me. In such a case, the intermediary in a sale is called the commission agent ("commissionaire") and must pay tax on the total price paid by the third-party purchaser. At the same time, he will also be considered as the purchaser from his own principal for a price reduced by his remuneration. From a VAT point of view, Article 14.2. (c) allows for the continuation of the chain of deduction. In the absence of such a provision, the principal could not justify a VAT deduction for the goods which are no longer his assets; on the other hand, the commission agent would be obliged to pay to the State all the VAT on the goods sold without the right of VAT deduction on the "purchase" of those goods. I admit that the English translation of Article 14.2. (c) does not express this idea.*

*4. It is therefore clear that, however the intermediary is acting, the fact of disclosing or not disclosing the identity of the principal should have no influence on the fiscal treatment of the two types of representation.*

*5. I understand that you also wish to know the means by which the tax administration is able to distinguish between the two types of representation so as to be able to apply the appropriate fiscal treatment. Strictly speaking, this distinction can only be made by an appraisal of the facts on a case by case basis, and in particular, by an analysis of the legal ties between the principal and his representative. It seems to me, however, that in the absence of clarity, given that commercial practices are often based on oral agreements or tacit understandings between the principal and the intermediary, the fiscal administrations generally base their interpretation upon the manner in which the invoicing takes place.*

*6. If, for example, in the case of a sale, the intermediary invoices the total price of the goods to the purchaser, he is deemed to act in his own name (application of Article 14.2. (c). In this case, the principal, if he is a taxable person, will have issued another invoice for the price received from his intermediary. If, on the other hand, one is faced with two invoices of a different kind, one issued by the principal to the purchaser for the goods, the other issued by the intermediary to his principal for his services, one can suppose that this intermediary acts in the name of another."*

148. One conclusion that appears clear from the above answer is that in the case of an agent in a Roman or civil law jurisdiction acting for an undisclosed principal (i.e. indirect representation) Article 14.2. (c) deems the transactions to involve the agent as both buyer and seller. This is slightly odd, however, because in the civil law jurisdiction we are told that this is the legal analysis of the transactions in any event without any different analysis being treated as occurring for VAT purposes. Why, in other words, do not the two transactions, actually involving the agent for the undisclosed principal, not fall within Article 14.1 in the first place? The only conceivable answer appears to be that the agent is not analysed to have the general liberty to on-sell the goods as he pleases, but must perhaps sell them in accordance with the agency instructions. Arguably that removes the civil law or Roman law commissionaire from being treated as a person having*" the right to dispose of tangible property as owner"*. This however is a minor point.

149. The more serious point is that paragraphs 4 and 5 quoted from the letter seem to suggest that the hallmark of "indirect representation" is "strictly speaking" to be analysed by

addressing "the legal ties between the principal and his representative". If this means that the reason why the agent for the undisclosed principal in civil or Roman law jurisdictions is treated as an indirect agent is because that is the plain result of the "legal ties between the principal and his representative", the critical question then becomes whether Article 14.2 (c) should be treated as inapplicable in the common law jurisdiction in which the legal ties result in the sale and purchase transaction being between the principal and the third party, with the agent simply receiving remuneration, and of course having secondary liabilities to the third party, should the principal not honour his side of the bargain.

150. The second half of paragraph 5 also appears rather odd. It seems to suggest that tax authorities answer the question of "direct or indirect representation" by looking at how the parties have invoiced the transactions. This seems to be suggested to be a practical response to uncertainties, and oral transactions, which is hardly the point in the UK when there is no doubt that the agent for the undisclosed principal creates a contract between the third party and the principal, whether oral or written, and there is no uncertainty in relation to that. It also seems to invert the proper order of events in that, instead of proceeding along the lines that Article 14.2.(c) specifies when the transactions should be treated as involving the agent as seller and buyer, one ignores Article 14.2.(c) and considers how the parties themselves have invoiced the transactions, and then one should treat the actual transactions as following the indication given by the invoicing.

151. In conclusion, it seems to us that the relevant question has not been answered. The relevant question seems to us to have been that raised in the last sentence of the quoted paragraphs from the HM Customs & Excise letter that we quoted in paragraph 145 above. In other words, does Article 14.2. (c) require the transaction involving an agent for an undisclosed principal to be treated as occasioning intermediate sale and purchase transactions involving the agent only where that corresponds to the legal analysis of the transaction in the particular jurisdiction, or does Article 14.2.(c) require the two step sale and purchase analysis to occur, simply because the agent has acted for an undisclosed principal, and utterly regardless of the fact that in the common law jurisdiction the transaction is treated as involving only the principal and the third party. The letter from the Commission appears to us not to have answered this question, and indeed to have re-raised the doubt that one might have thought had been dispelled (assuming that the answer had been authoritative) in the document dated 1983.

152. We consider that if it was vital in this case to resolve the issue just stated for the purpose of disposing of this present Appeal, we would refer the question to the ECJ. As it is, since we consider that the decision given in paragraph 129 above renders the present question strictly irrelevant, there is no need to refer the doubtful question to the ECJ. In view of that we also consider it inappropriate for us to venture any further *obiter* remarks in relation to the question that is irrelevant, and that has already occasioned sufficient unsatisfactory explanations.

***Summary conclusions***

153. Our decisions are accordingly that:

- unless section 47(2A) VAT Act 1994 is held, following some reference to the ECJ, to fail to reflect the intention of the paragraph 14.2.(c) of the amended Directive, the effect of that section in this Appeal is to undermine the Appellant's claim for an input

deduction since the transaction was deemed to take place by indirect supplies to and by the unregistered runners, and the Appellant cannot derive an input deduction when buying from a non-registered person;

- if the above conclusion is wrong, the Appellant still had no valid VAT invoice, and we have decided that the HMRC case officer acted perfectly reasonably in refusing to accept the limited evidence that she was given in corroboration of the claimed transactions;
- absent a reference to the ECJ, there can be no question of our seeking to interpret section 47(2A) to conform to some interpretation of Article 14.2. (c) because the section is drafted perfectly clearly and we cannot distort it out of existence. The meaning of Article 14.2. (c) itself is obscure, and any contention that the Directive provision is so clear that we should distort or override the statutory provision is absolutely untenable; and
- were it essential in order to dispose of this Appeal, to answer the question of interpretation of Article 14.2. (c), we would have referred this question to the ECJ, but we consider that this is unnecessary as we have reached conclusions that dispose of this Appeal without answering that difficult question.

154. The result is that the Appeal is dismissed.

***Right of Appeal***

155. This document contains full findings of fact and the reasons for our decision in relation to this appeal. Any party dissatisfied with the decision relevant to it 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.

**HOWARD M. NOWLAN**
**TRIBUNAL JUDGE**

**RELEASE DATE: 26 January 2015**