TC02309

Appeal number: LON/2008/1179

VAT – Whether allegations of fraud should be restricted to those pleaded – Admissibility of evidence – Whether Appellant knew or should have known that its transactions were connected to MTIC fraud – No – Mobilx v HMRC [2010] STC 1463 applied – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JDI TRADING LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
GILL HUNTER

Sitting in public at 45 Bedford Square, London WC1 on 3 – 6, 9 -13, 16 & 19 July 2012

David Scorey and Andrew Legg, counsel, instructed by Smith & Williamson LLP for the Appellants

Jonathan Hall and Amy Mannion, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal, by JDI Trading Limited ("JDI"), is against a decision of HM Revenue and Customs ("HMRC") contained in a letter, dated 30 April 2008, denying JDI its right to deduct input tax in the sum of £688,420.96 in its VAT accounting period ended 31 July 2006 on the basis that nine transactions, in which it sold Nokia mobile phones to an Italian company, Navigo SPA IT ("Navigo"), were connected to missing trader intra-community ("MTIC") fraud which was part of an overall scheme to defraud the revenue and that JDI knew or should have known that, through its purchases, it was participating in MTIC fraud.

2. JDI was represented by Mr David Scorey and Mr Andrew Legg. Mr Jonathan Hill and Miss Amy Mannion appeared for HMRC.

3. Although throughout this decision we have referred to the respondents as HMRC this should be read, where appropriate, as a reference to HM Customs and Excise.

Procedural Background

4. Given the highly contentious nature of this appeal we consider it appropriate to summarise its procedural history. In doing so, we have concentrated on particular directions and pleadings relating to allegations of fraud, a subject matter of the preliminary application by JDI (see below), rather than applications and directions relating to disclosure, as these matters had been substantially resolved by the time of the hearing. As such, we have not found it necessary to mention every application made to, and all directions given by the Tribunal.

5. Having received HMRC's letter of 30 April 2008, denying its right to deduct input tax, JDI appealed to the Tribunal on 22 May 2008. Its grounds of appeal were as follows:

> (1) JDI challenges HMRC's assertion that it knew or should have known the transactions formed part of an overall scheme to defraud the revenue;
>
> (2) JDI further challenges any assertion of HMRC that it deliberately or recklessly ignored factors which indicated that the transactions may have formed part of an overall scheme to defraud the revenue;
>
> (3) JDI asserts that the information and features identified by HMRC and taken into account by them in making their decision to deny the appellant input tax on the transactions in question, fail to substantiate their allegation that the JDI knew, could or should have known about the existence of any scheme to defraud the revenue; and
>
> (4) JDI further asserts that it took robust and reasonable steps to ensure that the transactions it entered into were free from any attempt to defraud the revenue and that these steps were in fact proportionate.

6. On 24 July 2008 HMRC served their Statement of Case.

7. In a letter, dated 22 August 2008, to Howes Percival LLP, the solicitors then acting for HMRC, Vantis Plc, on behalf of JDI, requested that HMRC provide Further and Better Particulars of this Statement of Case stating, inter alia in the letter that:

> … on any view, it cannot be right to ask [JDI] to prove it could not know that a fraud was in operation without setting out precisely the nature of the alleged fraud.

Howes Percival replied on 28 August 2008 stating that the majority of requests for Further and Better Particulars would be dealt with in detail in HMRC's witness statements and suggested that if, after these had been served, JDI still felt Further and Better Particulars were required, a further application could be made giving HMRC adequate time to respond.

8. Following an exchange of witness statements and further correspondence between the parties during the year, on 16 December 2009 HMRC made an application to the Tribunal for disclosure of documents by JDI. On 7 January 2010 JDI applied to the Tribunal for a direction that HMRC produce Further and Better Particulars to enable it "to consider the case against it and respond accordingly."

9. At the directions hearing before Judge Khan, on 8 January 2010, it was accepted by JDI that its application for Further and Better Particulars could not be properly considered at that hearing as HMRC would not have had sufficient time to deal with the substance of the application. Therefore, the directions of Judge Khan, which were released on 19 January 2010, dealt with disclosure and procedural aspects of the case such as service of skeleton arguments and listing the case for a final hearing. Judge Khan also directed that:

> The Value Added Tax Tribunal Rules 1986 (as amended) are to apply in relation to costs.

10. Following receipt of these directions, representations were made by Howes Percival in a letter to the Tribunal, dated 8 February 2010, which was copied to JDI. In the light of these representations, and as further case management matters had arisen since 19 January 2010, further directions were given by the Tribunal (Judge Khan) on its own initiative under Rule 6.1 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the "Tribunal Rules"). These directions, which were released on 24 February 2010, were made so as to enable all evidence and material to be properly considered before a final hearing date was agreed and fixed.

11. With regard to JDI's application for Further and Better Particulars, in a letter, dated 3 March 2010, Howes Percival suggested that "in the interests of saving unnecessary costs" HMRC should delay their response to the request for Further and Better Particulars until after the decision of the Court of Appeal in conjoined appeals of *Mobilx Ltd (in Administration) v HMRC; HMRC v Blue Sphere Global Ltd ("BSG"); Calltel Telecom Ltd and another v HMRC* [2010] STC 1436 ("*Mobilx*").

12. Judgment was given in *Mobilx* on 12 May 2010 and on 2 June 2010 HMRC's solicitors wrote to JDI advisers stating:

> … in the light of the decision of the Court of Appeal in Mobilx, we do not consider it necessary to provide any further response to your Request for Further and Better Particulars.

13. On 2 August 2010 JDI applied to the Tribunal for a pre-trial review to consider, inter alia, what was described by JDI as HMRC's consistent failure "to provide an adequate response to the Appellant's request for Further and Better Particulars of their case." The application came on before Judge Avery-Jones CBE on 7 October 2010 who directed as follows:

> "It is understood by the Tribunal that the Respondents' case is that the fraud alleged is that of the missing trader in each chain and that any fact proved by the Respondent is relevant to show that either the Appellant knew or that the Appellant ought to have known about the connection of its transactions with the fraud (unless by its nature the fact is relevant to one of the alternatives only). On this basis although the Statement of Case was served before the Court of Appeal decision in *Mobilx Limited* no amendment to the Statement of Case need be made. However, if the Respondents wish to allege any other basis for the fraud (other than one arising out of fresh evidence given at the hearing) an amended Statement of Case is required. The Appellant's application for Further and Better particulars is dismissed"

14. In response to this direction, and in the absence of any application to the Tribunal for permission to do so, HMRC served an Amended Statement of Case on 30 November 2010. Paragraphs 17, 19 and 20 of this Amended Statement of Case state as follows:

> [17] It is not necessary for [HMRC] to allege that [JDI] knew or should have known the precise nature of the fraud, … It is sufficient to establish that [JDI] knew there was some connection with fraud.
>
> …
>
> [19] [HMRC] are not required to prove the precise nature of the fraud of which [JDI] was aware or ought to have been aware that its transactions were connected. Nevertheless, the fraud of which [JDI] knew or should have known includes the fraud of one or more of the following (a) [JDI] itself and/or its directors and/or its employees or agents; (b) its supplier; (c) its customer; (d) the freight forwarders and/or inspection companies engaged in these transactions; (e) the defaulting trader; and/or (f) other persons with whom [JDI] is likely to have dealt in relation to these transactions, whose identity is unknown to [HMRC], but who are likely to have had a co-ordinating role in the fraud.
>
> [20] So far as [JDI's] knowledge is concerned (without prejudice to [HMRC's] alternative case that [JDI] should have known as much):
>
> [20.1] The fact that all the deals undertaken by [JDI] in the period under investigation have been traced to VAT loss is beyond coincidence. The fact that [JDI's] purchases were so constructed demonstrates on the balance of probabilities that [JDI] knew or was informed in advance which transactions it should engage in, and agreed

to do so. Such agreement is only consistent with being a knowing party to fraud.

[20.2] The transactions in this case show evidence of circularity of funds. Since such circularity is (a) unlikely to be anything other than the product of organised fraud and (b) unlikely to be feasible without the willingness of each part to the circle of funds to participate in pre-ordained transactions, [JDI] must on the balance of probabilities have agreed with others to conduct certain transactions. Again, such agreement is only consistent with being a knowing party to fraud.

[20.3] Looking at the totality of the circumstances in which these particular deals were conducted [JDI's] conduct demonstrates that it knew that its transactions were connected to fraud. In particular, the due diligence conducted indicates indicators of risk which a normal business would have sought further and better particulars. [JDI's] failure to follow up reasonable lines of enquiry was because [JDI] knew that its trades were connected to fraud and knew that there were no explanations that their trading partners could give which were consistent with not being connected to fraud.

15. On 28 July 2011 HMRC made an application to the Tribunal for permission to serve further evidence in the form of additional witness statements.

16. This application was opposed by JDI which, on 5 August 2011, itself made an application to Tribunal for a direction for HMRC's case to be restricted to that directed by Judge Avery-Jones (see paragraph 13, above) and that "each and every other allegation of fraud and/or means of knowledge of fraud be deleted, redacted or expunged" from HMRC's Amended Statement of Case and witness statements. Alternatively JDI sought a direction requiring HMRC to set out:

(1) each and every element of the alleged fraud or frauds to which JDI's supplies are alleged to be connected including but not limited to:

(a) the identity of the relevant participants of the alleged fraud or frauds,

(b) the place of each participant in the fraud in each supply chain, and

(c) the means by which it is alleged monies were extracted from (a) participants in each supply chain and/or (b) HMRC in order to bring the alleged fraud to fruition;

(2) the identity of the individual whom HMRC contend did or should have known of the alleged fraudulent activities including full particulars in support;

(3) each and every step HMRC will contend JDI should have taken in relation to each transaction and, in respect of each step, the effect that taking that step would have had in providing knowledge of the existence of a fraudulent transaction.

17. On 27 September 2011 the applications of HMRC and JDI together with an application by HMRC for further disclosure from JDI made on 31 August 2011, to which JDI objected on 2 September 2011, were heard by Judge Gort.

18. She gave HMRC permission to serve the Amended Statement of Case subject to certain redactions (although not in relation to paragraphs 17, 19 and 20 of the Amended Statement of Case) and the:

> "parties using their best endeavours to agree and then submit Further and Better Particulars of the Amended Statement of Case."

Also, at that hearing the parties agreed that comment and opinion in HMRC's evidence should be redacted although this was not reflected in Judge Gort's direction.

19. However, HMRC, contrary to the direction of Judge Gort and without any reference to JDI, served the following Further and Better Particulars of their Amended Statement of Case on 11 October 2011:

> Of Paragraph 19
>
> 'Precise nature of the fraud': As a matter of law, it is sufficient for [HMRC] to show that [JDI] knew, or ought to have known, of a connection between its transactions and the fraudulent evasion of VAT. As a matter of fact, [HMRC] will invite the Tribunal to draw sensible inferences from the totality of the evidence. In pursuance of its primary case, that [JDI] knew of a connection between its transactions and the fraudulent evasion of VAT' (without prejudice to its alternative case that [JDI] ought to have so known), [HMRC] will invite the Tribunal to conclude that the following entities were participants in an orchestrated VAT fraud:
>
> [JDI] (whether through its directors, employers or agents)
> 'Supplier': Wizard Trading (Europe) Ltd, DVB Limited, Cybacomms (UK) Ltd.
> 'Customer': Navigi.it SPA
> 'Freight Forwarder': Interken Freighters (UK) Ltd, Pauls Freight Services
> 'Inspection agent': A1 Inspection Ltd
> 'Defaulting trader': GPA, LTH, DBP, Alartec.
>
> [HMRC] invite the inference that each of these participants presented themselves as independent commercial entities carrying out their given role (trader, freight forwarder, inspection agent) but were in fact engaged in the coordinated purchase, sale and zero-rated export of large quantities of mobile telephones for the purpose of VAT fraud.
>
> Facts and matters relied on: [HMRC] rely on the totality of the evidence, and in particular:
>
> So far as [JDI], its suppliers and customers are concerned, [HMRC] rely on the evidence of circularity of funds in 8 of the 9 transactions (each of the suppliers, customers named above figure in one or more of the 8 transactions in which circularity occurs). Circularity of funds could not have taken place unless each of these traders knew from

> whom to buy and to whom to sell. [HMRC] rely on the fact that the trading in issue was contrived. The Tribunal will be invited to infer that this contrivance was in order to facilitate VAT fraud. [HMRC] again rely on the totality of the evidence in this regard and reiterate the matters expressly pleaded at paragraphs 27.1, 27.2, 27.3, 27.4, 27.5, 27.6, 27.7, 27.8, 27.9. 27.10, 27.12 and 27.13.
>
> So far as the defaulting traders are concerned, [HMRC] rely on the FCIB [First Curacao International Bank] analysis for each of the 9 deals (showing that the defaulting trader was not paid for its sale) and the circumstances in which the VAT default took place.
>
> So far as the Freight Forwarders are concerned, [HMRC] rely on the matters set out at paragraphs 68-75 (Pauls) and 76-85 (Interken) of the statement of Carolyn Ross [of HMRC] dated 17 December 2008. In particular, that Pauls held paperwork for transaction chains which were nearly (but not quite) identical to those that occurred shows that Pauls was facilitating contrived transactions (because the identities of some of the traders within the chains were interchangeable); and that Interken moved goods to Speed International in Italy before those goods were moved back to Interken 2 days later shows that Interken were knowingly involved in the fraudulent circulation of mobile telephones.
>
> So far as A1 Inspections is concerned, [HMRC] rely in particular upon the fact that A1 Inspections claimed to have carried out unfeasible inspections (as set out in paragraphs 30-34 of the statement of Carolyn Ross dated 24 June 2009).
>
> [HMRC] reiterate that it is sufficient for [HMRC] to show that [JDI] knew or ought to have known of a connection between its transactions and the fraudulent evasion of VAT. It is therefore sufficient for [HMRC] to establish fraud of the defaulting traders alone. The particulars above relate to [HMRC's] contention that, in addition to the fraud of the defaulting traders, other entities (as specified above) were involved in a coordinated VAT fraud.

20. HMRC enclosed a copy of the Amended Statement of Case with a letter, dated 25 October 2011, to BTG Tax ("BTG") who was then representing JDI. This letter referred to the Further and Better Particulars and explained that HMRC considered it was "appropriate" to file and serve these after the hearing and that any comments JDI may have, "either on the subject matter or content of the further particulars" would be considered. On 28 October 2011 HMRC wrote to BTG enclosing an index to 53 files of disclosure on the traders in the transaction chains that they were reviewing stating that "batches of files" would be forwarded to BTG "as they are being reviewed by HMRC so that you can begin your review as soon as possible.

21. BTG replied on 4 November 2011. The relevant parts of that letter are as follows:

> First, we acknowledge receipt of your letter dated 28 October 2011, with the enclosed index of 53 files of documents that you are reviewing in relation to the following twelve entities: Wizard, Black Country Trading, DVB, Cobra Communications, Vescon Construction, Fonestop MG, Cybacomms, Navigo, Alartec, LTH, DBP and GPA.

…

We reserve our position in respect of the apparent state of affairs whereby HMRC has seen fit to make very serious allegations of fraud against these twelve entities without having reviewed – carefully or at all – the materials already available and in the possession of HMRC.

…

Secondly, further to your letter of 25 October 2011, we respond as follows:

1. We acknowledge receipt of the Amended Statement of Case that you enclosed with the letter dated 25 October 2011. …

2. Further, on a related note, please confirm that HMRC will pay the costs of and occasioned by the amendments (if any) in any event, ie in the usual order in civil litigation. …

3. …

4. In respect of the Further and Better Particulars we understand HMRC's case to be as follows:

a. It alleges fraud against the missing traders based upon witness statements and supporting documentation already served.

b. Fraud is alleged against the other parties identified in HMRC's Further and Better Particulars based upon the FCIB material from which HMRC will invite the Tribunal to draw adverse conclusions against those parties. In other words, HMRC does not intend to adduce further evidence from the officers dealing with those parties in similar manner to the missing traders and [JDI].

If we have misunderstood the position we would be grateful for clarification as soon as possible.

22. HMRC replied in a letter which, as it acknowledges receipt of BTG's letter of 4 November 2011, was incorrectly dated 10 September 2011. In relation to point 4 of BTG's letter (dealing with the Further and Better Particulars) HMRC confirmed that they had no current intention to serve further evidence in relation to the other traders in JDI's transaction chains and referred BTG to the Further and Better Particulars where HMRC state "so far as the defaulting traders are concerned, [HMRC] rely on the FCIB analysis for each of the 9 deals (showing that the defaulting trader was not paid for its sale) and the circumstances in which the VAT default took place."

23. At the Pre-Trial Review, on 14 November 2011, before Judge Gort, HMRC were directed to pay the costs occasioned by and incidental to the amendment of Statement of Case including the costs of JDI in resisting the application. In giving reasons for her direction Judge Gort said that, "there would have been no cause for [JDI] to have incurred those costs if the matter had been fully and properly pleaded in the first instance."

Preliminary Application

24. Following the opening submissions, but before the commencement of the substantive hearing Mr Scorey, for JDI, addressed two complaints about the manner in which HMRC had conducted their case.

25. First, he contended that despite repeated applications made to ensure that exhaustive particulars of fraud were provided, HMRC's skeleton argument contains "new and unheralded allegations of fraud against JDI and others"; and secondly, that statements have been adduced that should be excluded because they are either irrelevant or inadmissible.

Allegations of Fraud

26. With regard to allegations of fraud, Mr Scorey's general complaint was that these have been made against parties not included in paragraph 19 of the Amended Statement of Case or mentioned in the Further and Better Particulars contrary to the general principle that fraud must be distinctly alleged and pleaded clearly with particularity (see *Armitage v Nurse* [1998] Ch 241 at 254-7). Mr Scorey submitted that HMRC should not be permitted to advance these allegations at trial as it was "entirely improper and irregular for them to make extremely serious allegations of fraud that have not been properly pleaded, particularly against third parties" and that JDI was entitled to rely on the pleadings to meet the case against it.

27. In reply, Mr Hall contended that it was beyond dispute in this case that fraud is "being fairly and squarely pleaded against both JDI and its associated companies." He took us to *Mobilx* where Moses LJ said, at [81-83]:

> [81] HMRC raised in writing the question as to where the burden of proof lies. It is plain that if HMRC wishes to assert that a trader's state of knowledge was such that his purchase is outwith the scope of the right to deduct it must prove that assertion. No sensible argument was advanced to the contrary.
>
> [82] But that is far from saying that the surrounding circumstances cannot establish sufficient knowledge to treat the trader as a participant. As I indicated in relation to the BSG appeal, Tribunals should not unduly focus on the question whether a trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is that his transactions have been or will be connected to fraud. The danger in focussing on the question of due diligence is that it may deflect a Tribunal from asking the essential question posed in *Kittel*, namely, whether the trader should have known that by his purchase he was taking part in a transaction connected with fraudulent evasion of VAT. The circumstances may well establish that he was.
>
> [83] The questions posed in BSG (quoted here at § 72) by the Tribunal were important questions which may often need to be asked in relation to the issue of the trader's state of knowledge. I can do no better than

repeat the words of Christopher Clarke J in *Red12 v HMRC* [2009] EWHC 2563:-

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

Mr Hall contended that there was no support in this approach for what was sought by JDI which was effectively to require HMRC to separately plead any matter whenever they wanted to draw the Tribunal's attention to a similarity between the transactions with which the appeal was concerned and another one set of transactions.

28. We were then referred to the passage from *Megtian Ltd v HMRC* [2010] STC 840 at [38] where Briggs J had said:

> "Similarly, I consider that there are likely to be many cases in which facts about the transaction known to the broker are sufficient to enable

> it to be said that the broker ought to have known that his transaction was connected with a tax fraud, without it having to be, or even being possible for it to be, demonstrated precisely which aspects of a sophisticated multifaceted fraud he would have discovered, had he made reasonable inquiries."

Mr Hall submitted that it necessarily follows that if HMRC is not required to prove a particular fraud they cannot be required to plead a particular fraud.

29. Although he had contended that HMRC did not need to do so, Mr Hall submitted that HMRC had in fact pleaded, at paragraph 20, particularly paragraph 20.2, of the Amended Statement of Case (which we have set out at paragraph 14, above), that there was a circularity of funds and that this was unlikely to be anything other than the product of organised fraud and unlikely to be feasible without the willingness of each party to the circle of funds to participate in pre-ordained transactions. This, Mr Hall submitted, was sufficient to include all parties to these transactions even if they had not been specifically mentioned in the Amended Statement of Case or Further and Better Particulars.

30. He also contended that in any event JDI was aware of the allegations of fraud against third parties and referred us to the letter, dated 4 November 2011, to HMRC from BTG (the relevant parts of which we have set out at paragraph 21, above) which lists the entities concerned and therefore, he submitted, JDI understood that fraud was alleged against those entities.

Inadmissible/Irrelevant Evidence

31. Mr Scorey's second complaint concerned what he contended was either inadmissible or irrelevant evidence. Although Mr Scorey had initially raised several issues, some had been resolved by agreement between the parties and the only matters outstanding were whether the evidence of John Fletcher and references to circularity of payments in the witness statement of HMRC Officer Michael Downer should be excluded.

Evidence of John Fletcher

32. In order to determine the admissibility or otherwise of his evidence it was agreed that we should read the witness statement of John Fletcher which, although we were not referred to the case, was the approach suggested by Lightman J in *Mobile Export 365 v HMRC* [2007] EWHC 1737 (Ch) where he said, at [20(3)]:

> "… the Tribunal cannot (as it has proposed in the Decision) decide to admit evidence on the basis that it can later reverse this decision if it considers it just. The Tribunal must (at least in any ordinary case such as the present) make a final decision either way. Pending such a final decision, the Tribunal may find it necessary to allow evidence to be read and referred to "de bene esse" before finally deciding on its admissibility. The availability of this course does not afford a green light to postponing a final decision on admissibility longer than is necessary."

33. Mr Fletcher is a Principal Advisor in KPMG LLP ("KPMG") who has had over 15 years experience in the telecoms industry holding positions in audit, accounting, corporate finance and international business development and has worked as a strategic adviser to participants and investors in the industry.

34. His witness statement, dated 25 June 2009, is in the form of a report and has the heading *Mobile Phone Handset Distribution Authorised and Grey Markets in 2006* and does not refer to the facts of JDI's appeal but contains generic evidence about the mobile phone industry and the wholesale "grey market" for mobile phones in the UK during 2006. At paragraph 1.4.1 Mr Fletcher explains that he has been assisted in the preparation of his statement "by a team of industry specialists, forensic accountants and economists" who have worked under his supervision and direction but makes it clear that the opinions expressed in his statement are his own.

35. Mr Scorey submitted that we should exclude Mr Fletcher's evidence, which was in effect a "thinly veiled expert opinion" as was apparent from its title, on the grounds that:

> (1) it was the evidence of a non-expert gathering together information which he had derived ex post facto from nameless individuals and from reports obtained after the event (see *Excel RTI Solutions Limited v HMRC* [2010] UKFTT 519 (TC) at [243]);
>
> (2) even if Mr Fletcher were to be considered capable of providing expert evidence his report did not comply with the duties of experts in civil cases or Part 35 of the Civil Procedure Rules ("CPR") which should apply to experts in the Tribunal (see *National Justice Compania Naviera SA –v-Prudential Assurance Co. Limited ("The Ikarian Reefer")* [1993] 2 Lloyd's Rep 68 pages 81-82 and *Chandanmal & Ors (t/a Narain Bros) v HMRC* [2012] UKFTT 188 (TC) at [11]); and
>
> (3) there is the risk of perceived bias or impartiality as KPMG is a member of the "Anti-Gray [sic] Market Alliance" which seeks to promote the interests of authorised distributors and undermine the importance and significance of the grey market and is also an adviser to Nokia (see *HT Purser v HMRC* [2011] UKFTT 860 (TC)).

36. In response Mr Hall contended that:

> (1) Mr Fletcher's evidence was relevant to the present appeal and that as JDI's case relied on the exploitation of the grey market HMRC was entitled to meet that evidence with an expert report from Mr Fetcher;
>
> (2) even if Mr Fletcher's evidence was such that it was considered to be inadmissible in a civil trial it could still be admitted by the Tribunal under rules 15(2)(a) of the Tribunal Rules (see *Mobile Export/Shelford v HMRC* [2009] EWHC 797 (Ch)); and
>
> (3) the risk or perception of impartiality was a matter for cross examination of the witness rather than the exclusion of his evidence.

Circularity

37. Mr Scorey referred us to *Chandanmal & Ors (t/a Narain Bros) v HMRC* [2012] UKFTT 188 (TC) ("*Chandanmal*") where Judge Mosedale said, at [55]:

> "…, in paragraph 160-161 Mr Moorhead [an HMRC officer who had analysed statements of bank accounts held with FCIB] states that he found payments involving the appellants' purchases to be circular in that the person at the start of the money chain was the same as the person at the end. Mr Kinnear says that this is a statement of fact. Mr Dagnall says it is a statement of opinion. I find it is a statement of opinion: this is because it is built on other opinions that Mr Moorhead has formed. In particular, he has looked at the statements and found payments between FCIB account holders. He has formed a view that a payment from A to B relates to a payment by B to C and so on. This in turn has led to his forming a view that the payment chains were circular. That is a matter of opinion and as he is not an expert witness it is inadmissible. The view that the payments are circular can of course form the basis of submissions by counsel at the hearing if counsel is of the same opinion."

38. Similarly in the present case the statement of HMRC Officer Michael Downer who analysed statements of FCIB accounts includes references to payments involving JDI's transactions being "circular". Mr Scorey submitted that these were statements of opinion and as in *Chandanmal* should be excluded as inadmissible.

39. Mr Hall disagreed contending that there already had been many redactions in HMRC's evidence to exclude opinions as requested by JDI and that as there had been no request regarding the particular references to circularity it should be a matter for cross examination and not excluded.

Directions

40. Having considered the submissions of counsel for both parties we orally directed that:

> (1) The Respondents are not permitted to advance or rely upon any additional or further allegations or basis of fraud to that specifically alleged in paragraph 19 of the Amended Statement of Case and set out in the Further and Better Particulars.
>
> (2) The evidence of Mr John Fletcher be excluded.
>
> (3) Paragraphs 87 – 92 of the first witness statement of Officer Downer and paragraphs 96 and 97 of the second witness statement of Officer Downer [which refer to "circularity"] be excluded.

41. In response to Mr Hall's request for an indication as to the practical effect of the direction on the conduct of the hearing we made it clear that the direction restricted allegations of fraud to those parties named in the Further and Better Particulars and paragraph 19 of the Amended Statement of Case but did not restrict any evidence from being adduced which went to JDI's knowledge of fraud.

Application by HMRC

42. In order to allow the substantive hearing to proceed without delay we did not provide reasons for our directions at the time they were given but indicated that they would be provided in our decision. These are set out below.

43. However, following our oral announcement of the directions, Mr Hall made an application for permission to appeal submitting that "there are strong arguments that the directions in regard to the pleadings and Mr Fletcher are arguably wrong in law". He accepted that in order to make such an application it was necessary to have full reasons for the directions and asked that the appeal be adjourned to enable full reasons to be produced and for an appeal to be made to the Tax and Chancery Chamber of the Upper Tribunal.

44. This application was strongly opposed by Mr Scorey who reminded us that these were case management directions against which there was "a very very high bar for permission to appeal." As Sir Andrew Park said *Mobile Export/Shelford v HMRC* [2009] EWHC 797 (Ch) at [13]:

> "The extent to which an appellate court should interfere with an interlocutory decision of a first instance tribunal is significantly restricted. I was referred to paragraphs 11 to 14 of the judgment of Mr Justice Richards in *CCE v Gil Insurance Limited* [2000] STC 204. I will not reproduce those paragraphs in extenso here but I adopt and respectfully agree with everything that they say. I do, however, quote three sentences from paragraph 11 of the judgment.
>
> > "It is not the function of this court to entertain a re-run of the arguments before the Tribunal and to reach its own decision on whether to order a strike-out or the hearing of a preliminary issue ... Not every error of law in the Tribunal's reasoning would vitiate the decision and justify intervention. It seems to me that in this context the court should not intervene unless the error has resulted in a decision that is plainly wrong."
>
> Mr Justice Richards also quoted the following passage from the judgment of Lord Hope in the Court of Session in *CCE v Young* [1993] STC 394 at 397.
>
> > "It is clear that it is not open to us to interfere with the decision which was taken by the Tribunal in this case simply because if we had been presented with the same facts we would have reached a different result. The test which we must apply is whether the tribunal exercised its discretion reasonably and in a judicial way ..."
>
> See also Peter Smith J in *Seabrook and Smith Limited v CCE* [2004] EWHC 306 at paragraph 3."

45. The present appeal had commenced in 2008, over four years ago, and had, after several highly contested interlocutory hearings been listed for a 15 day hearing. The parties, their witnesses and their representatives were all present and prepared for the hearing. Given the all too real difficulties of listing an appeal such as the availability of counsel, witnesses and a suitable venue able to accommodate the parties, their

representative and the considerable volume of papers that are a feature of MTIC cases we considered that it would not be in the interests of justice for the matter to be further delayed and came to the conclusion, having regard to the overriding objective in Rule 2 of the Tribunal Rules to deal with a case "fairly and justly", to refuse Mr Hall's application and continue with the hearing.

Reasons for Directions

46. The reasons for our directions are as follows.

Restriction on Allegations of Fraud

47. With regard to allegations of fraud, as Millett LJ said in *Armitage v Nurse* [1998] Ch 241 at 254-7:

> "The general principle is well known. Fraud must be distinctly alleged and as distinctly proved: Davy v. Garrett (1878) 7 Ch.D. 473, 489, per Thesiger L.J. It is not necessary to use the word "fraud" or "dishonesty" if the facts which make the conduct complained of fraudulent are pleaded; but, if the facts pleaded are consistent with innocence, then it is not open to the court to find fraud. As Buckley L.J. said in Belmont Finance Corporation Ltd. v. Williams Furniture Ltd. [1979] Ch. 250 , 268:
>
> > 'An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognised rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used . . . The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity.'
>
> That case is authority for the proposition that an allegation that the defendant "knew or ought to have known" is not a clear and unequivocal allegation of actual knowledge and will not support a finding of fraud. It is not treated as making two alternative allegations, i.e. an allegation (i) that the defendant actually knew with an alternative allegation (ii) that he ought to have known; but rather a single allegation that he ought to have known (and may even have known - though it is not necessary to allege this)."

48. It is clear that the same general principle applies to appeals before the Tribunal. In *Blue Sphere Global Limited v HMRC* [2008] UKVAT 20694, the chairman of the VAT and Duties Tribunal, Mr Theodore Wallace (as he then was), said at [30]:

> "It is a long established principle of English law that any allegation of fraud must be clearly pleaded with particulars. This applies to civil as well as to criminal proceedings. It applies to tax appeals just as much

> as to any other litigation. An Appellant against whom fraud is alleged is entitled to know clearly what case he has to meet."

49. In *Earthshine Limited v HMRC* [2011] UKFTT 667 (TC), an MTIC case, the Tribunal (Judge Mosedale and Mrs Salisbury) considered as a preliminary matter whether allegations of actual knowledge of fraud (as opposed to allegations of fraud) were pleaded with sufficient particularity stating at [24]:

> "An appellant cannot expect the entire content of a witness statement to be set out in the Statement of Case. We agree with Judge Wallace in *Late Editions Limited* [2009] UKFTT 166 (TC)*:*
>
> > "We do not read the judgment [Lloyd J in *Mobilx*] as saying every allegation must be pleaded in detail in the Statement of Case. The crucial matter is that the appellant should have had a proper opportunity to deal with any material allegation. Cases such as this involve a mass of detail. It is unrealistic to expect every detailed allegation to be in the Statement of Case…." [para 148]
>
> The Statement of Case is of necessity a summary of the evidence HMRC say their witnesses will give and the inferences which HMRC draw from it: we find it was given in sufficient particularity for the Appellant to be very well aware of HMRC's case long before the hearing. Indeed, there were about 4 rounds of witness statements being made in response to various points made by witnesses for each side before the hearing commenced. The Appellant knew the case against it."

50. In the present case it is common ground that it is necessary for allegations of fraud to be distinctly pleaded. It is not disputed that fraud has been alleged and pleaded against JDI and those parties specifically mentioned in the Further and Better Particulars. However, the issue is whether, as Mr Scorey contends, HMRC should be restricted in being able to make allegations of fraud against only those parties included in paragraph 19 of the Amended Statement of Case and/or the Further and Better Particulars and be precluded from including any other party or transactions in the allegations; or, as Mr Hall submits relying on *Mobilx* and *Megtian*, that if it is not necessary for HMRC to prove a particular fraud they cannot be required to plead a particular fraud.

51. On re-reading the passages from *Mobilx* and *Megtian* especially the subsequent paragraph to that cited by Mr Hall in *Megtian* it is apparent that the court in each of these cases was concerned with the appellant's "knowledge" of fraud and not whether fraud had been alleged, a different issue to that before us.

52. It is clear, from *Armitage v Nurse* and *Blue Sphere Global Limited* that allegations of fraud should clearly pleaded with particulars to enable a party to know the case against it or, to paraphrase Judge Wallace in *Late Editions Limited*, (as cited in *Earthshine Limited v HMRC*), to allow it a proper opportunity to deal with these material allegations. It is therefore necessary to consider whether JDI has had such an opportunity in this case.

53. Mr Hall contends that JDI did have such an opportunity as the allegations of fraud are pleaded against all parties. He points to paragraph 20, particularly paragraph 20.2 of the Amended Statement of Case (see paragraph 14, above) which refers to the transactions showing "circularity of funds" which is the "product of organised fraud" which would not be feasible without the willingness of "each party to the circle of funds to participate in pre-ordained transactions". However, as Mr Scorey, submitted, paragraph 20 of the Amended Statement of Case, as is clear from its terms, concerns JDI's "knowledge" of fraud as opposed to allegations of fraud.

54. Mr Hall also relied on the letter from BTG to HMRC, dated 4 November 2011 (relevant parts of which we have set put at paragraph 21, above), which referred to DVB, Cobra Communications, Vescon Construction, Fonestop MG, Cybacomms, Navigo, Alartec, LTH, DBP and GPA in which JDI reserved its position "in respect of the apparent state of affairs whereby HMRC has seen fit to make very serious allegations of fraud … against these twelve entities" submitting that this shows that JDI knew of the allegations of fraud against those parties.

55. However, this does not take into account the subsequent passage in the letter which refers to the Further and Better Particulars and sets out JDI's understanding that fraud is alleged "against the other parties identified in HMRC's Further and Better Particulars" and requests clarification from HMRC as soon as possible if the position is misunderstood.

56. HMRC did not respond to this request for clarification by JDI and no further allegations of fraud were made until they appeared in HMRC's skeleton argument. In our judgment this was too late and an inappropriate method of advancing such allegations.

57. Although it is a case dealing with a 'best judgement' VAT assessment, we accept Mr Scorey's submission that the principle in *Pegasus Birds v HM Commrs. of Customs and Excise* [2004] STC 1509 regarding allegations of improper conduct or dishonesty applies equally in the context of allegations of fraud. As Carnwath LJ (as he then was) said in that case, at [38(iii)]:

> "In particular the Tribunal should insist at the outset that any allegation of dishonesty or other wrongdoing … should be stated unequivocally."

58. In the circumstances, having regard to the overriding objective of the Tribunal Rules to deal with cases fairly and justly, we conclude that HMRC should be restricted to the allegations of fraud that were unequivocally and specifically alleged in paragraph 19 of the Amended Statement of Case and set out in the Further and Better Particulars.

Evidence of John Fletcher

59. Although it is accepted that Mr Fletcher's evidence is relevant to the case, Mr Scorey submitted that it should be excluded because he is a non-expert; he has not complied with the duties and responsibilities of an expert witness as required by the

Ikarian Reefer and Part 35 CPR; and his evidence cannot be perceived to be impartial because of KPMG's membership of the Anti-Gray Market Alliance.

60. The first question that arises is whether Mr Fletcher is an expert?

61. Mr Scorey submits that as Mr Fletcher has not been involved in the wholesale export of mobile phones in the grey market he should not be regarded as an expert but as a non–expert gathering information and asserting his point of view. He referred us to the decision of Judge Wallace in *Excel RTI Solutions v HMRC* where he said, at [215]:

> "Mr Patchett-Joyce said that expert evidence should only be admitted in carefully defined circumstances. He cited Aikens J at [19]-[23] in *J P Morgan Chase Bank v Springwell Navigation Corpn* [2007] 1 All ER (Comm) 549 in relation to Part 35 of the Civil Procedure Rules, and submitted that the Tribunal Rules have the same overriding objective. He said that there is no sufficient recognised body of knowledge as to the grey market. The issues covered by expert evidence should be identified and the relevance and necessity of such evidence established. Mr Fletcher's evidence did not satisfy those criteria and was irrelevant because he expressly accepted that there was a grey market in mobiles. It was irrelevant whether it was illegitimate. Mr Fletcher was a non-expert gathering together information which he had derived from nameless individuals at Nokia and from reports produced after the event. He went round ex post facto assembling factual data from others where the factual basis was not properly laid."

At [243] Judge Wallace said:

> "We have considered the evidence of Mr Fletcher with care but do not place any substantial reliance on it. We consider that there is considerable force in the submissions of Mr Patchett-Joyce recorded at paragraph 215. His evidence included factual material which was inevitably nearly all second hand including that on Nokia's pricing policy; we have no difficulty with that since the Tribunal regularly receives hearsay evidence. However his conclusions seem to us to be a matter for submission by counsel rather than evidence by an expert witness. There is an inherent difficulty in expert evidence as to the grey market, particularly since it did not appear that Mr Fletcher's researches covered inquiries to any authorised distributors. It does not seem to us that there is any inherent improbability in a trader engaging in broker-like activities, matching deals, carrying no stock and only dealing at a profit. We do not understand why Excel should be expected to have known why its counterparties should have chosen to deal at the prices which they were willing to agree.

62. It would appear from the above that, despite finding "considerable force" in the submissions of counsel for the appellant in *Excel RTI Solutions*, Judge Wallace considered the evidence of Mr Fletcher to be that of an expert. We agree. In our view given Mr Fletcher's significant experience of the trade in mobile phones together with his extensive research and the support of his research team, which is apparent from his witness statement, we find that his evidence is expert in nature.

63. We have already, at paragraph 34 above, referred to Mr Fletcher's evidence giving a generic view, with his opinions and conclusions in relation to the grey market in mobile telephones during 2006 rather than dealing with the specific issues and facts of this appeal. Having considered this evidence we find, as did Judge Wallace in *Excel RTI Solutions v HMRC*, that "his conclusions seem to us to be a matter for submission by counsel rather than evidence by an expert witness" and, as such, it does not materially assist the Tribunal in the determination of this appeal. For that reason, we find that Mr Fletcher's evidence should be excluded.

64. Although it is not therefore strictly necessary for us to consider the additional arguments advanced by Mr Scorey for the exclusion of Mr Fletcher's evidence we have done so as these were fully argued before us. We first consider whether Mr Fletcher has complied with the duties and responsibilities of an expert witness.

65. In *National Justice Compania Naviera SA –v- Prudential Assurance Co. Limited ("The Ikarian Reefer")* [1993] 2 Lloyd's Rep 68 at pages 81-82 Cresswell J said:-

> "The duties and responsibilities of expert witnesses in civil cases include the following:
>
> 1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (Whitehouse v. Jordan, [1981] 1 WLR 246 at p. 256, per Lord Wilberforce).
>
> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see Polivitte Ltd. v. Commercial Union Assurance Co. Plc., [1987] 1 Lloyd's Rep. 379 at p. 386 per Mr. Justice Garland and Re J, [1990] F.C.R. 193 per Mr. Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.
>
> 3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (Re J sup.).
>
> 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
>
> 5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (Re J sup.). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (Derby & Co. Ltd. and Others v. Weldon and Others, The Times, Nov. 9, 1990 per Lord Justice Staughton).
>
> 6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.

> 7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice)"."

66. Insofar as civil proceedings are concerned the duties of an expert witness are set out in Part 35 of the CPR and its associated Practice Direction. Although the CPR do not apply to proceedings before the Tribunal, which are governed by the Tribunal Rules, both the CPR and Tribunal Rules have a similar overriding objective which is to deal with cases "justly", which includes ensuring they are dealt with "expeditiously and fairly"(CPR) and deal with cases "fairly and justly" (Tribunal Rules).

67. Part 35.3 CPR provides:

> (1) It is the duty of experts to help the court on matters within their expertise.
>
> (2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

Under Part 35.10 CPR an expert's report must comply with the requirement of Practice Direction 35 and at the end of the report there must be a statement that the expert understands and has complied with his duty to the court. The Protocol for the Instruction of Experts to give Evidence in Civil Claims is annexed to the Practice Direction. Paragraph 13.8 of the Protocol states:

> Where experts rely in their reports on literature or other material and cite the opinions of others without having verified them, they must give details of those opinions relied on. It is likely to assist the court if the qualifications of the originator(s) are also stated

68. The application of Part 35 CPR to cases before the Tribunal was considered by Judge Mosedale in *Chandanmal* at [7-14]:

> [7] "HMRC have served an expert witness statement by Mr Fletcher, a consultant with KPMG, who gives expert evidence on the grey market in mobile phones. It contains only a statement of truth and not the normal expert witness statement given under Part 35 of the Court Procedure Rules ("CPR"). The appellant seeks a direction that Mr Fletcher provides a further statement saying whether he has complied with Part 35 of CPR.
>
> [8] It is part of the role of the court or Tribunal to ascertain the reliability of evidence of fact: where opinion evidence is being expressed in a specialist area it may not be as easy for a court or Tribunal to assess the reliability of that evidence. It is likely to be for that reason that the courts have detailed rules, such as CPR 35 for the High Court, which seek to ensure the reliability of expert evidence.
>
> [9] CPR practice direction 35 at 2 requires an expert witness to give an independent view. At 3.2 it requires the expert witness to state his expertise, disclose his sources, make clear if anyone helped him with the report, summarise the range of opinions on the matter and give

reasons for his own opinion, and state that he has complied with his duty to the court. At 2.5 he is required to communicate any material change of view to the parties without delay.

[10] HMRC point out that the Tribunal does not have rules similar to CPR part 35. The Tribunal can admit what evidence it chooses (Rule 15(2)(a) of Tribunal Procedure (First Tier Tribunal)(Tax Chamber) Rules 2009) and theoretically could admit expert evidence from an expert who was not independent. But I see no good reason why I would do that in this case. A Tribunal as much as a court is concerned with the reliability of expert evidence. It is right and in the interests of justice that the only opinions of witnesses relied on by the Tribunal are witnesses who are both expert in the specialist area on which they give their opinion and who are impartial between the parties.

[11] I reviewed the requirements of CPR Practice Direction 35 paragraph 3.2 at the hearing and HMRC agreed that Mr Fletcher would comply or had complied with every one. Indeed, Mr Kinear [sic] said Mr Fletcher was instructed to observe the practice direction on experts. However, I note that in one respect at least I was not satisfied that Mr Fletcher had necessarily complied with the practice direction. His summary of sources at paragraph 1.3.1 of his statement does not contain a reference to a confidential report from Nokia which the appellant believes that Mr Fletcher may have relied on when compiling the report and I know from my experience in another case that Mr Fletcher did rely on in compiling the report in that case.

[12] This only goes to reinforce my view that expert witnesses, even in the Tribunal, should comply with the requirements of CPR practice direction 35 and state that they have done so. Indeed, it is normal practice within the Tribunal to direct that expert witnesses should do so.

[13] That such a direction has not been given in this case is likely to be because leave to serve an expert witness statement was not sought by HMRC. Although no point is taken on this, arguably under Rule 15(1)(c) such leave should have been obtained before serving Mr Fletcher's statement.

[14] My conclusion is that there is every advantage to expert witnesses in the Tribunal following CPR Practice Direction 35 and no disadvantage. While some cases in the tax tribunal are informal, in this case, with nearly £5million at issue, both parties are represented by solicitors and counsel and there is no advantage to informality. Even HMRC do not suggest that Mr Fletcher would not in practice obey CPR 35. There is no reason why he should not state (if true) that he has so complied and I so direct."

69. It is clear from the comments of Cresswell J in the *Ikarian Reefer*, Part 35 CPR and its associated Practice Direction and paragraph 13.8 of the Protocol (see paragraph 67, above) that an expert, where he has relied on the opinions of others, should give details of those opinions relied on. However, contrary to this requirement, the team of industry specialists, forensic accountants and economists who worked

under Mr Fletcher's direction and supervision and on whom he relied to produce his report are not identified.

70. In addition, the possibility, identified by Judge Mosedale in *Chandanmal*, at [11] that she was not satisfied that Mr Fletcher had necessarily complied with the practice direction in that his summary of sources at paragraph 1.3.1 of his statement did not contain a reference to a confidential report from Nokia which she knew from previous experience in another case that he did rely on in compiling the report is a cause for concern. Also, despite Judge Mosedale's comments at [14] of *Chandanmal*, that "there is every advantage to expert witnesses in the Tribunal following CPR Practice Direction 35 and no disadvantage", Mr Fletcher's report does not contain a statement that he has complied with Practice Direction 35

71. However, even if this was sufficient to exclude Mr Fletcher's evidence in civil proceedings Mr Hall contends that it could still be admitted by the Tribunal.

72. He referred us to the part of the decision of Sir Andrew Park in *Mobile Export/Shelford IT* in which he had considered the admissibility of the evidence of Gary Taylor of KPMG in an MTIC appeal. Sir Andrew Park said, at [17(2)]:

> "It is said that Mr Taylor is not an expert. I do not accept that his evidence should be excluded on this ground. I make three specific points in support of my conclusion.
>
> (a) For most purposes, I think that Mr Taylor can be regarded as an expert. He has considerable past experience, which he describes in his witness statement, of the mobile telephone business generally, even though he has not himself worked in the particular sector of it in which the appellants have operated. Further, an important point in my opinion is that Mr Taylor appears to be KPMG's internal expert upon the mobile telephones sector. In that role it must be expected that he would have acquired a great deal of specialist knowledge of the business. And the content of his evidence displays to my mind that he plainly does have extensive knowledge and understanding of the field to which the evidence is directed.
>
> (b) In any case the Value Added Tax Tribunal rules provide as follows in paragraph 28:
>
> > "28. Evidence at a hearing"
> >
> > "(1) ... a tribunal may direct or allow evidence of any facts to be given in any manner it may think fit and shall not refuse evidence tendered to it on the grounds only that such evidence would be inadmissible in a court of law."
>
> This rule is not an open sesame for any party to an appeal to call anyone to give evidence on anything. It does however relax, and in my judgment is intended to relax, some of the more rigid evidential rules which can arise in High Court proceedings. I do not accept the submission that the rule comes close to being a one-way option in favour of appellants. If HMRC wish to adduce in evidence a competent and informative analysis of a sector of business and of an appellant's

activities within it, rule 28(1), in my judgment, enables them to do that without having to meet technical arguments about whether the witness does or does not strictly rank as an expert.

(c) I should, however, say that I do accept that there are some respects in which what the Tribunal has said on this aspect of the case is not very happily expressed. I quote paragraph 1(1) of the directions:

> "The evidence of Gary Taylor of 14/03/08 is admitted as evidence of fact but with no special status as expert evidence."

Then the Tribunal reverted to this topic in paragraph 5 of the reasons (which I have quoted earlier and do not repeat here). It is not altogether clear to me whether the Tribunal takes the view that all the evidence of Mr Taylor was evidence of fact and admissible as such or whether all that it was saying was that, given that the rules applicable to VAT tribunals draw no distinction between factual evidence and expert evidence, it does not matter whether Mr Taylor's evidence is categorised as expert evidence or not. Although the Tribunal's reasons are somewhat obscure on this, my own opinion is that the categorisation of the evidence as expert or not does not matter. As I have said, I have read Mr Taylor's evidence. It appears to me potentially helpful to the Tribunal, and it seems to me entirely proper for the Tribunal to have accepted it.

73. It would seem from Sir Andrew Park's paragraph (a) that the experience of Mr Taylor was expert in nature and, as such, similar to Mr Fletcher in the present case. Also it would appear that unlike Mr Fletcher's generic evidence Mr Taylor's evidence did additionally specifically refer to the facts in the case.

74. It should also be noted that Rule 28 of the Value Added Tax Tribunal Rules, to which Sir Andrew Park referred, has been replaced by Rule 15 of the Tribunal Rules which, insofar as is relevant to the present case provides:

> (1) Without restriction on the general powers in rule 5(1) and (2) (case management powers) the Tribunal may give directions as to–
>
> (a) …
>
> (b) …
>
> (c) whether the parties are permitted or required to provide expert evidence, and if so whether the parties must jointly appoint a single expert to provide such evidence;
>
> (d) ..
>
> (e) …
>
> (f) …
>
> (2) The Tribunal may–
>
> (a) admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom.

75. Comparing the Tribunal Rules with the Value Added Tax Tribunal Rules it is apparent, as noted by Judge Mosedale in *Chandanmal* at [13] (see paragraph 68, above) that the Tribunal Rules envisage that a direction should be sought for permission to adduce expert evidence before serving a statement of an expert witness.

76. Also, under the Value Added Tax Tribunal Rules the use of the word "shall" meant that the Tribunal could not "refuse evidence tendered to it on the grounds only that such evidence would be inadmissible in a court of law" whereas the Tribunal Rules, by the use of the word "may", allows evidence to be admitted at the discretion of the Tribunal "whether or not the evidence would be admissible in a civil trial in the United Kingdom." Therefore, the starting point for the Tribunal in considering whether to admit evidence must be to determine whether or not it would be admissible in civil proceedings. If it was not admissible it would then be for the Tribunal, having regard to the overriding objective, to exercise its discretion and, if appropriate to do so, admit the evidence.

77. The Tribunal Rules therefore allow the Tribunal to adopt a degree of informality and flexibility in the admission of evidence as appropriate to the case before it. This is often necessary, especially if a taxpayer, who has no experience of litigation, appears in person and HMRC are represented by an experienced advocate. However, in a case such as the present where both parties are represented by solicitors and counsel there is no advantage or benefit to informality and we would have expected Mr Fletcher's evidence to state that it complied with Practice Direction 35 and for him to have complied with the duties and responsibilities of an expert witness. As he has not done so we would, in the circumstances, have been reluctant to exercise our discretion to admit his evidence.

78. With regard to the issue of perceived impartiality. Mr Scorey referred us to the comments of Judge Cornwell-Kelly in *HT Purser Ltd v HMRC* [2011] UKFTT 860 (TC) where he said at [170]:

> "… Mr Fletcher's evidence tending to the contrary is not convincing because he is not properly an 'expert witness', being through his firm committed to a major manufacturer/distributor in the white market; and his reports are, moreover, lacking direct evidence of or experience in trading on the grey market – a market which, in principle, it is not in the interests of his firm's client to encourage. **Mr Fletcher's perception of the position is thus necessarily partial** and cannot directly gainsay the evidence we have heard from Mr Purser, which we have accepted." (emphasis added).

79. We were also taken to a 2008 "Gray Market Study Update" written by KPMG entitled *Effective Channel Management Is Critical in Combatting the Gray Market and Increasing Technology Companies Bottom Line* which, as the spelling of "gray" indicates, was aimed at the American market. The Study includes the following conclusion:

> Not surprisingly our survey found that most channel partners believe their market positions would benefit by eliminating gray markets …

80. Although we note that this report was written and published by KPMG in the United States and Mr Fletcher is employed by the UK part of KPMG, given its international presence, we consider that KPMG's membership of the Anti-Gray Market Alliance is sufficient to affect the perception of the impartiality of Mr Fletcher's evidence.

81. In *Liverpool Roman Catholic Archdiocese Trustees Incorporated v Goldberg (No 2)* [2001] 4 All ER 950, a case not cited before us, Evans-Lombe J said, at 953 that:

> "…, where it is demonstrated that there exists a relationship between the proposed expert and the party calling him which a reasonable observer might think was capable of affecting the views of the expert so as to make them unduly favourable to that party, his evidence should not be admitted however unbiased the conclusions of the expert might probably be. The question is one of fact, namely the extent and nature of the relationship between the proposed witness and the party."

Although Mr Scorey did not refer us to the case, it is the approach he advocated we should adopt given Mr Fletcher's perceived impartiality as a result of KPMG's membership of the Anti-Gray Market Alliance.

82. However, in another authority which was not brought to our attention, *R (on the application of Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No.8)* [2003] QB 381("*Factortame*"), although the Court of Appeal considered that it was highly undesirable that an expert should have a significant financial interest in the outcome of the case, it disapproved the observations of Evans-Lombe J in *Liverpool Roman Catholic Archdiocese Trustees*. Lord Phillips MR (as he then was) giving the judgment of the court, said at [70]:

> This passage seems to us to be applying to an expert witness the same test of apparent bias that would be applicable to the tribunal. We do not believe that this approach is correct. It would inevitably exclude an employee from giving expert evidence on behalf of an employer. Expert evidence comes in many forms and in relation to many different types of issue. It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence. Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management. In considering that question the Judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules.

83. The current position was conveniently summarised by Nelson J *Armchair Passenger Transport Ltd v Helical Bar Plc & Anor* [2003] EWHC 367 (QB), yet another authority to which we were not taken, at [29]:

> "The following principles emerge from these authorities: -

(i) It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings.

(ii) The existence of such an interest, whether as an employee of one of the parties or otherwise, does not automatically render the evidence of the proposed expert inadmissible. It is the nature and extent of the interest or connection which matters, not the mere fact of the interest or connection.

(iii) Where the expert has an interest of one kind or another in the outcome of the case, the question of whether he should be permitted to give evidence should be determined as soon as possible in the course of case management.

(iv) The decision as to whether an expert should be permitted to give evidence in such circumstances is a matter of fact and degree. The test of apparent bias is not relevant to the question of whether or not an expert witness should be permitted to give evidence.

(v) The questions which have to be determined are whether (i) the person has relevant expertise and (ii) he or she is aware of their primary duty to the Court if they give expert evidence, and willing and able, despite the interest or connection with the litigation or a party thereto, to carry out that duty.

(vi) The Judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules.

(vii) If the expert has an interest which is not sufficient to preclude him from giving evidence the interest may nevertheless affect the weight of his evidence."

84. Therefore, although his evidence may be perceived to be partial, the decision as to whether or not Mr Fletcher's evidence should be admitted or excluded is a matter of fact and degree and a case management decision to be determined as soon as possible. However, the test of apparent bias is not relevant. The questions to be determined are whether he has relevant expertise and whether he is aware of primary duty to the Tribunal and willing and able to carry out that duty.

85. Although we have found Mr Fletcher's evidence to be that of an expert, and it is not disputed it is relevant, in the absence of a statement that he understands and has complied with Part 35 CPR, we cannot be satisfied that he is aware of his primary duty to the Tribunal. Given that the decision on whether or not we should admit or exclude Mr Fletcher's evidence is a case management decision to be determined as soon as possible we do not accept Mr Hall's submission that this is something that can be put to him at the outset of his evidence during the substantive hearing.

86. We would therefore have excluded Mr Fletcher's evidence on this ground also.

Evidence of Circularity of payments

87. Having considered *Chandanmal* we agree with Judge Mosedale that the view expressed in a witness statement to the effect that payments are circular are statements

of opinion and as Mr Downer is not an expert witness that evidence is inadmissible and should be excluded.

88. As for JDI failing to request the removal of these passages at an earlier stage in the proceedings we find, as Mr Scorey submitted, that it is not for JDI to police HMRC's responsibility to adduce fact and not opinion.

89. We now turn to the substantive appeal.

Evidence

90. We were provided with witness statements from the following HMRC officers:

(1) Carolyn Ross who was the officer responsible for the extended verification process of JDI's claim for repayment of input tax which is the subject matter of this appeal;

(2) Geoffrey Swinden, a member of HMRC's MTIC fraud team based in Luton who was the assigned officer for JDI having previously been the officer assigned to CGS Trading Limited; and

(3) Michael Downer, whose evidence concerned the FCIB data submitted by HMRC;

We heard from Mrs Ross, Mr Swinden and Mr Downer, who we found to be credible witnesses. Each of whom confirmed under oath that their respective statements were true and was cross examined by Mr Scorey.

91. In addition HMRC adduced evidence by way of witness statements from the following officers:

(1) Laura Hartell, a member of HMRC's MTIC in Leeds whose evidence was in relation to LTH Limited ("LTH");

(2) Michael Merriman of HMRC's Salford MTIC team whose evidence was about GPA International Limited ("GPA"); and

(3) Allistair Strachan, a member of HMRC's Specialist Investigations – MTIC fraud team based in Stoke on Trent. His evidence concerned Alartec Limited ("Alartec") and DBP Trading Limited ("DBP")

The evidence contained in these witness statements were not challenged and although we did not hear from these officers their statements were admitted in evidence

92. We were also provided with witness statements from Clive Smith, Stephen Clews, Gordon Cuthbertson and Guy Johnson all of whom gave sworn oral evidence for JDI and were cross examined by Mr Hall. We found all four to be credible witnesses.

93. There was also extensive documentary evidence (which including the witness statements was contained in 24 ring binders).

94. On the basis of this evidence we make the following findings of fact.

Facts

Background

95. JDI was incorporated on 13 April 2003 with an issued share capital of 100 shares of £1 each. 50 shares are owned by Clive Smith, 45 shares are owned by Guy Johnson and 5 shares are owned by Stephen Clews. In addition to being the only shareholders these three men are JDI's only directors.

96. Clive Smith, who has over 20 years experience in the mobile phone industry, managed the day-to-day operations of JDI. Previously he had been the Group Purchasing Manager of European Telecom Plc ("ET"), a company that employed 650 people and was based in seven different countries. ET was an authorised distributor for a variety of mobile phone manufacturers including Nokia, Motorola and Sony Ericsson, as well as being a substantial operator in the grey market. Mr Smith was a director of ET at the time of its flotation and, as such, underwent the London Stock Exchange vetting process. After leaving ET, Mr Smith worked for Phones International ("PI") for a short while before deciding to pursue his own interests and went into business with Mr Johnson.

97. Guy Johnson, who is one of the founders of Carphone Warehouse ("CPW"), is the source of JDI's funding. He left CPW in 2001 and his resulting wealth has permitted him to pursue a wide variety of business and philanthropic interests via his Family Office. Mr Johnson explained that his decision to go into business with Mr Smith in 2006 was because he "loved the mobile phone business" which he had been involved in since he "was almost a boy" being "intrigued with the technology" and describing mobile phones as "a product that has changed the way we live" and himself as "sort of wedded" to mobile phones.

98. Stephen Clews, the brother-in-law of Mr Johnson, has a background in corporate compliance and is a chartered company secretary (and a Fellow of the Institute of Chartered Secretaries and Administrators). He administers the investments of Mr Johnson's Family Office, managing a portfolio in excess of £150 million. As a director of JDI Mr Clews was responsible for the company's compliance and finance functions, including VAT.

CGS Trading Limited

99. JDI was the second business that Clive Smith, Guy Johnson and Stephen Clews operated together. The first of these was CGS Trading Limited ("CGS"). CGS was established in 2002 to allow Clive Smith to be more actively involved in running an export trading business, rather than overseeing it as he was doing at PI. Guy Johnson funded this business and Stephen Clews was in control of compliance and funding. The directors of CGS were Stephen Clews and Clive Smith. Mr Smith was a paid employee along with a salesman Robert Beard and one other employee.

100. CGS, a wholly owned subsidiary of one of Mr Johnson's trading companies, traded from July 2002 to November 2003. In that time it exported stock to the value of just under £100 million and was repaid VAT of £16.4 million.

101. The allocated MTIC VAT officer for CGS was Geoffrey Swinden who had a good working relationship with Mr Smith whom he met during all but one of the seven VAT audit inspections for CGS. During these visits MTIC fraud was discussed and Mr Smith told Mr Swinden about how he had given evidence for the Crown in an MTIC fraud prosecution.

102. However, in 2003, a number of events happened that led to the winding up of CGS and the launch of JDI.

103. On 9 April 2003, joint and several liability for VAT was announced in the Budget (which was subsequently enacted as s 77A Value Added Tax Act 1994 ("VATA")) in relation to traders who knew or should have known that their trades were connected with fraud.

104. On 8 May 2003, the Tribunal decision in *Bond House Systems v HM Cmmrs. of Customs and Excise* ("*Bond House*") was released in which it was successfully argued that fraudulent transaction chains were non-economic activities. The effect of this was to deny exporting taxpayers a repayment even if they had no means of knowing that their transactions were connected with fraud. However, the decision was subsequently reversed by the European Court of Justice ("ECJ"), in January 2006 as it offended basic principles of VAT.

105. Notice 726 was released in August 2003. Although Notice 726 is concerned with "Joint and Several Liability" it is made clear (at section 1.3) that it should be read by all VAT registered businesses that trade in goods or services that are subject to MTIC fraud, which includes mobile phones (section 1.4). Section 4.4 of the Notice asks "How can I avoid being caught up in MTIC fraud?" It is answered in section 4.5 which advises that "reasonable steps" are taken to "establish the legitimacy of your supply chain and avoid being caught up in a supply chain where VAT would go unpaid." It continues:

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

Examples of checks are contained at section 8 of the Notice. However, section 4.6 makes it abundantly clear that these are "guidelines" only, as "a definitive checklist would merely enable fraudsters to ensure that they can satisfy such a list."

106. As it was not known what effect these measure would have on CGS, Mr Smith, Mr Clews and Mr Johnson took the decision to cease the export trading business. However, CGS was able to secure a new line of supply of "service" mobile phones. These were second hand mobile phones, described as obsolete models, 14 day returns and warranty returns, which were purchased directly from Nokia UK by PST Limited ("PST"). On acquiring these phones PST would immediately sell them to CGS which would then sell them to West One Technologies Limited ("West One"). West One would then sort, repair and refurbish the phones as required and sell them to

customers in Africa and the Far East. CGS knew the source of these phones and also that it was a specific condition in purchasing them from PST (and ultimately Nokia UK) that they were exported out of Europe.

107. Mr Smith, Mr Johnson and Mr Clews realised that this business was likely to have a much lower turnover than that previously enjoyed and, as under the arrangement West One would have access to some of its books (ie customers etc.), a different corporate structure was necessary. Therefore, JDI was formed to operate this new business.

108. CGS de-registered for VAT purposes from 31 October 2003 and was placed in Voluntary Liquidation. On 27 January 2004 Mr Swinden visited Mr Smith in connection with both JDI and CGS. He examined the accounts and after raising several queries with the accountants who had prepared VAT returns for CGS was satisfied that there were no accounting matters outstanding.

Impex Telecom Limited

109. Impex Telecom Limited ("Impex") was established in 2005 by Gordon Cuthbertson to be used as a vehicle for the wholesale export of mobile phones.

110. Mr Cuthbertson, who has been involved in the mobile phone industry since 1985, joined International Communications Limited in 1986 leaving later that year for Executive Car Telephones Limited ("ECT"). He reminded us that at that time a mobile phone could cost around £3,000 and it was normal for a customer to lease a phone from a finance company and pay for airtime separately.

111. While at ECT Mr Cuthbertson met Mr Johnson who was then working for a finance company that administered ECT's leasing arrangements for handsets. He left ECT in late 1987 to join London Car Telephones ("LCT") becoming the company's sales director responsible for managing its wholesale division. Mr Cuthbertson's role in LCT changed following its takeover by Vodafone in 1994 and he left the company and the mobile phone industry later that year. He came back to the mobile phone industry in 2004 when he joined Unique Distribution Limited ("Unique") where he was responsible for co-ordinating the trading team. Unique went into liquidation in 2005.

112. Around the time Mr Cuthbertson established Impex he contacted Mr Johnson to ask for some assistance, such as a loan, to help with the funding of the company. After some discussion, in which Mr Clews was also involved, an arm's length commercial loan arrangement was agreed subject to a personal guarantee from Mr Cuthbertson and the possibility of a legal charge on Mr Cuthbertson's house. Although draft documents were produced these were never executed as, by late March 2006, it became clear that Impex which had been unable to open a business bank account would not trade.

113. In view of his experience in the industry, Mr Cuthbertson decided to establish himself as a self-employed consultant in the mobile phone sector trading as GC Consulting.

114. After discussions with Mr Johnson, Mr Clews and Mr Smith, Mr Cuthbertson was contracted in this capacity by JDI to "prospect" for the company, ie to contact various potential suppliers and customers to put deals together and was required to report to Mr Smith for authorisation of all transactions.

JDI

115. On 19 June 2003 Mr Clews submitted an application for VAT Registration ("VAT1") to HMRC on which the trading activity of JDI was described as "the buying and selling of electronic equipment/products". The turnover was estimated at £10 million and Mr Clews gave his home address in Kent as the company's principal place of business although HMRC were later informed that this would be at Mr Smith's home address in Hertfordshire. The VAT1 also stated JDI would not be buying from or selling to EU Member States and would not be expecting regular VAT repayments.

116. In line with HMRC's then policy regarding companies intending to operate in trade sectors in which MTIC fraud was prevalent a pre-registration visit was required. At such a visit on 13 August 2003 (before JDI had undertaken any trade) Mr Smith advised Mr Swinden that JDI intended to develop the business carried on by CGS and West One (described above) selling on refurbished second hand mobile telephones, which West One exported outside the EU. Based on this information and his knowledge of CGS Mr Swinden, who confirmed that he had no concerns about Mr Smith and his business, in his report of the pre-registration visit stated:

> I have no doubt about the credibility of Mr Smith and I recommend that this application be processed without delay.

117. JDI was registered for VAT with effect from 2 June 2003.

118. On 17 December 2003 Mr Clews wrote to HMRC to notify them of a change of address (Mr Smith had moved house) and its trade classification should change to Telecommunications. The Register was amended and a new Certificate of Registration issued.

119. On 9 September 2005 Mr Clews wrote to HMRC asking if JDI could be transferred from quarterly to monthly accounting periods. This requrest was declined by HMRC in a letter dated 28 September. The previous day, 27 September 2005, HMRC had written to JDI, enclosing a copy of Notice 726, to remind the company that HMRC were still experiencing problems with MTIC fraud and requested JDI to verify the VAT status of suppliers and customers with HMRC's Redhill office. Subsequently, during a telephone conversation on 3 October 2005, Mr Smith explained to Mr Swinden that monthly returns were sought by JDI as there had been a change in the relationship with West One which was then handling the warranty returns from CPW but did not have the capacity to continue with the work supplied by

JDI. JDI would therefore continue to deal in second hand phones but would be responsible for the export sales.

120. Following the decision of the ECJ in *Bond House* in January 2006, the directors of JDI considered, as Mr Johnson put it in his witness statement:

> "… that we could safely re-commence exporting new handsets once more as the judgment appeared to us to remove the threat that HMRC could deny VAT repayments even if there was no way we could or should have known of a fraud committed by somebody else in the supply chain. We were confident that with our understanding of the market, by dealing with only a few select suppliers and customers and by complying with HMRC guidance on due diligence, we would be taking every precaution we could to ensure that we only ever traded with legitimate traders in a bona fide market."

121. On 25 January 2006 Mr Johnson together with Mr Clews and Mr Smith attended a meeting with Sara Fairnie, a Tax Investigations Department Manager with PricewaterhouseCoopers ("PwC"). Prior to her employment with PwC Ms Fairnie had been an investigator with HMRC and had spent nine years specialising in the detection and prosecution of MTIC fraud. Following the meeting it was decided to instruct PwC to advise JDI on general policy and compliance matters and to approve JDI's customers and suppliers after having carried out due diligence checks on them.

122. On 07 February 2006 PwC sent JDI an "Engagement Letter" setting out the terms of business and services which PwC had agreed to provide for JDI. These services included, inter alia:

> (1) the conduct of "full due diligence checks on half a dozen or so intended suppliers (including a site visit) and half a dozen or so customers (no site visit required) and provide a written report on each counterparty. Once trading has commenced should [JDI] decided to add any new supplier or customer to the approved list a full due diligence check on that intended counterparty will be undertaken as required";
>
> (2) an initial review of JDI's current procedures manual; and
>
> (3) a general review of all trading activity

For the provision of these services it was agreed that PwC would be paid a monthly retainer of £3,500 and £1,000 for a due diligence report which necessitated a site visit and £650 for a due diligence report where no site visit was required.

123. In a letter dated 16 February 2006 Mr Clews explained to Mr Swinden that JDI had taken the decision to increase its trading activities and that Sara Fairnie of PwC had been appointed as the company's adviser in relation to its trading activities. The letter enclosed a copy of JDI's Procedures Manual which had been reviewed by PwC asking for confirmation from HMRC that JDI's "working practices were as rigorous as possible."

124. Mr Swinden spoke with Mr Smith on 22 February 2006 and was advised that JDI intended to sell new mobile phones to customers outside the UK. Mr Swinden expressed his concern that that JDI was moving into this sector in view of the prevalence of MTIC fraud.

125. Mr Smith said that he was aware of dangers and to avoid these PwC would be undertaking extensive due diligence checks on potential suppliers and customers. Although Mr Swinden was unable to provide any official approval of Procedure Manual he did inform Mr Smith that it appeared to cover most of the points listed in Notice 726 and recommended removing the personal details of the directors in the "letter of introduction" in appendix 1 of the Manual as it could potentially assist someone who might try to hijack the company name..

126. On 26 April 2006 Ms Fairnie wrote to Mr Swinden to advise that PwC had been employed by JDI "to assist them with their VAT matters". After providing details of her background Ms Fairnie continued:

> My role for JDI includes the undertaking of due diligence exercises on their behalf, to ensure that trade is only undertaken with legitimate traders, assistance in setting up their trading systems, attendance at VAT control visits as required and general VAT advice where needed.

Due diligence

127. Under the "Approval Process" detailed in JDI's Procedures manual it is stated that: the following due diligence must be undertaken on behalf of JDI by PwC" before entering into "any business relationship with either a potential supplier or customer." Included in these measures is the requirement for JDI to write to the potential counterparty and request a completed and signed 'JDI New Trading Account Registration' form and forward this to PwC. However, in a letter to HMRC, dated 8 December 2008, Ms Fairnie confirmed that no such forms had been used "as they were superseded by other due diligence checks."

128. The 'Pre Approval' section of the Manual concludes:

> Only once PwC has provided a written report confirming all of the above [pre-approval requirements] has been complied with and there are no grounds to believe a counterparty concerned is anything other than a legitimate and ongoing business concern will that counterparty be approved and all relevant details entered onto the **JDI Approved Counterparty Schedule**.

Although there was no JDI approved counterparty schedule, Mr Clews maintained, when giving evidence, that an email he had sent to Ms Fairnie and copied to Mr Smith on 18 April 2006 constituted such a schedule. The email requested confirmation from Ms Fairnie that the following represented the current position:

> Suppliers (all UK)
>
> Synectiv – Approved
>
> Cybacomms UK Ltd – Approved

DVB Ltd – Approved
S&I Electronics Plc – Approved (some docs still awaited?)
Wizard Trading (Europe) Limited – Approved
Carphone Warehouse Plc – Approved
MNR Global Ltd – Due diligence underway (visit 21/04/06)

Customers

Cell Avenue LLC (Dubai) – Approved (original docs awaited?)
3G Trade SA (Luxembourg) – Approved (original docs awaited?)
Carphone Warehouse Plc (UK) – Approved
Navigo.it. SpA (Italy) – Approved
Arkridge Trading Ltd (ROI) Approved (some docs still awaited?)
Paris 2000 (France) – Due diligence underway

Ms Fairnie responded by email on 24 April 2006 to confirm that the position was as stated in the email with the exception that she had visited MNR "and they are fine" and that she had discussed them on the telephone with Mr Smith the previous Friday.

129. The 'Post Approval' section of the Manual states that PwC will confirm in writing to HMRC relevant details of all JDI approved counterparties "before a business relationship is commenced with them." Also, the 'Sales and Purchasing Procedure (Post Approval)' section states:

> Stock details are to be logged onto the **JDI Daily Stock Opportunities Spreadsheet** to facilitate monitoring of "fair market value" of stock together with supporting data for market value obtained from the IPT website and other sources.

However, JDI did not keep a Stock Opportunities Spreadsheet. As for the IPT website Mr Smith confirmed in his evidence that he did not use it or encourage Mr Cuthbertson to use it saying that "in the main" those who subscribed to it "tended to be dreamers or desperate."

130. Other than instruct A1 Inspections Limited ("A1") to check and record all of the IMEI numbers of the mobile phones it bought and sold, JDI relied on PwC to undertake due diligence on its behalf. This is clear from Mr Smith's comment that, "you do not buy a dog and bark yourself."

131. The due diligence undertaken by PwC involved the collection of the business information (such as certificate of incorporation, VAT registration certificate, a letter of introduction on headed paper, and banking details); a visit to the business premises of all suppliers, to meet the director's and observe the operations of the businesses; a review of customers' profiles; and a transfer and exchange of information to HMRC at their Redhill office.

Deals

132. Although this appeal is concerned with nine deals undertaken by JDI we heard evidence in relation to a deal that took place in April 2006 and two cancelled deals.

Although there is no allegation of any loss of tax in relation to these deals, details of these and the nine deals with which we are concerned are set out below. It should be noted that in all deals the goods were insured by JDI.

133. Although Mr Cuthbertson, who was primarily responsible for negotiating the deals, was on holiday in Scotland between 27 May and 3 June 2006 and in Spain in the last two weeks in July of that year and Mr Smith, who authorised the deals, was in Cyprus between 23 June and 18 July, they explained that as communication between each other and their customers and suppliers was by telephone it did not matter where they were to enable them to transact business for JDI.

April Deal

134. On 24 April 2006 JDI sold 4,998 Samsung D500 mobile phones to Paris 2000 Sarl, a Belgian company. It had purchased the phones from Wizard, JDI's supplier for this transaction and its supplier in deals 1 – 6.

135. Wizard was Mr Cuthbertson's contact, as he explained in the course of his evidence "I would have dealt with Wizard because they were 'my' customer, I knew them well" from his previous experience in the industry. For these deals, Mr Cuthbertson negotiated with Wizard the price for the supply of stock within the UK and with Navigo for the export of stock.

136. PwC's Due Diligence Report on Wizard is dated 7 April 2006. It notes that it has two directors, Paul Dey and Robert Barton. Its business is in "new used and refurbished handsets and accessories. Wizard's customers "tend to be distributors" and "they do not export and try not to deal with brokers." IMEI numbers are not recorded by Wizard which always uses a third party to carry out an inspection prior to purchase.

137. Ms Fairnie recorded that Wizard's directors who "are extremely security conscious" were initially suspicious of her visit. It subsequently transpired that this was because they had been visited by a different company undertaking due diligence which was "aggressive in the extreme" and their attitude towards her subsequently thawed. Although Ms Fairnie then found them to be "extremely helpful although still very security conscious" they still refused to provide copies of their passports as they did not see the need to do so as Ms Fairnie had seen "with my own eyes" that they existed and the business was trading from the premises.

138. JDI's customer was Paris 2000. Although there was not a PwC Due Diligence Report on Paris 2000 it is clear from the email of 18 April 2006 from Mr Clews which was confirmed by Ms Fairnie on 24 April 2006 (see paragraph 128, above) that due diligence on Paris 2000 was underway. Mr Smith said that JDI had received oral approval from Ms Fairnie before any trade with Paris 2000 commenced.

139. This is corroborated by a letter from her to HMRC dated 20 April 2006 querying HMRC's request for documentation regarding Paris 2000 and an email of 24

April from Mr Cuthbertson to Mr Smith and Mr Clews confirms that he understood this to be the position.

Deal 1

140. On 28 April 2006, JDI received a purchase order for 2,500 Nokia 6680s from its customer Navigo, which was followed by an invoice also on the same day. Also on 28 April 2006, JDI issued a purchase order to its supplier Wizard, for 2,500 Nokia 6680s. This was followed by an invoice also on the same day.

141. On 2 May 2006, JDI issued instructions to A1 to inspect the goods. On the morning of 3 May 2006, JDI learned that there were two handsets missing, but they had not received the report from A1 at that time. The report was later emailed to JDI and confirmed that there were two handsets missing. Accordingly JDI sought and obtained a credit note from Wizard Trading for these two handsets.

142. It is apparent from an email sent on 3 May 2006 from Mr Cuthbertson to Marcello Tormenti the managing director of Navigo that they had spoken that afternoon to amend the payment. In that email, Mr Cuthbertson explains that they were having difficulties arranging shipment for 3 May 2006.

143. Export trucking instructions were issued on 4 May 2006, but then cancelled as JDI still had some difficulties shipping the goods, revised export trucking instructions were issued on 4 May 2006, for dispatch on 7 May 2006. On 5 May 2006, Navigo chased JDI for information about the shipping. On 8 May 2006, the goods were shipped on hold. On 9 May 2006, JDI was paid the balance for the goods by Navigo, a sum of £366,424. Once JDI had received payment in full from Navigo, it released the goods.

144. Wizard had obtained the phones from Cobra Communications Ltd ("Cobra"), who in turn had purchased these from GPA. It is not disputed that GPA has failed to account for VAT in respect of this deal as a result of fraud.

145. Despite neither JDI or Wizard having an FCIB account (JDI's account was with EFG Private Bank which records transactions to the minute not the second as does FCIB), an analysis of FCIB accounts by HMRC Officer Michael Downer traced the following movement of funds which took place at the following times on 3 May 2006:

(1) 11:12:07 Navigo paid on JDI £40,750 (10% deposit for the goods);

(2) 13.52:48 Wizard paid Cobra £440,265.62;

(3) 14:24:05 Cobra paid Raja Amanullah (the director of GPA) £437,924.30;

(4) 14:34:35 Raja Amanullah paid Navigo £419,664.

JDI paid Wizard £452,038.10 on 4 May 2006 in full and final settlement and on 9 May 2006 it received the payment of the outstanding balance of £366,424 from Navigo.

146. The goods in this Deal, and Deals 2, 3 and 4, were held throughout the chain at Interken Freight Forwarders. Evidence obtained from the freight forwarders by HMRC demonstrates:

> (1) that the source of the handsets in deal 1 was Navigo – the eventual customer for the goods.
>
> (2) The goods supplied to Navigo in deal 1 (released on 9 May) were immediately shipped straight back into the UK by Navigo – arriving back at Interken on 11 May.
>
> (3) The goods supplied to Navigo in deal 2 (released 10 May) were also immediately shipped straight back into the UK by Navigo – arriving back at Interken on 11 May.
>
> (4) The source of the goods in deals 3 and 4 was Navigo – again the eventual customer for the goods. It shipped them into the UK arriving 12 May at Interken before providing a purchase order to JDI for the product on 16 May 2006.

147. JDI's customer in this Deal and all deals other than the 'April' Deal, when it supplied goods to Paris 2000, was Navigo. Mr Smith first became aware of Navigo in 2002, whilst at PI, as he had received an unsolicited email from the company offering to sell 2,500 Nokia 3310s. The email stated that Navigo were able to "flash" (ie overwrite the software of a handset to change its language) 500 units a day and put whatever language pack on the phone that its customer required. In evidence Mr Smith said that when he was with PI he would often receive such speculative emails.

148. Mr Smith explained how JDI commenced its business relationship with Navigo, which he described as a "mini Carphone Warehouse", in the following terms:

> "When [in 2006] I was one day simply trawling through my emails, I came across this [the 2002 email] and thought, hold on a second, I wonder – well, if they have the capacity to be able to flash units inhouse, which is what it suggests, then maybe they are quite a substantial player, maybe it would be worth prospecting and seeing what the opportunities are with them. So I simply contacted Gordon [Cuthbertson] and said, "Get in touch with these people and see if there is an opportunity."

149. He told us that as a result of some research he undertook at the time he discovered that Navigo sponsored Teramo basketball team. Further research indicated that basketball was the second most popular spectator sport in Italy, after football, which Mr Smith described as akin to rugby union in England. Mr Smith also had the Dun and Bradstreet ("D&B") rating for Navigo which, although it was in Italian it was, as Mrs Ross accepted, in the same format as that used in its English Reports and recorded that Navigo had a score of 1 indicating "*livelle di rishio minimo*" ie minimum level of risk. Its D&B failure score was 97 where 100 represented the least risk.

150. On 11 April 2006, after it had been contacted by JDI, Navigo faxed JDI a 'letter of introduction' in which it is stated that:

> The company [Navigo] has been operating as mobile phone trading company since the year 2000. However, we have been operational in the telecommunications industry since 1987 with numerous retails outlets of our own property. … Since the year 2000 our energies have been concentrated on the import and export of mobile phones and Games that correspond to the following characteristics: euro spec, central European Software, packaged in original master cartons (5/10/8) sim free original, with European guarantee and manuals.
>
> Our current trading volumes are more than **100,000 units** (hundred thousand units) **per week** (some time over 150,000 units / week) of different models and brands. These include NOKIA, SIEMENS, SAMSUNG, MOTOROLA, SONYERICSSON, PANASONIC etc.
>
> Because we believe in what we do, we put our money where our mouth is. We ONLY trade with stocks we physically own. We never offer stock on a back to back basis. This practise coupled with a highly professional service has allowed us to acquire a well earned reputation for reliability, dependability, seriousness and above all continuity.

However, Navigo's trading volumes, as stated in the letter were disparaged by Mr Smith who described it as "puffing" and a "marketing piece" saying he was born at night "but it wasn't last night" and there was the "huge pinch of salt" he took with it and explained that is why JDI took the letter to PwC "and asked them to find out what they [Navigo] are really all about."

151. Mr Cuthbertson was Navigo's contact within JDI and it was Mr Cuthbertson who dealt with any discrepancies between Navigo's orders and the goods supplied, eg where the keypad language on the phones was in English and Arabic or when the quantity did not match the order. Mr Cuthbertson explained this in the following terms:

> "… the thing about trading, which I'm sure the Tribunal has understood, is it's not quite black and white. If you – the best example I can give is if you went to a Mercedes dealership and said, "I want to buy a 500SL. I want it to be navy blue, I want it grey leather with blue piping and I want it automatic, and whatever else" that's what you would get. If you went to a Mercedes dealerships who had cars that had come in and then the customer, for whatever reason, let's say they had changed their mind, and you just said, "I'm looking for …" and then they said, "I've got a black one with cream", you've got a choice. You either wait X number of weeks and get your blue one or you go, "Actually, black with grey will do." It wasn't uncommon … in our experience at JDI, to have a situation where a customer asked for X spec and you get as close to that as you can. The whole idea of an inspection report was to highlight any discrepancies that you could then deal with. If the customer didn't want them, they didn't want them and the deal was off. If the customer said, "Actually, I can deal with those, I can put two-pin chargers in, I can supply the other manuals, I

have got the ability to flash the software", it wasn't an issue. It was merely something that needed to be dealt with."

152. The PwC Due Diligence Report on Navigo, dated 8 June 2006, shows that it was incorporated in 2000 and its registered office was in Martinsicuro, in Italy. Navigo's sole director was Marcello Tormenti and it owned "numerous retail outlets" and had one main office. It dealt only in mobile phones and its sales were primarily to the UK, Europe, Asia, Middle East, North Africa and the USA. Navigo had an account with the FCIB. After undertaking due diligence on Navigo PwC came to the conclusion that it was aware of the importance of due diligence and, while it appeared to have a "robust system in place", recommended that JDI continues its "ongoing vigilance".

153. HMRC were provided with a copy of the Report by PwC. However, this copy is dated 7 June 2006 and differs in some respects from that disclosed by JDI, most noticeably in that the 7 June 2006 Report refers to Navigo's website being "under construction" whereas no such reference appears in the 8 June 2006 version.

154. Although the Due Diligence Report post-dates this and JDI's next five transactions with Navigo, the email of 18 April 2006 from Mr Clews, which was confirmed by Ms Fairnie on 24 April 2006 (see paragraph 128, above) records that Navigo was "approved" by PwC by 18 April 2006 before any trade commenced.

Deal 2

155. On 5 May 2006, Mr Cuthbertson emailed Mr Smith to explain that Navigo were looking for "1k [Nokia] 7370s", and he was "trying to sort that".

156. On the same date, Navigo sent JDI a purchase order for 1,000 Nokia 7370s. Also, on 5 May 2006, JDI issued a purchase order to Wizard for 1,000 Nokia 7370s, and this stock was allocated by Wizard to JDI by an instruction sent to Interken freight forwarders.

157. A1 produced an Inspection Report for the goods on 5 May 2006, which identified that 4 handsets were missing and there were only 996 handsets in the consignment. This report was sent to JDI by email on 8 May 2006.

158. Earlier on 8 May 2006, Mr Cuthbertson emailed Mr Smith to explain that Navigo required a pro- forma invoice in order to make a 10% deposit payment on the goods. This pro-forma invoice notes the order date as 5 May 2006. Before receiving the report from A1 Mr Cuthbertson had emailed Mr Smith to explain that he would soon receive the report saying that (so he thought) five handsets were missing although, in fact, it was four. Later that morning Mr Cuthbertson emailed Mr Smith again to report that "Phil at Wizard is suspect of the four missing phones and wanted the IMEI's. I explained we will only have IMEI's for 996"

159. As a result a new purchase order was required by Wizard for 996 phones. A new invoice from Wizard to JDI for 996 phones was issued, dated 8 May 2006 and

JDI issued a new invoice to Navigo for 996 phones. The goods were shipped, on 8 May 2006, for delivery on 9 May 2006.

160. Wizard had acquired the goods from Cobra, who in turn obtained them from LTH. It is accepted that LTH, the defaulter in this and deals 3 and 4 has failed to account for VAT in respect of these deals as a result of fraud.

161. The movement of funds, which took place at the following times on 8 May 2006, has been traced in respect of this deal:

(1) 11:30:16 Navigo paid JDI £16,000 (10% deposit);

(2) 13:23 JDI paid Wizard £17,650 (10% deposit);

(3) 13:55:23 Wizard paid Cobra £171,442.10 (in full payment);

(4) 14:36:10 Cobra paid LTH £170,220.14;

(5) 14:42:07 LTH paid Navigo £165,000;

(6) 17:47 JDI paid Wizard £157,920 (balance).

Navigo paid JDI £143,360 the balance for the goods on 9 May 2006 at 15:33:08.

Deal 3

162. On 16 May 2006, Navigo issued a purchase order to JDI for 5,000 Nokia N70 handsets and JDI issued a pro-forma invoice for that amount. JDI's purchase order for 5,000 handsets to Wizard appears to be wrongly dated 5 May 2006 (the same date as a previous purchase order). JDI asked A1 to inspect 5,000 N70s. This deal for 5,000 phones was then split into two deals, which constituted Deals 3 and 4.

163. The Inspection Report for the 2,500 phones that make up Deal 3 was sent to JDI on 16 May 2006 and showed there were 100% of the goods in that consignment. The invoice for these goods was sent by Wizard to JDI on 16 May 2006.

164. As in the previous deals Wizard had been supplied by Cobra, who in turn had acquired the goods from LTH.

165. Navigo paid JDI a 10% deposit of £50,000 for the phones on 16 May 2006 (the timings of the payments are not available for this Deal and Deals 4, 5, and 6 as Mr Downer, due to pressure on resources only requested HMRC's analyst, David Young, to consider FCIB Paris server material which shows the timings of FCIB transactions of in respect of Deals 1, 2, 7, 9 and 10). Also on 16 May 2006 JDI paid a 10% deposit to Wizard of £50,026.

166. JDI paid £499,337.50, being the balance, to Wizard on 17 May 2006. The following money movements also occurred on 17 May 2006:

(1) Wizard paid Cobra £537,555.68;

(2) Cobra paid LTH £534,478.12; and

(3) LTH paid Navigo £522,500.

Navigo paid JDI the outstanding balance of £450,000 to JDI on 19 May 2006.

Deal 4

167. This was in effect the second part of the previous deal which was split into two on 16 May 2006. There was a different stock inspection of this second batch of 2,500 units which Mr Smith remembered because it took place very late at night, or in the early hours of the morning, as it was not possible for A1 to complete the inspections on both Deals 3 and 4 on the same day. A1 emailed its Report, in which it identified three missing handsets, taking the consignment to 2,497 N70s, to JDI at 02:57 on 17 May 2006 although it is dated 16 May 2006, when the inspection started.

168. Navigo paid JDI a deposit for the goods on 17 May 2006. Wizard provided a new invoice for 2,497 handsets on 18 May 2006 and on the same date JDI issued a new invoice to Navigo. JDI made full payment to Wizard on 18 May 2006, the day it shipped the goods to Italy, for arrival on 19 May 2006. JDI did not receive full payment for these goods from Navigo until 22 May 2006, whereupon it released the goods to Navigo.

169. The phones had been purchased by Wizard from Cobra who had acquired then from LTH.

170. The movement of funds in this Deal was as follows:

(1) Navigo paid JDI £50,000 (deposit) on 17 May 2006;

(2) JDI paid Wizard (in full) £548,678.32 on 18 May 2006;

(3) Wizard paid Cobra £536,910.64 on 18 May 2006;

(4) Cobra paid LTH £533,836.75 on 18 May 2006;

(5) LTH paid Navigo £522,291 on 18 May 2006; and

(6) Navigo paid JDI (the balance) £449,400 on 22 May 2006.

Deal 5

171. Like Deals 3 and 4, Deals 5 and 6 were a single commercial transaction and began with a purchase order from Navigo on 22 May 2006 for 5,000 N70s. JDI placed an order on 22 May for 5,000 N70s to Wizard, noting that the consignment should be in two tranches of 2,500.

172. On 23 May 2006, Wizard invoiced JDI for the 2,500 N70s that were supposed to be used for Deal 5. JDI was paid a deposit for these goods on the same date. Also on 23 May 2006 this consignment was inspected by A1. Its report was emailed to JDI that evening. After the inspection of the 2,500 handsets, JDI were informed that they could only have 2,000 of that consignment. JDI paid a deposit for 2,000 handsets on 24 May 2006. Wizard released the goods to JDI on 26 May 2006, and JDI invoiced Navigo for 2000 handsets on the same day. The goods were shipped on 26 May 2006.

173. Wizard's supplier for this deal was Cobra who in turn obtained the phones from DBP. It is not disputed that DBP, the defaulter in this deal and deals 6, 9 and 10 has failed to account for VAT in relation to these deals as the result of fraud.

174. JDI received a deposit of £50,125 for the goods from Navigo and paid a deposit of £50,000 to Wizard on 23 May 2006. The following movement of funds took place on 26 May 2006:

(1) £389,475 was paid by JDI to Wizard;

(2) £409,993.18 was paid by Wizard to Cobra;

(3) £410,000 was paid by Cobra to DBP;

(4) £410,000 was paid by DBP to Paris 2000;

(5) £8,000 was paid by DBP to Paris 2000; and

(6) £418,000 was paid by Paris 2000 to Navigo.

On 30 May 2006 Navigo paid JDI £350,875 who then paid Wizard £389,450. On 2 June 2006 Wizard paid Cobra £20,043.14 and Cobra paid DBP £17,582.50 on the same day.

Deal 6

175. Deal 6 began in exactly the same way as Deal 5. The second batch of 2,500 handsets was inspected on 23 May 2006 and the both Reports from A1 were emailed together. The Report for Deal 6 showed that there were 2497 handsets.

176. However, once Deal 5 could only ship with 2,000 handsets, the contours of Deal 6 shifted as well. Although Navigo wanted a total of 5,000 handsets for Deals 5 and 6, JDI were left to look for the missing 500. Shortly after shipping the 2,000 handsets in Deal 5, Wizard made clear to JDI that they could in fact have the 500 handsets that had been inspected as part of that consignment. However, Mr Smith realised that as a Mercedes Sprinter van would only hold 1,400 N70s it would not be cost effective to ship 3,000 handsets.

177. Following negotiation in relation to this by Mr Cuthbertson, Navigo put in a new purchase order for 2,800 handsets on 30 May 2006, a credit note was issued by Wizard for the 500 phones from the first invoice on 31 May 2006. Wizard also sent on the same day an invoice for 2,800 handsets. JDI paid a deposit of £50,000 to Wizard on 31 May 2006 and was paid a deposit of £56,025 by Navigo on the same date. JDI invoiced for this on 1 June 2006 and exported the goods on the same date.

178. Wizard had obtained the goods from Cobra, who in turn obtained them from DBP. The movement of funds on 1 June 2006 was as follows:

(1) JDI paid £565,255 to Wizard;

(2) Wizard paid £603,708.14 to Cobra;

(3) Cobra paid £600,260.50 to DBP;

(4) DBP paid £590,800 to Paris 2000; and

(5) Paris 2000 paid £418,000 and 104,500 to Navigo.

On 5 June 2006, JDI received full payment of £505,260 from Navigo whereupon the stock was released to Navigo.

179. This Deal, and Deal 5 which were each part of a single commercial transaction, was memorable to Mr Smith because of the capacity of a Mercedes Sprinter van, and the need to reduce the consignment to 4,800 phones, when the original order was for 5,000 phones. Mr Cuthbertson also remembers the deal because he was on holiday in Scotland at the time and he received a telephone call from Wizard to try and raise the price of the deal by 50p a unit. As this was not acceptable to JDI, Mr Smith refused to increase the price, and Paul Dey (a director of Wizard) phoned Mr Cuthbertson to say that since they had agreed the price, they would not demand the increase since it was their own fault for not seeking a higher margin.

Deal 7

180. On 6 July 2006, Navigo sent a purchase order to JDI for 1,400 Nokia N80s. On 7 July 2006, JDI sent a purchase order for these goods to DVB and requested an inspection of the goods by A1 whose inspection report is dated 7 July 2006. On 10 July JDI invoiced Navigo for its purchase order. The goods were released to JDI on 10 July 2006 whereupon they were shipped by JDI. DVB invoiced JDI for the goods on 11 July 2006. JDI was paid in full on 11 July 2006 and released the goods to Navigo on 12 July 2006. JDI invoiced DVB for the goods on 18 July 2006.

181. DVB acquired the goods from Fonestop MG Limited ("Fonestop"), who in turn obtained them from Black Country Trading. Black Country Trading obtained them from Vescon Construction Limited ("Vescon") who procured them from Alartec who failed to pay £64,851.50 to HMRC. There is no dispute that Alartec's failure to account for VAT was as a result of fraud.

182. The movement of funds in this Deal took place at the following dates and times:

(1) On 11 July 2006 at 14:37:40 Navigo paid JDI £400,410;

(2) On 17 July 2006 at 17:38 JDI paid DVB £422,530;

(3) On 20 July 2006 at 18:50:32 DVB paid Fonestop £439,530; and

(4) On 21 July 2006 at 10:27:04 Fonestop paid Black Country Trading £437,570.

183. Also on 21 July 2006 at:

(1) 10:36:03 Black Country Trading paid Vescon £435,925;

(2) 10:45:11 Vescon paid Alartec £435,431.50;

(3) 10:54:02 Alartec paid DTM Provisions Ltd ("DTM") £435,020.35;

(4) 11:06:04 DTM paid Paris 2000 £434,197.75; and

(5) 12:30;12 Paris 2000 paid Navigo £420,000

184. Mr Cuthbertson was not able to recall whether he was the person who dealt with DVB on this occasion. Although he spoke regularly to DVB to try to find relevant supplies and prices, he could not remember whether it was he or Mr Smith who closed this particular deal.

185. The PwC Due Diligence Report for DVB is dated 2 March 2006. It notes that although its director did have a conviction for money laundering he brought this to Ms Fairnie's attention. She concluded that he "seems to have undergone an epiphany after his conviction. He is certainly passionate about his work, and open and honest about his activities." Although no notes were kept of due diligence undertaken by DVB Ms Fairnie formed the opinion that the company was "well aware of the importance of due diligence" and while the lack of notes could leave it open to challenge by HMRC the PwC Report considered that this was a matter for DVB and "of no concern to JDI."

Deal 8

186. Although negotiations had taken place for JDI to sell 3,100 Nokia 8800s to Navigo which it was going to acquire from DVB the Deal did not proceed. Mr Smith's recollection, in the absence of any documentary evidence, was that this was because of an anticipated drop in price of the Nokia phones in mid-July. This would appear to have been the case as the same model of mobile phones, Nokia 8800s, were subsequently sold in deal 10 at a unit price of £311 whereas the price that had been agreed in this cancelled deal was £324.

Deal 9

187. On 24 July 2006 Navigo sent a purchase order to JDI for 2,000 Nokia N70s. JDI sent Navigo an invoice for these on the same day. JDI's purchase order of the same date was sent to its supplier Cybacomms. On 24 July JDI was sent its inspection report, dated 21 July 2006, by email. The goods were shipped on hold on 24 July 2006. JDI was paid and made payment for the goods on 27 July 2006.

188. Cybacomms obtained the goods from Fonestop who obtained them from Cobra who acquired them from Vescon. Vescon's supplier was DBP.

189. The movement of funds between the parties occurred on 27 July 2006 at the following times:

(1) 11:28:08 Navigo paid £374,000 to JDI;

(2) 14:03:16 JDI paid £412,425 to Cybacomms;

(3) 14:24:17 Cybacomms paid £408,900 to Fonestop;

(4) 14:39:03 Fonestop paid £406,550 to Cobra;

(5) 15:03:06 Cobra paid £404,670 to Vescon;

(6) 15:12:08 Vescon paid £404,082.50 to DBP;

(7) 15:36:14 DBP paid £403,495 to D Hof – Carisma Ind Supplies Limited ("Carisma");

(8) 15:40:07 D Hof – Carisma paid £402,495 to Paris 2000; and

(9) 15:48:05 Paris 2000 paid £394,000 to Sunico.

190. For deals 9 and 10 JDI's supplier was Cybacomms. This was Mr Smith's contact. He explained that he had a closer relationship with Cybacomms than Mr Cuthbertson, and that he initiated those particular deals or was involved in them although Mr Cuthbertson did know David Whisson, the person authorised to conduct business, at Cybacomms, and spoke to him in relation to the other deals.

191. The PwC Due Diligence Report on Cybacomms is dated 27 February 2006. It notes that the company's sole director is David Whisson who is "clearly knowledgeable of his trading area, current legislation and potential challenges to his company" and that the company is "well aware of the importance of due diligence and appear to have a robust system in place."

Deal 10

192. On 24 July 2006 Navigo sent a purchase order to JDI for 2,882 Nokia 8800s. JDI sent Navigo an invoice on that date. Also on 24 July 2006 JDI sent a purchase order to its supplier Cybacomms. On 24 July JDI was sent its inspection report by email. The Report is dated 24 July 2006. The goods were shipped on hold on 24 July 2006.

193. JDI was paid and made payment for the goods on 26 July 2006. The goods were released to JDI on 26 July 2006 and by JDI on the same date.

194. As in Deal 9, Cybacomms obtained the goods from Fonestop, who in turn obtained them from Black Country. Black Country obtained the goods from Vescon who procured them from DBP, the defaulting trader.

195. The movement of funds between the parties in this Deal occurred on 26 July 2006 at the following times:

(1) 10:37:20 Navigo paid JDI £896,302;

(2) 14:47:35 JDI paid Cybacomms £987,121.03;

(3) 14:54:04 Cybacomms paid Fonestop £982,041.50;

(4) 15:06:07 Fonestop paid Black Country Trading £975,268.80

(5) 15:24:08 Black Country Trading paid Vescon £971,882.45;

(6) 15:39:06 Vescon paid DBP £971,035.85;

(7) 15:45:13 DBP paid Carisma £970,189.27;

(8) 15:47:26 Carisma paid Paris 2000 £968,496.10; and

(9) 16:12:03 Paris 2000 paid Navigo £934,800.

Cancelled Deal

196. In a deal, due to take place on 28 July 2006, JDI had agreed to sell 2,974 Nokia 8800s which it was to acquire from Fonestop.

197. However, the deal was cancelled following an inspection of the stock by A1 which revealed, from IMEI numbers, that JDI was being offered stock it had sold on 24 July 2006 at a lower price than it had been sold. On becoming aware of the situation JDI immediately sought the advice of PwC. Following this advice on 1 August 2006 Mr Smith wrote to HMRC "to report this suspicious incident".

198. Although there was no PwC Due Diligence Report on Fonestop it appears from an email sent by Mr Smith to Mr Clews and copied to Ms Fairnie and Mr Johnson on 28 July 2006 that due diligence had been undertaken. The emails states that:

> … we have very recently, this week in fact, had PWC carry out a comprehensive due diligence check on Fonestop, which in her words "they came out of very well!"

Law

199. The Right to deduct input tax is derived from Articles 167 and 168 of Council Directive 2006/112/EC of 28 November 2006 which provide:

> [167] A right of deduction shall arise at the time the deductible tax becomes charged.
>
> [168] Insofar as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay: The VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person.

200. This has been implemented into UK domestic law by ss 24-26 VATA. Insofar as they are relevant to this appeal these provide:

> **Section 24**
>
> (1) Subject to the following provisions of this section, "input tax", in relation to a taxable person, means the following tax, that is to say –
>
> (a) VAT on the supply to him of any goods or services;
>
> (b)VAT on the acquisition by him from another Member State of any goods, and
>
> (c) VAT paid or payable by him on the importation of any goods from a place outside the member States;
>
> being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him…

…

(6) Regulations may provide

(a) for VAT on the supply of goods or services to a taxable person, VAT on the acquisition of goods by a taxable person from other member States and VAT paid or payable by a taxable person on the importation of goods from places outside the member states to be treated as his input tax only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases…

Section 25

(1) A taxable person shall

(a) in respect of supplies made by him, and

(b) in respect of the acquisition by him from other member states of any goods; account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.

(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

Section 26

(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax for supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.

(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business – taxable supplies; supplies outside the United Kingdom which would be taxable supplies if made within the United Kingdom; (c) such other supplies outside the United Kingdom and such exempt supplies as the Treasury may by order specify for the purposes of this subsection.

201. Regulation 29 of The VAT Regulations 1995 provide as follows:-

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

(2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall if the claim is in respect of – a supply from another taxable person, hold the document which is

required to be provided under regulation 13; provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a Claimant shall hold [or such other … evidence as the Commissioners may direct."

202. Therefore, in principle an exporter is entitled to claim a deduction of input tax. However, an exception to this right was identified by the ECJ in its judgment, dated 6 July 2006, in the joint cases of *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL* (C-439/04 and C-440/04) [2006] ECR 1 – 6161 ("*Kittel*") where the Court stated:

"[51] … traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud, be it the fraudulent evasion of VAT or other fraud, must be able to rely on the legality of those transactions without the risk of losing the right to deduct the input VAT.

[52] It follows that, where a recipient of a supply of goods is a taxable person who did not and could not know that the transaction concerned was connected with a fraud committed by the seller, Article 17 of the Sixth Directive must be interpreted as meaning that it precludes a rule of national law under which the fact that the contract of sale is void, by reason of a civil law provision which renders that contract incurably void as contrary to public policy for unlawful basis of the contract attributable to the seller, causes that taxable person to lose the right to deduct the VAT he has paid. It is irrelevant in this respect whether the fact that the contract is void is due to fraudulent evasion of VAT or to other fraud."

…

[56]. … a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.

[57] That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.

[58] In addition such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them.

[59] Therefore, it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and do so even where the transaction in question meets the objective criteria which form the basis of the concept of "supply of goods effected by a taxable person acting as such" and "economic activity".

…

[61] … where it is ascertained, having regard to objective factors, that the supply is to a taxable person who knew or should have known that,

> by his purchase, he was participating in a transaction connected with the fraudulent evasion of VAT, it is for the national court to refuse that taxable person entitlement to the right to deduct."

203. The decision of the ECJ in *Kittel* was considered by the Court of Appeal in *Mobilx* where Moses LJ, giving the judgment of the court, said, at [59-60]:

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

204. The questions asked by the Tribunal to determine this issue in the *BSG* appeal (heard by the Court of Appeal together with that in *Mobilx*) which were approved by the Court of Appeal in *Mobilx*, at [69], were:

> (1) Was there a tax loss?
>
> (2) If so, did this loss result from a fraudulent evasion?
>
> (3) If there was a fraudulent evasion, were the appellant's transactions which were the subject of this appeal connected with that evasion? and
>
> (4) If such a connection was established, did the appellant know or should it have known that its transactions were connected with a fraudulent evasion of VAT?

205. In making its findings on the issue of whether the appellant knew or should have known that its transactions were connected with the fraudulent evasion of VAT the Tribunal should not unduly focus on whether a trader has acted with due diligence but consider the totality of the evidence, an approach taken by Christopher Clarke J in *Red12 v HMRC* [2010] STC 589 and adopted by Moses LJ in *Mobilx* at [82-83] (to which we have referred at paragraph 27, above).

206. With regard to the burden of proof Moses LJ said, at [81]:

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

However, as the standard of proof was not considered by the Court of Appeal the prevailing authority is the decision of the House of Lords In *Re B* [2009] 1 AC 1.

207. This was confirmed by the Supreme Court in *Re S-B (Children)* [2010] 1 AC 678 Lady Hale giving the judgment of the Court said, at [34]:

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

Discussion

208. Clearly this is not an archetypal MTIC case concerning an inexperienced trader with no prior knowledge or understanding of the market in which he operates who seizes what is perceived to be an opportunity to make a substantial and effortless financial gain. In contrast, in this case, Mr Cuthbertson and the directors of JDI have many years experience in, and knowledge of, the mobile phone industry and the amount at stake, although not insubstantial, is modest when compared to the sums involved in many other MTIC cases.

209. Taking the *BSG* questions as approved in *Mobilx* in turn, it is accepted that there is a tax loss and that it resulted from the fraudulent evasion of tax, not only from the defaulters GPA, LTH, DBP, and but also Navigo. As Mr Scorey submitted "the information currently available (ie the FCIB data and the evidence of circularity of goods in a limited number of deals) does suggest that Navigo has serious questions to answer. Indeed, with the benefit of hindsight and in possession of information which was unavailable to JDI at the time, it does appear that Navigo was engaged in a complex and organised scheme to defraud HMRC."

210. In the circumstances we have no hesitation in finding that there was a contrived scheme for the fraudulent evasion of VAT with Navigo at its heart. It is also clear and undisputed that the transactions with which this appeal is concerned were connected to that fraud. The issue is whether JDI knew or should have known that its transactions were so connected.

211. It is not disputed that Mr Cuthbertson and JDI's directors were fully aware of the existence and the significant level of MTIC fraud in the wholesale mobile phone trade and that they took the decision to re-enter and trade in this market through JDI notwithstanding their knowledge.

212. Mr Hall contends that JDI, through Mr Smith, Mr Clews and Mr Cuthbertson, must have known that its transactions were connected to fraud as the deals it entered into were too good to be true. He points to the fact that Mr Smith and Mr Cuthbertson were, between them, on holiday for a combined period of six weeks during the period in which the transactions took place. Nonetheless JDI was still able to profit from the transactions and did so without advertising or responding to advertisements or engaging in any market research before commencing trading. He also questions how it appears that JDI had no difficulty in securing Navigo as a customer which accepted any phones offered by JDI. This was despite Navigo being a company described by

Mr Smith as a "mini Carphone Warehouse" with a substantial turnover, even if it was accepted that much of its claimed sales figures were exaggerated marketing puff. Also for a company of that size there does not seem to have been any suspicions aroused by the fact that the managing director personally dealt with every query.

213. Mr Hall emphasised that it was JDI and not PwC that made the decision to trade and that it was only JDI that could assess material it received from PwC. However, in most cases it traded without the benefit of PwC Due Diligence Reports. In trading without these Reports, compiling daily stock sheets or Approved Counterparty Schedule JDI was not following its own Procedure Manual. Mr Hall noted that JDI itself did not ask any questions of its customers and suppliers with a view to avoiding fraud and that the common sense guidance in Notice 726 was not followed. He submitted that if such questions had been asked of Mr Tormenti, its managing director, it was "almost inevitable that Navigo would have backed off" and that JDI did not comply with its own Procedure Manual or ask questions because it knew its transactions were connected to fraud.

214. In addition to these matters Mr Hall contended that the standalone evidence of FCIB circularity is a compelling indication that JDI was knowingly involved in fraud. No explanation has been given as to how it could happen other than that the participants were told who to buy from and who to sell to – whether expressly, or with a nudge and a wink. It could not be the product of open market trading and was implausible that it could have happened by chance given the number of traders in the market. He further submitted that the evidence of contrivance is supported by two further compelling features. First, JDI's earlier customer Paris 2000 (the April deal) appeared as a party to the money circulation in later deals (deals 5 to 10) which is beyond coincidence; and secondly, JDI entered into a transaction (which did not go ahead) with Fonestop immediately after Fonestop appeared as a buffer in deals 7, 9 and 10.

215. This direct and repeated involvement with those involved in fraudulent money circulation, Mr Hall contended, is beyond coincidence. If, circularity and fraud is established, the suggested scenario in which JDI just happens to buy the very goods sold into the UK by Navigo is implausible. The only explanation is that it was, as Mr Clews said in his evidence "engineered". If so, JDI must have known or at least should have known that its transactions were connected to fraud.

216. However, as Mr Scorey submitted, given the amounts at stake in this appeal we fail to see why Mr Cuthbertson and JDI's directors, particularly Mr Johnson would risk their reputations by knowingly becoming involved in fraudulent transactions. We also find that if the intention had been to enter into fraudulent transactions JDI would not have appointed PwC to undertake due diligence on its behalf. Not only was Ms Fairnie a former employee of HMRC who had been responsible for investigating MTIC fraud but, as PwC are subject to the Money Laundering Regulations 2007 and the Proceeds of Crime Act 2002, she would have been under a statutory obligation to report any "suspicions" of fraud to the authorities irrespective of PwC's relationship with its client, JDI, hardly a satisfactory situation for a company intending to participate in fraudulent transactions.

217. In addition, when JDI was presented with an inspection report that provided evidence of circularity of goods it first sought the advice of PwC and then wrote to HMRC "to report this suspicious incident" which, in our view, is not a typical reaction of a fraudster.

218. Although both Mr Smith and Mr Cuthbertson were on holiday during part of the period in which the transactions took place, we accept their evidence that most of the negotiation took place by phone, something that Mr Cuthbertson particularly remembered, referring to his "other half" getting frustrated by him being on his "mobile phone conducting business" while away on holiday. That said, JDI, contrary to its own Procedure Manual, entered into transactions and did not wait until it had received Due Diligence Reports from PwC. Mr Scorey submits that the delay would not have unearthed any evidence of fraud or an indication that they were fraudsters and in any event JDI had received the imprimatur of PwC before the trade commenced.

219. Turning to the FCIB circularity which Mr Hall contends is a compelling indication that JDI was knowingly involved or at least should have known that its transactions were connected to fraud we note that neither JDI nor Wizard had FCIB accounts.

220. On examination of the transactions we find that there was no circularity in Deal 9. In Deals 1, 2 and 3 although the first payment came from Navigo this was a deposit. The first party to make payment in full was Wizard which paid Cobra. In each of these transactions Navigo paid the balance later. In Deal 4 JDI made a payment in full to Wizard on 18 May 2006 and was not paid by Navigo until 22 May 2006, four days later. Similarly with Deals 5 and 6 there are seven and four days respectively between payment of the balance by JDI and receipt of funds from Navigo.

221. Also, in his evidence Mr Smith explained what he described as a "very simple process" of how phones placed in the market by Navigo could travel through a chain of suppliers returning to Navigo without the knowledge of its supplier, JDI. As the process is driven by demand by the export customer, he said that all Navigo needed to do after supplying a particular model of phone at the top of the chain was to tell the variety of potential suppliers that they were looking for the particular model of product and one or the other of them will find the product, which did not necessarily need to be the exact same goods, and supply it to Navigo.

222. Having regard to all these matters we cannot be satisfied, on a balance of probabilities, that JDI knew its transactions were connected to fraud and find ourselves in a similar position to the Tribunal (Judge John Walters QC and Andrew Perrin FCA) in *Else Refining and Recycling Ltd v HMRC* [2012] UKFTT 470 (TC), a decision released on 23 July 2012 after we had heard the closing submissions in this case.

223. In that case the Tribunal, at [56] accepted that the chains of supplies in which the Deals featured were contrived for fraudulent effect "as most clearly demonstrated

by the circularity of payments" shown from the FCIB evidence. However, the Tribunal did not accept the premise that the appellant *had* to deal with the particular parties it dealt with in order for the circular chains to be maintained. The decision continued, at [57]:

> "We consider it is certainly possible (and may indeed be likely) that the organisers of the fraud saw a benefit in using a 'patsy' (or unknowing party whom they manipulated) as the 'Broker' in the chain – that is, the party who would claim a refund of VAT from HMRC. Further, we consider it possible (and maybe likely) that the organisers of the fraud had sufficient flexibility of approach that if a broker in the position of Else [the appellant] decided to sell to one party rather than another, then the chain could be maintained, either by the supplier to the broker pulling out, or, more likely, an onward sale being arranged to be made by the customer chosen by the broker, which onward sale would resurrect the chain. In making this suggestion we are inferring from the evidence that all the (relatively few) parties which Else might have chosen as its customer – the 'pool' of customers to which JE made reference – had positioned themselves to be the entities which Else would most likely contact with offers to sell product and were knowingly involved in the fraud."

224. Turning to whether JDI, through its directors and Mr Cuthbertson should have known its transactions were connected to fraud we note, as the Tribunal (Judge Nowlan and Sandi O'Neil) did in *Masstech Ltd v HMRC* [2010] UKFTT 386 (TC) at [147]

> "… that the Kittel test, as re-stated by Lord Justice Moses [in *Mobilx*] is a stringent test. We must be satisfied that there can have been no other reasonable explanation for the transactions in which ML participated than that they were connected to VAT fraud.

225. Having carefully considered the transactions and the surrounding circumstances and having heard the cross-examination of JDI's witnesses, we find that, at best, HMRC have established that JDI through its directors and Mr Cuthbertson should have realised that it was more likely than not that the transactions were connected to fraud. However, as is clear from *Mobilx* this is not enough for JDI to be regarded as a participant and denied its input tax. As Moses LJ said at [60]:

> "The true principle to be derived from *Kittel* does not extend to circumstances in which a taxable person should have known that by his purchase it was more likely than not that his transaction was connected with fraudulent evasion. But a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion."

226. In the circumstances, as we are not satisfied that JDI, through Mr Smith, Mr Clews, Mr Johnson or Mr Cuthbertson, should have known that the only reasonable explanation was that the transactions were connected with fraud, we find that HMRC incorrectly denied JDI its input tax. Accordingly its appeal must succeed.

Costs

227. We have already noted (at paragraph 9, above) that Judge Khan directed that the Value Added Tax Tribunal Rules 1986 (as amended) are to apply in relation to costs. This gives the Tribunal a general discretion as to costs. Both parties applied for their costs, if successful. We see no reason to depart from the usual practice and therefore award JDI its costs of and incidental to and consequent upon the appeal.

Decision

228. The appeal is therefore allowed with costs to be assessed on the standard basis under Rule 29(1)(b) of the VAT Tribunals Rules 1986 if not agreed.

Right to Apply for Permission to Appeal

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

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 26 September 2012