TC04316

Appeal number: TC/2010/03258

VAT – MTIC – transaction connected with fraud? – yes - did the appellant know? – yes – appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

DIGITAL INTERNATIONAL SOLUTIONS LTD

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Respondents

TRIBUNAL: JUDGE RICHARD BARLOW
MRS SHAMEEM AKHTAR

Sitting in public in Birmingham on 17, 18, 19, 20, 21 and 24 March 2014 and 12, 13, 14, 15, 16, 19 and 20 January 2015 (12 half day reading and 19 half day)

Matthew Boyden of counsel instructed by Messrs Ferdinand Kelley solicitors for the Appellant

James Puzey of counsel instructed by the solicitor for HMRC for the Respondents

DECISION

1. This is the appeal of Digital International Solutions Ltd which was incorporated on 2 February 2004. The appellant company was registered for VAT with effect from 23 February 2004 as a result of its application to register which was dated 9 February 2004 and received by HMRC on 10 February.

2. At the date of registration the appellant had one director Mr Dipak Chhiber and we will refer to him as Mr Chhiber junior. The company secretary was Mr Parshotam Lal Chhiber who is Mr Chhiber junior's father and we will refer to him as Mr Chhiber senior. They held 50% each of the shares of the company at the time of its incorporation.

3. Mr Chhiber senior was the director of a company called Devi Communications Ltd which traded as PLC Communications and he described himself as the owner of that company by which he meant that he was the sole shareholder. We will refer to that company as PLC. For reasons which will become clear later in this decision we also note that Mr Chhiber senior owned a Danish company called Trading Point Aps.

4. This appeal relates to decisions made by the respondents to deny the appellant entitlement to input tax it claimed in the following amounts and to assess the appellant to repay one of those amounts:

- In respect of the monthly VAT period 06/06 - £676,547.21.
- In respect of the monthly VAT period 07/06 - £551,664.75.
- In respect of the monthly VAT period 08/06 - £ 459,776.80.
- An assessed sum of £674,065.00 in respect of period 06/06.

5. In each case the decision is based on the allegation that the appellant either knew or should have known that the transactions giving rise to those decisions were connected with fraud. In other words this is an MTIC appeal. It involves both dirty chain and contra-trading transactions.

6. By way of introduction only, we mention that the appeal is what is called, in the jargon that has become well known through other appeals, an MTIC case and the appellant's transactions are what are known as dirty chain broker transactions or contra trading broker transactions in which recovery of input tax is denied on the basis that those transactions are connected with fraudulent transactions and the appellant either knew or should have known of that connection. In using the terms clean and dirty chains and broker, contra-trader or defaulter we do so only for convenience and, as has been pointed out before by the Tribunal (see the Decision in *Totel Distribution Ltd*), use of those terms, although now well understood, cannot be allowed to prejudge or influence the Tribunal's decision one way or the other as to the correct legal and factual position.

The legal issues.

7. In *Kittel –v- Belgium* [2008] STC 1537 the ECJ held that on the one hand, at [60], where a recipient of a supply buys goods and "did not and could not know that the transaction concerned was connected with fraud" then the Member State in which the recipient is registered for VAT cannot provide, by its domestic law, that such a transaction is void and cannot provide that input tax is not claimable on the transaction. On the other hand, at [61], the ECJ held that "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 fraudulent evasion of VAT, it is for the national court to refuse that person entitlement to the right to deduct".

8. At [51] the ECJ had also held that a trader who has taken every precaution to ensure that his transaction is not connected with fraud, must be allowed to claim input tax. At [52] the Court held that a person who "did not and could not" know that his transaction was connected with fraud would be entitled to claim input tax despite a connection between his transaction and a VAT fraud.

9. The Court did not explain specifically what it meant by "should have known" but [51] and [52] of the judgment suggest that a trader should take, at least, reasonable precautions to avoid being involved in a transaction connected with fraud. Taken literally "every precaution" and "could not know" might suggest that the test is a very strict one. But bearing in mind [56] to [58] of the judgment we do not read it in that way. The Court used the word "should" for the first time in paragraph [56] and explained the rationale of the rule it then set out at [61]. It said that the rationale was that a person who either knew or should have known of the connection with fraud is to be "regarded as a participant" and that he "aids the perpetrators"; which appears to suggest a degree of blame that would not have attached to a person simply for overlooking a precaution that he might have taken or who could have known of a connection but only in some obscure way.

10. The Court also explained the underlying rationale of the rule in terms of its being for the better prevention of fraud.

11. It is well established that the right to deduct input tax is exercisable immediately when a transaction occurs and the ECJ emphasised this in *Kittel*. One consequence of that is that the applicable circumstances known to the appellant at the time of a transaction and the actions taken by the appellant at or before the transaction occurred are the relevant facts and that information acquired by the appellant subsequently will be irrelevant. Actions taken by the appellant after a transaction will also be irrelevant as such but, of course, they may shed light on what the appellant knew at the time if, for example, they appear to amount to attempts to cover up the true circumstances applying at the time of the transaction.

12. The Court of Appeal judgment in *Mobilx and others –v- Revenue and Customs Commissioners* [2010] STC 1436 considered in detail the issues raised in cases of this sort and Moses LJ elaborated on the meaning of the "should have known" concept.

He held that it is not enough for HMRC to prove that the circumstances were such that it was more likely than not that a transaction in question was connected with fraud and that what they must prove is that the transaction was connected with fraud.

13. The *Mobilx* litigation included some decisions relating to contra-trading. Moses LJ specifically held that it matters not if the input transaction in question precedes the transaction which gives effect to the fraud. He held that if the taxable person is proved to have entered into a transaction that he knew or should have know, at the time of entering into it, was at that time connected with fraudulent evasion or would be so connected later; that is sufficient to deny recovery of input tax.

14. Moses LJ also held that, where an issue arises about what a person should have know, it is relevant to consider whether the only reasonable explanation for the circumstances surrounding the transaction is that it is connected with fraud. He also stressed the relevance of circumstantial evidence generally.

15. In *HMRC –v- Brayfal* [2011] STC 1338 at [19] Lewison J, after noting that there is no fraud in the clean chain, said that the clean chain broker must be shown to have known or to have had the means of knowledge that his transaction is connected with fraud and "he must either know or have the means of knowledge that the contra-trader is a fraudster". We assume the judge's reference to the means of knowledge is shorthand for the "should have known" concept as understood in the authorities because having the means of knowledge by itself is not sufficient to disallow input tax. But the relevance of the passage is that the reference to the contra-trader is to him as a fraudster without any specific type of fraud being specified. The judge then added that the taxpayer's input tax claim would also be disallowed if he had knowledge or the means of knowledge of the dirty chain.

16. We interpret Lewison J's remarks as meaning that the taxpayer must know or be a person who should have known of a fraud before input tax will be disallowed and the fraud in question will in fact be either the dirty chain fraud or the cover up by the contra-trader. But he need not know or be a person who should have known what precise form the fraud takes as long as he knew or should have known there was a fraud of some type being committed by the contra-trader or alternatively that he actually knew or should have known about the dirty chain fraud, the latter being less likely to be capable of proof where the claimant is in the clean chain because he will have dealt only with the contra-trader. That interpretation of Lewison J's remarks is also more in tune with the judgment of Briggs J in *Megtian –v- HMRC* [2010] STC 840 at [35] to[39] (especially [38]) and indeed to *Mobilx* and *Kittel* itself.

17. The Tribunal was urged by Moses LJ not to over elaborate the tests set out in *Kittel*.

The details of the relevant transactions.

18. In period 06/06 the relevant transactions are 15 sales of mobile phones made by the appellant by way of dispatches (for convenience we will call them exports) to EU purchasers registered for VAT in Denmark which were therefore zero rated for UK

VAT purposes but, as the appellant had bought them from UK registered suppliers, the appellant had, in principle, a net reclaim of VAT. The sales were all in wholesale quantities and the values of the appellant's transactions totalled £3,563,389.70.

19. The appellant's supplier in all 15 deals was PLC. Twelve of the deals were alleged to be dirty chain transactions in which Derwyn Building Partners Ltd a UK company (hereafter referred to as DBP) had acquired (imported) goods from the EU and sold them to a UK trader in transactions taxable at the standard rate but had failed to account for VAT. The respondents allege that that failure was fraudulent and that together with the repayment of input tax to the appellant it caused a tax loss.

20. In all 12 dirty chain deals the goods passed through the same hands according to documents and now undisputed evidence produced by the respondents. The appellant accepts that the chains of transactions were as alleged but denies that either it or PLC knew of that or were in a position to know that. The chains were DBP – 4A Developments Ltd – SA Trading Ltd – Grade One - PLC – the appellant. In all 12 the appellant's customer was Sunico AS (Sunico), a Danish company.

21. We will comment further below about these facts but it convenient to note at this point that in nine of the twelve transactions PLC made a loss on the sales having sold to the appellant at a lower price than it paid to Grade One. It is further noted that although PLC made a gross profit (mark-up) of only £1.34 per unit on a sale of Nokia 8800 phones to the appellant on 7 June 2006 it achieved a mark-up of £54.34 per unit on the sale of the same model on the same day to Trading Point. Nor was that exceptional as PLC achieved the same mark up on other sales of Nokia 8800 phones to Trading Point on 9, 13 and 16 June 2006. Also there was a marked difference in the sales price obtained by the appellant on 7 June 2006, £320.00 per unit, compared with the £409.50 PLC was able to obtain selling the same model on those dates in June, though that was to a different customer.

22. The remaining three transactions of the appellant in June 2006 were alleged contra trades by PLC. In these transactions the deal chains were consistent but much shorter than the twelve mentioned above. The goods were imported by PLC which had purchased them from Sunico, then sold to the appellant which sold them to Trading Point.

23. PLC achieved a £2.00 per unit mark up on Sony Ericson W810i phones (two deals dated 5 and 8 June) and £5.00 per unit on a single sale of Nokia 8800 phones on 5 June. The appellant achieved a mark-up of £10.10 and £10.35 on the Sony Ericson phones and £17.25 on the Nokia phones. The appellant's sale price for the Nokia 8800 phones sold to Trading Point on 5 June was £362.25 per phone which can be contrasted with the price of £320.00 it achieved two days later when it sold to Sunico and with the prices that PLC might have been able to achieve if it had sold the phones to Trading Point which had been £409.50 two days later and consistently for several more days after that.

24. Sunico's position also seems worthy of note as it was selling Nokia 8800 phones to PLC on 5 June 2006 for £340.00 but buying from the appellant at £320.00 two days

later on which date Trading Point were buying at £409.50 from PLC. Although prices of goods will fluctuate we have noted that the price of £409.50 held for at least ten days and it was 28% higher than the £320.00 achieved by the appellant when it sold to Sunico.

25. In period 07/06 the appellant conducted nine deals having a total value of £3,305,290. All of them were wholesales and exports to Denmark. Seven of them were alleged to be dirty chain deals. In all of those deals the appellant purchased goods from PLC and in five of them it sold to Trading Point. In the other two deals it sold once to Sunico and once to yet another Danish company Nordisk Telecom Aps (Nordisk).

26. Five of the seven deals are in chains for which the starting point is a company called Bushmaster Ltd but it is not known if that company imported the goods or whether there was a further link or were further links earlier in the chain which have not been traced (as to which see below). But in each of those five chains the known parties are as follows: Bushmaster – Eagle – Woodworks – 4A Developments – SA Trading – Grade One – PLC - the appellant – Trading Point (four deals)/Sunico (one deal).

27. Of the other two alleged dirty chain deals in 07/06 one began with a company called Alartec and the chain was: Alartec – 4A Developments – SA Trading – Grade One – PLC – the appellant – Trading Point. The last alleged dirty chain deal was: DBP - 4A Developments – SA Trading – Grade One - PLC – the appellant – Nordisk. As can be seen therefore the last three links in the chain before PLC are consistent with all the 06/06 deals though the earlier links are different.

28. The mark ups achieved by PLC and the appellant were fairly close to each other in the deals where both were involved in the chain with one exception. In one deal involving Nokia 8800 phones PLC made a loss of £18.00 per unit on 1,540 units buying from Grade One and selling to the appellant. The appellant sold the 1,540 units to Sunico at a profit of £8.00 per unit. That deal occurred on 28 July 2006 and on the same date PLC bought a further 1,000 units from Grade One at the same price as the 1,540 units which it sold on 8 August to Trading Point at a profit of £47.00 per unit. The 1,540 and 1,000 units had passed along the chain to Grade One as a single quantity and so although PLC made a loss on the sale to the appellant it more than recouped the loss when it sold to Mr Chhiber senior's company in Denmark.

29. The remaining two deals by the appellant in July 2006 are alleged contra deals by PLC. Again the chains are much shorter consisting of a Danish supplier (Sunico) in one deal and a German supplier (NT Plus) in one deal - PLC – the appellant and Trading Point (one deal) and Sunico (one deal). The profits made by the appellant and PLC were not markedly dissimilar. One deal concerned Nokia 8800 phones and the price was consistent with PLC's deals in that model of phones around that time in which the appellant was not involved.

30. The appellant's deals in 08/06 consisted of one dirty chain deal and five alleged contra deals.

31. The single dirty chain deal was the result of a chain starting with a UK company called TDL and then – Bushmaster – Eagle – Hillgrove Trading Ltd – SA Trading – Grade One – PLC – the appellant – Sunico. That chain therefore had similarities with all the alleged dirty chain transactions in 06/06 and 07/06.

32. The alleged contra deals were shorter chains. There were three chains consisting of: NT Plus – PLC – the appellant, two of which ended with the appellant exporting to Nordisk and one to Trading Point. There were two chains: Sunico – PLC – the appellant – Trading Point. The two deals ending with Nordisk were apparently two parts of a single parcel of goods and both PLC and the appellant made a loss on 2,000 items only partly ameliorated by a gain on 200 which were traded separately but NT subsequently issued a credit note so it is unclear what the end result of these two transactions was. The deal starting with NT and ending with Trading Point caused a loss to PLC of £8.34 per unit and a gain to the appellant of £8.00 per unit. In the other two deals the appellant made a much bigger profit (£7.00 per unit) than PLC (£1.27 per unit).

33. PLC was required to make returns of VAT every three months, unlike the appellant which made monthly returns, so PLC's tax period most relevant to this appeal is the three month period ending August 2006. It is noticeable that all of PLC's export deals in that period were ones in which the appellant was not involved. With one exception they all concerned sales of Nokia 8800 phones to Trading Point. The exception was a sale of Nokia 8800 phones to Nordisk.

34. There were sixteen such deals and the total value of the goods involved was £998,795. There were marked similarities in each chain and there were also similarities to the chains in the deals in which the appellant was involved. Of the sixteen deals nine ended with the following sequence: 4A Developments – SA Trading – Grade One- PLC – Trading Point. Of those four started with DBP, one with Alartec and four with Eagle Solutions. In the Eagle Solutions deals an additional party, Woodworks, appeared between Eagle and 4A. The remaining seven export deals conducted by PLC in that period involved the addition of Bushmaster - Eagle Solutions and Hillgrove before the goods passed through SA and Grade One to PLC (4A Developments did not feature in these deals). In six of those deals TDL featured before Bushmaster.

35. We should add that the chains of transactions may not be complete as HMRC have not necessarily been able to identify all the participants. However the evidence that the above mentioned parties were in fact involved is not disputed.

36. We also heard evidence about the various defaulting traders in the alleged dirty chains. We do not consider it necessary to go into the details of those defaults as the appellant accepts that they had occurred and that the parties involved were fraudulent. Those concessions were made after the appellant had tested the evidence of the relevant officer witnesses by cross examination. Of course we repeat that the appellant did not admit that it had the means of knowing anything about these traders and indeed denies it did have any such knowledge. The appellant seeks to rely on the extreme nature of some or all of the defaults by way of contrast to what it claims to

have been its professional and legitimate business practices. The defaults involved such features as businesses with multi-million pound turnovers quickly emerging from small artisan traders trading from home having met someone in a Night Club who introduced them to mobile phone trading and traders simply going missing without making returns.

The connection with fraud issue.

37. Before input tax recovery can be denied HMRC must show that there was a connection with fraud and the necessary knowledge.

38. In the case of the alleged, now admitted, dirty chains the connection with fraud is established by the appellant's admissions. The chains of transactions leading to exports by the appellant to traders registered for VAT in other EU countries created, at least in principle, a right to recover input tax. If the defaulting traders had not defaulted the input tax would have been offset by payments of output tax elsewhere in the chains of transactions in accordance with the requirements of the tax and no fraudulent loss of tax would have occurred. However, as those output tax payments were not made, there has been a loss to the revenue taking the chain as a whole. In addition, if the input tax has been or will be repaid then the parties to the fraudulent chain will have benefitted at the expense of HMRC. The addition of input tax repayments into the chain is the source of the fraudulent gains of its participants.

39. It is not known how the parties to the various transactions or which of them may have benefitted or by how much or even by what method the benefit was distributed amongst them. That does not alter the fact that there has been a fraud in the dirty chains and that the appellant's dirty chain export transactions either have been or will be the source of the fraudulent gains if the payment of input tax already made or those still claimed are upheld.

40. In respect of the dirty chain transactions it is not essential to HMRC's case for them to prove that the appellant was a party to the fraud. They will succeed if they prove that is the case but they will also succeed if they only prove that the appellant knew or should have known its transactions were connected with fraud; even if it was not actually a participant as such. We have already said why the appellant does not have to be shown to have known what the connection with fraud is and that it is sufficient for HMRC to prove that it knew or should have known that there was a connection of some kind.

41. We reject a submission made by Mr Boyden that HMRC have alleged and must prove that the appellant was a conspirator in the fraud. A conspiracy would involve an agreement to be involved and although being knowingly involved in fraud may amount to being a conspirator that is not a requirement of the legal principles for denial of input tax established by the authorities cited above. Clearly a person who should have known of a connection with fraud will not be a conspirator because in that case it is presumed he did not in fact know of the connection and so no agreement of a conspiratorial nature would be possible in such a case.

42. We will approach this issue on the basis of what the European Court and the Court of Appeal have decided. Namely the question is whether the appellant knew or should have known of the connection with fraud at the time the transactions occurred but that a connection with a fraud that had not by then actually occurred is sufficient provided the transaction was connected with a fraud that was to be put into effect albeit at a later date.

43. The position as far as the contra trading is concerned is somewhat different. The issue as far as the appellant is concerned is the same as for the dirty chain transactions. Again, the issue is did the appellant know or should it have known that its transactions were connected with a fraud that had been or would be effected but it is not necessary for HMRC to prove that the appellant knew exactly how the fraud worked or would work. In other words the appellant does not have to be shown to know how the contra trades worked to the advantage of the fraud as long as it has have been shown to be connected with it and that the appellant knew or should have known that there was a connection, of some sort.

44. The situation of the alleged contra-trader is different. In the case of the dirty chains the appellant's supplier may be entirely innocent of any knowledge and may not even be someone who should have known the transactions were connected with fraud. It is only the appellant's state of knowledge that is in issue. That is not to say that the supplier's knowledge of the dirty chains is necessarily irrelevant as a matter of evidence. We are noting that it is only the appellant's knowledge that is directly in issue.

45. Where the contra trades are concerned the connection with fraud will usually and perhaps always involve an allegation that the contra-trader deliberately entered into certain transactions with a view to doing one or more of three things. First, it may simply be part of a smokescreen to try to prevent HMRC looking too closely at the transactions undertaken by the trader, including the dirty chain ones, because the trader appears not to be involved in blatantly fraudulent trading if he is accounting for output tax and not making repayment claims or only making small claims. Secondly, the money obtained by the contra-trades may be being used to finance the dirty chain transactions. Thirdly, it is also possible that the contra trading transactions are used as a means of distributing the fraudulently obtained money amongst those involved by means of supposed profits in transactions entered into for the purpose of dividing up the proceeds of the fraud.

46. It may be possible to imagine a case in which a contra-trader is manipulated into engaging in what are in fact contra-transactions in the relevant sense but that does seem unlikely and also to be difficult to achieve on the part of the fraudulent parties if they attempt to manipulate an innocent person to act unknowingly as a contra-trader.

47. Therefore deciding whether there is a connection with the fraud in the alleged contra trades in this case will involve considering whether HMRC have proved that PLC deliberately engaged in the contra transactions with a view to doing one or more of the things mentioned.

The history of PLC and the appellant.

48. Devi Communications Ltd trading as PLC Communications was founded in 1992 and as the use of his initials in the trading name suggests it is Mr Chhiber senior's company. That company has undoubtedly traded in ways unconnected with MTIC fraud and it had a long history in trading in mobile phones by retail and in the sale of contracts to members of the public as agents for service providers in order to earn commissions. Mr Chhiber senior also had many other business interests over a long period of time.

49. From an early age Mr Chhiber junior took an interest in business affairs and accompanied his father to the shops operated by PLC and learnt a certain amount about its business in that way. By the age of fifteen, he told us, he was working in the Wolverhampton shop at weekends and holidays dealing with the public selling phones and contracts.

50. Mr Chhiber junior was born in 1979 and obtained a BSc Honours degree in computer science from De Montfort University in 2003. After leaving University he worked at the Wolverhampton shop operated by PLC until "probably all the way till middle of 2004" as he said in evidence.

51. As we have already mentioned, the appellant company was incorporated on 2 February 2004 so that was while Mr Chhiber junior was working in the retail shop at Wolverhampton and he had then been doing so for about eight months. He continued to work in the retail shop for several months after that as well.

52. On 10 February 2004 HMRC received from PLC an application to register for VAT dated 9 February 2004 signed by Mr Chhiber senior who wrongly described himself as a director of the company by ticking the relevant box. He gave his home address and the company's principal place of business in the appropriate boxes on the form and the latter was a warehouse owned by Mr Chhiber junior, though used by PLC. In the box on the form which requires the applicant to state "all your current and/or intended business activities" the reply was "retail of mobile phone handsets and accessories".

53. The application to register was on the basis that PLC was going to transfer part of its business to the appellant on 23 February and the registration was requested from that date which, given that the expected turnover in the next twelve months was said to be "up to £1 million", was the date required by law anyway. The form did not ask the applicant to define which part of the business of Devi Communications Ltd was to be transferred but that company was identified as the transferor.

54. In answer to the question "do you expect to receive regular repayments of VAT" the appellant replied "no" and in answer to the questions "please tell us the value of goods you are likely to buy from other EC member states or to sell to other EC member states" the appellant replied "£nil" in both replies.

55. An accompanying letter sent with the registration application by Messrs Barringtons Chartered Accountants and signed by that firm's VAT manager stated

that Digital International Solutions Limited was "to take over the retail operations of [Devi] and in particular the activities of the retail outlet at … Wolverhampton …".

56. The Commissioners registered the appellant with effect from 23 February 2004 and its first return period was the period of slightly more than three months ending May 2004.

57. On 13 April 2004 the appellant bought from PLC goods described in a schedule of transactions produced to the tribunal as SGH 200s. Those goods were worth £99,875.00 (tax inclusive) which was made up of £85,000 for the goods and £14,875 tax. The appellant sold them to World Communications Import Export of Spain at a tax exclusive price of £95,000 which a subsequent return showed must have been a zero rated sale. In other words the goods were exported.

58. On 26 April 2004 Mr Chhiber junior wrote to HMRC saying "I wish to request that [the appellant] be put on a monthly VAT return … the reason for this is because I wish to export goods and need the VAT repaid at the end of each month instead of on a three month basis this is the only way in which I am going to be able to export".

59. HMRC refused that request on 12 May 2004 saying monthly returns could only be allowed where a trader would be entitled to regular repayments or could forecast a repayment pattern for several months.

60. On 27 May 2004 the appellant bought Nokia phones worth £339,298.88 (tax inclusive) from a UK supplier and sold them to a Danish company for £300,150 by way of a zero rated supply.

61. Both of those transactions were apparently declared in the appellant's first tax return for the period ending May 2004, though the figures do not seem to match completely. No output tax was declared and the outputs were all declared as EC supplies. It can be seen from that that the appellant did not declare any retail sales at the Wolverhampton shop.

62. The appellant made nil returns for VAT in the next three tax periods (that is to say for the following nine months).

63. On 1 September 2005 the appellant carried out a triangulation transaction buying phones in Switzerland and selling to Sunico in Denmark.

64. In the tax period ending May 2005 the appellant carried out two transactions consisting of the purchase of phones from PLC and selling by way of exports to Sunico in one case and an Italian company in the other.

65. On 10 August 2005 the appellant wrote to HMRC and asked again to be allowed to make monthly returns on the strength of its VAT return for the period ending May 2005 in which the last two mentioned transactions had been declared. This time HMRC allowed the appellant to start making monthly returns which decision they notified to the appellant on 26 August. The first monthly return was for September 2009.

66. On 30 July 2005 Mr Chhiber senior resigned as company secretary of the appellant and was replaced by his daughter. He also transferred his 50% shareholding to Mr Chhiber junior at about that time. Mr Chhiber junior said the shares were transferred to him in August 2005.

67. In the August VAT return period which was the last three monthly return one export transaction was declared but that had taken place on 31 August and therefore it fell within the last month of that period, so it might as well have been a one month return as far as speed of input tax recovery was concerned. PLC was the supplier to the appellant and the goods were phones.

68. Thereafter the schedule produced by the appellant shows that 65 further transactions were carried out before the periods in dispute in this appeal. In every one of those transactions PLC was the appellant's supplier as was the case in all 30 of the transactions under appeal. So therefore from a total of 101 transactions all but two featured PLC as supplier. All but the first transaction were mobile phone sales and the first one may have been (we do not know if SGH 200s are phones).

69. Mr Chhiber senior's company Trading Point was established in Denmark on 3 March 2006 and from that date all but one of the appellant's 53 sales were to Denmark being to Sunico, Nordisk or Trading Point. The appellant had dealt with Sunico and Nordisk before that date as well as after it but had had a number of customers in Dubai and a few in other countries up to that date.

70. The appellant's declared outputs on its returns starting with 09/05 were all zero rated sales and were as follows:

- 09/05 £225,748
- 10/05 £1,128,265
- 11/05 £866,845
- 12/05 £22,364
- 01/06 £1,301,576
- 02/06 £1,040,273
- 03/06 £2,988,800
- 04/06 £1,492,120
- 05/06 £3,119,347
- 06/06 £3,964,498
- 07/06 £3,181,947 (Corrected figure)

- 08/06 £2,939,045

71. Thereafter only small amounts have been declared. The turnover in the last twelve months of export sales was £13,204,837. The appellant company had started in business with a loan of £55,000 or thereabouts from either Mr Chhiber senior or PLC (neither Mr Chhiber was sure of the details). The appellant's trading from 09/05 was financed either by reinvesting profits or by obtaining credit from PLC for purchases of goods which was not paid back in full until the appellant's customers had paid the appellant. As the price of the appellant's customers' zero rated purchases were less than the tax inclusive sums owed to PLC repayment of the credit allowed by PLC was also dependent on the repayment of input tax. In fact the Commissioners' refusal to repay input tax has left the appellant owing PLC what appears to be £394,472. We will deal with the credit allowed to the appellant by PLC in more detail below. In the annual accounts to February 2007 that sum is show as owing to trade creditors. The appellant's operating profit on those accounts which cover six months of actual trading in wholesale quantities of phones was £490,283.

72. PLC and the appellant shared premises. Both companies shared offices and both used the warehouse owned by Mr Chhiber junior. In fact the appellant employed no staff at all and by arrangement it was able to use staff of PLC.

73. Mr Chhiber senior said in evidence that he dealt with purchases of goods for PLC but that he left sales to employees. A Mr Mahesh Jangra was employed by PLC and his name appears on many documents relating to sales by PLC to the appellant and sales by the appellant to its customers (often for the same goods). We will deal with this aspect of the case in more detail below.

74. As we have already noted, after Trading Point was set up both the appellant and PLC dealt extensively with that company. Mr Chhiber senior said he had left the running of that company entirely to a Mr Gert Degnegaard. We will deal with this further below.

FCIB Evidence

75. PLC had an account with the FCIB bank and some evidence was given about payments. In the appellant's period 06/06 there were twelve dirty chain deals in all of which the defaulter was DBP, the appellant's supplier was PLC and the appellant's customer was Sunico. In respect of ten of the twelve transactions some or all of the money paid by Sunico to the appellant and then by the appellant to PLC had passed along the chain to 4A Developments and then in seven cases to DBP and in three cases that company was not involved in the payments though it had been involved in the supplies. All ten payments were then passed either by 4A or DBP to a company called Pound Trading LDA of Portugal which paid the money to Trading Point.

76. It might have been possible that Trading Point had supplied the goods to Pound Trading which supplied DBP. However evidence produced by the Danish authorities

showing all of Trading Point's purchases do not feature Pound Trading at all so that is not in fact the explanation of why that company was involved in the money chain. HMRC rely on these facts as part of their case for saying that the trading of PLC, Trading Point and the appellant was contrived.

The evidence of Mr Chhiber senior.

77. Mr Chhiber senior's evidence about the setting up of the appellant company was as follows. Before the appellant company was set up Mr Chhiber junior had been working in the retail business of PLC and according to Mr Chhiber senior Mr Chhiber junior was trying to improve that side of the business which was having difficulties because of changes in trading practices by the network providers, who had entered the market selling phones and their contracts together, thus reducing the opportunity for PLC to sell contracts on commission which had been a major part of its business.

78. He said that the retail business had in fact continued until 2007/8 because the shops were only closed as their leases came to an end.

79. Mr Chhiber senior agreed that he gave his son some advice when the appellant was set up but he said it consisted of saying he should act correctly. He said that the decision to set it up was his son's idea not his. He did agree that he had loaned money to his son.

80. When he was being cross examined Mr Chhiber senior admitted that when the appellant was set up "we set this company up originally before to do the export. We did not use it until later on". The reference to "later on" is consistent with the fact that exports did not begin in earnest until August 2005 though the company was set up in February 2004. It is entirely inconsistent with the contention relied on before us by the appellant that the company was originally set up to carry on the retail business but that failed to materialise. We will deal below with Mr Chhiber junior's evidence about why the retail business did not start but it seems clear that the appellant has sought to assert that there was an intention to set up a retail business because otherwise it would have to admit that everything Mr Chhiber senior put on the application to register for VAT was a blatant lie.

81. When Mr Puzey cross examined him about the VAT registration application Mr Chhiber senior was reminded what he had said about the company being set up to do exports. He now said he could not recall what it was set up for. We find that statement and the statements in the VAT application to be entirely untrue. That is not based solely on an impression of Mr Chhiber's demeanour in the witness box. The events after the company was set up such as the attempt to obtain agreement to monthly returns almost straight away, the fact that no retail business was conducted by the appellant even though the application had said it would start almost immediately, and the fact that the company's name itself suggests it was intended to export or import goods; all suggest that the VAT application was deliberately untruthful. In addition we find Mr Chhiber junior's explanation about this aspect of the case to be untruthful (as to which see below).

82. The only plausible explanation for the untruthful application to register is that both Mr Chhiber senior and Mr Chhiber junior wanted to obtain a registration with the least possible delay and the least possible enquiry and knew that HMRC would be more interested in a company setting up for trading in phones internationally than they would be if the trade was retail. Even if that is not the explanation, the untruthfulness speaks for itself and discloses at least one respect in which both witnesses gave untruthful evidence to us and had tried to deceive HMRC.

83. Mr Chhiber senior's evidence about the support PLC gave to the appellant company was that the original loan had been given and that if it needed anything it was never denied. The assistance included the provision of services given by Mr Mahesh Jangra, who was a PLC employee consisting of work done for the appellant company as well as for PLC. In particular Mr Jangra was described as the in house accountant at PLC. Mr Jangra was described as doing all the paperwork for PLC including invoicing and purchase orders. As we saw from numerous documents produced at the hearing, Mr Jangra did indeed deal with all types of paperwork connected with the transactions in question in this appeal and acted for both PLC and the appellant in connection with many aspects of the transactions between the two companies and their suppliers and customers. He often acted for the appellant and PLC and with PLC's supplier and the appellant's customer in respect of the same goods.

84. It is an undisputable fact that Mr Jangra knew who was supplying PLC, that it was supplying the appellant and that the appellant was supplying, for example, Trading Point. Mr Jangra was also aware of the facts that, for example, Sunico supplied PLC on occasions and that the appellant sold goods to Sunico it had bought from PLC.

85. Mr Chhiber senior agreed that he dealt with purchases by PLC but he denied that he also dealt with sales and said that was left to staff employed by PLC.

86. Mr Chhiber senior said that PLC gave the appellant access to credit and the evidence of banking shows that was the case. As already explained, almost all of the appellant's transactions were sales of goods it had purchased from PLC and the documents show that PLC often gave PLC credit and allowed delays in payment.

87. Mr Chhiber senior said he set up Trading Point because he wanted to grow his business outside the UK and when he was asked why he had set up in Denmark he said it was nothing more than because he liked that country. Mr Chhiber was the sole shareholder of Trading Point.

88. Mr Degnegaard was appointed to work in Trading Point.

89. Mr Chhiber senior's evidence about PLC's deals was as follows.

90. He agreed that there had been 87 separate deals in PLC's 08/06 three month tax period and that the outputs of £22,058,000 were the highest turnover ever achieved by that company in any three month period. Inputs were £22,817,960. Both UK and EU

sales were the highest in any three month period. EU purchases were £6,704,784 and EU sales were £5,991,000. PLC paid £7,944.23 VAT in that period.

91. Of the 87 deals 16 were despatches to Denmark (fifteen to Trading Point and one to Nordisk). All the goods in those deals were purchased from Grade One and traced back to defaulters. The remaining 71 deals were all sold in the UK but some were acquisitions from the EU (imports) and others were bought and sold in the UK. All the goods which PLC had acquired from EU traders in that tax period were sold to one of five UK purchasers and of those purchasers three sold all the goods to Trading Point. One customer for those goods sold only to UK traders and the last, the appellant, sold all but one parcel of goods to Trading Point and the other to Nordisk. Therefore a large proportion of PLC's trade in that period involved goods coming from Denmark and ending up back in Denmark at Mr Chhiber senior's own company there. That was the case both when PLC sold to Denmark and when PLC sold to four out of five of PLC's customers.

92. When challenged about this and the fact that PLC could have made a better profit if it had supplied Trading Point directly on the occasions it sold goods to the appellant, Mr Chhiber senior said that he had left the running of that company entirely to Mr Degnegaard and that he himself had not dealt with the sales anyway. This last point does not entirely answer the question because it still remains unclear why PLC's sales team would not have been in the best position to discover that Trading Point wanted the goods because of the close connection with PLC. Clearly Mr Jangra was in a position to know that PLC (which was wholly owned by Mr Chhiber senior) was, in effect, selling goods to UK customers which goods it could have sold at a better price to Trading Point (which was wholly owned by Mr Chhiber senior). We find it most unlikely that Mr Jangra would not have said anything about that but, even if he did not, we consider it even less likely that Mr Chhiber senior would not have found out it was happening. This situation was exacerbated by the fact that PLC also gave credit to some of the customers so that not only was an opportunity for better profits missed but also there was an unnecessary extra cost for PLC.

93. It was also put to Mr Chhiber senior that when he had been interviewed about sales by a Customs officer (Mrs Griffiths) he had said that he organised the wholesale deals and telephoned customers to see if any of them were interested in buying stock before he decided to buy stock for PLC. It is true that was in January 2008 after the sales being considered here but there was no suggestion he had changed his practices. As we regard Mr Chhiber's evidence that he had nothing to do with sales as untruthful we conclude that his reason for denying that fact was because he was aware of the apparently anomalous situation described in the previous paragraph and was seeking to avoid the difficult questions that would arise from those facts.

94. Although Mr Degnegaard was described as being in sole charge of Trading Point the Danish tax authorities had reported to HMRC that he "has some customer contact and manage[s] bookkeeping". Both PLC and the appellant sold goods to Trading Point on its first day of business and the appellant and Mr Chhiber senior both put that forward as coincidence. We are asked to believe that Mr Degnegaard just came across the appellant somehow as soon as the business was set up and traded with it

straight away without any direction from Mr Chhiber senior or anyone at PLC. We were given no basis on which we could conclude how he might have done that. Later in his evidence Mr Chhiber senior denied that he even knew that the appellant company was dealing with Trading Point which we find incredible and indeed untrue. The chances that he would not have heard of that from Mr Jangra or the PLC sales team (all of whom worked for the appellant and so would know that fact), or his son or Mr Degnegaard appear to be so small as to make it incredible that he would not have known. Other factors which we will come to concerning his unreliability as a witness are relevant here.

95. Mr Chhiber senior also gave an account of the setting up of Trading Point which appears to be deliberately untruthful. He told officers Griffiths and Banks on 15 January 2008 that he had been invited to join the board of Trading Point because of his range of knowledge in the mobile phone industry but as the sole shareholder and sole director of Trading Point it is incorrect to say he had been asked to join the board because there was no-one to ask him. He appeared to be anxious to distance himself from the company. When Trading Point opened an account with the UMBS bank it gave its Danish address but the telephone and fax numbers of the Wolverhampton office of PLC and Mr Chhiber senior's personal email address. He had no explanation for this but it appears he was expecting to operate the bank account.

96. Mr Chhiber admitted that it would have been more profitable in cases where Sunico (a Danish company) had sold goods to the UK which went back to Trading Point, if Sunico had simply sold to Trading Point in Denmark but he said he did not know why he had not told Mr Degnegaard about that.

97. Mr Degnegaard was paid one third of the profits of Trading Point according to Mr Chhiber senior and it would have been very much to his benefit if he had maximised the profits of Trading Point. It is the appellant's case that he was left entirely to his own devices so far as sourcing supplies and finding customers were concerned.

98. The appellant does not dispute that on the first day of trading Mr Degnegaard discovered and traded with the appellant but asserts that that was not in any way at Mr Chhiber senior's prompting. We are asked therefore to accept that Mr Degnegaard was adept at finding counter parties for his trading but yet that he had been unable to discover the existence of Sunico as a potential supplier. In fact a schedule produced by the Danish authorities shows that Trading Point's business appears to have been mostly concerned with purchasing goods from the appellant or PLC and that most if not all of its other purchases were from UK companies. When Trading Point purchased from companies other than the appellant or PLC, it often purchased from other companies known to have dealt with PLC.

99. The respondents rely on this in support of their claim that the transactions as a whole with which this appeal is concerned consist of trading within a tight knit group of traders. They contend that the coincidences of so many transactions falling within that group of companies is indicative of contrived, which is to say directed and artificial, trading.

100.The evidence from the UK shows that most, if not all, of Trading Point's transactions when it purchased from PLC were either purchases of goods that had been shipped to the UK from Sunico in Denmark and sold back to Trading Point almost immediately having therefore made an unnecessary journey to the UK, having reduced the profits available to either PLC or Trading Point and having incurred unnecessary shipping and warehousing costs.

101. The respondents allege that the sole reason why these goods were shipped to the UK was to create an input tax claim in dirty chains or contra trading transactions to disguise and or to finance those dirty chain transactions.

102. It is also the case that when PLC or the appellant sold goods to Trading Point the latter company usually made a smaller mark up than those companies and indeed it appeared to have regular mark ups of either £2.50 per unit or £3.00 per unit when it sold on to its customers. Again, the question arises as to why Mr Degnegaard, if he was indeed acting independently and for a fixed share of the profit, would have behaved in that way. It also raises the question why so many transactions were conducted with consistent cash mark-ups.

103. One further point arose after Mr Chhiber senior had completed his evidence. It has been noted already that PLC made a loss on nine transactions when it sold goods to the appellant in 06/06 even though it had made large profits on similar deals at about the same time. HMRC rely on that as part of the evidence that the transactions are contrived and that the appellant and PLC were not really trading independently from each other.

104. Some time after Mr Chhiber senior had completed his evidence Mr Boyden applied to submit in evidence a paragraph from Mr Chhiber senior's witness statement in a tribunal case brought by PLC concerning a product called SanDisk. In paragraph in his written statement in that case Mr Chhiber senior said that PLC bought large numbers of units at a time (30,000 is mentioned) and that they would be sold in smaller parcels to customers sometimes leaving a small number unsold. Having made profits on the larger number those small numbers could be sold at a loss to his son's company without PLC incurring a loss overall. That seems perfectly reasonable.

105. However on examining the loss making trades again it is apparent that that is not the explanation of why PLC was prepared to sell at a loss. In each case the nine deals concern goods which can be traced back through chains of transactions and in five of the nine deals the goods sold at a loss are the entire quantity that passed down the chain and are in no sense a small parcel left over from a larger quantity. The numbers involved are 4,000 units 600 units, 500 units 2,000 units and 1,000 units. In the remaining four chains the loss making sales are in respect of 999 out of 1,999 bought by PLC, 2,500 out of 3,000 and 2,000 out of 4,000 (twice and which were two parts making up the whole of the 4,000). As can be seen none of these chains involve anywhere near 30,000 phones and in one case where 2,500 phones out of 3,000 were sold at a loss the situation is the exact opposite of what Mr Chhiber senior would have had us believe was the case. It was the bulk rather than the remainder that were sold at a loss.

106. The significance of the loss making chains might have been rather a side issue given that Mr Chhiber could well simply have been helping his son to make a go of his business by allowing him a good price; though that would have contradicted his evidence that he had nothing to do with sales. It was not Mr Chhiber senior's evidence that he had been prepared to make a loss to help his son. Therefore we find ourselves to be entitled to conclude that either Mr Chhiber senior or the appellant put this evidence forward with the intention of deliberately misleading the tribunal.

The evidence of Mr Chhiber junior.

107. We have already mentioned that Mr Chhiber junior took an interest in his father's businesses form an early age and in particular the retailing of phones and selling network contracts on commission and that he graduated in 2003 after which he worked in the Wolverhampton shop for about eight months before the appellant company was setup.

108. He explained that by 2004 conditions for independent retailers were badly affected the entry into the retail market of the network providers who were by then selling phones and selling their own contracts thus cutting the independents out of the market. We find that evidence to be truthful.

109. Asked by Mr Boyden to explain what had been the specific purpose of setting up the appellant Mr Chhiber junior replied as follows:

> "The specific purpose was to evolve, if I could, the retail end, make good the retail aspect".

110. He added that the £55,000 his father had lent the appellant was to help him to "restock re-establish the retail outlet in Wolverhampton and run it for myself".

111. Mr Boyden asked:

> "So when having established the company, took on Wolverhampton, on whom could you rely for support in running the shop"?
>
> He replied:
>
> "In running the shop itself I relied on Devi's retail staff".

112. He also described how he gave Mr Mahesh Jangra weekly figures of takings in the retail business.

113. Mr Boyden asked:

> "At what point after the creation of DISL for retail did you discover or determine that this was not likely to prove profitable"?
>
> He replied:

"Even if I got rid of the other [staff?] – if Digital was to employ anybody to work in retail there wouldn't have been enough money generated in that shop to actually pay the wages never mind mine and that was very quickly determined as the first four to six weeks of me actually looking at the figures in that sort of scrutiny".

"Did you talk to your father about these conclusions"?

"No, not – I mean I said that retail is struggling but I still thought I would make it work to be honest".

We, that is to say the tribunal, found these answers confusing and asked for clarification:

"Judge Barlow: … I am not quite clear about that point. Are you saying that after DISL was set up that retail sales were made by that company at the Wolverhampton shop"?

He replied:

"Sir basically when I started to get the figures the profit figures of what the shop was earning after DISL was set up I could not see it surviving".

114. Mr Chhiber junior then went on to say that no retail sales were actually declared by the appellant, as is in fact obvious from its first and subsequent VAT returns. At that point the tribunal adjourned for the day.

115. The next day Mr Chhiber junior said that after he started the retail business he "quickly found it wasn't going to work" for him.

116. When he was cross examined by Mr Puzey on this aspect of the case he said that he soon learnt that the retail business was not going to survive and it is clear in the context in which this was said that when he said soon he meant soon after the appellant was set up. He added that the retail sales that had then occurred and indeed which he had been involved in making in the sense that he was running the shop, were declared by PLC and that "the transition had not happened". By that he meant (putting it more formally) that the transfer of part of PLC's business as a going concern was never put into effect. Mr Chhiber junior said he had not discussed that change of plan with his father.

117. Mr Puzey asked how long after the appellant was registered on 23 February (that is to say registered for VAT) did he decide that the appellant would not take over the retail business. Mr Chhiber junior in effect then said that this decision had been made in the nineteen days between the date of incorporation of the appellant (4 February) and the date of VAT registration (23 February). Mr Puzey reminded Mr Chhiber junior that he had worked in the shop for years which he admitted was the case and of course, as we have noted, he was certainly in full charge of it for about eight months after he graduated and before the incorporation of the appellant.

118. Mr Chhiber junior claimed he had not looked at the expenditure incurred by the Wolverhampton business before he agreed to the appellant taking it over and then when pressed further by Mr Puzey he went back even on that answer and said: "I can't recall [if I looked at the expenditure] but obviously if I did I didn't make a good judgement of it".

119. We find Mr Chhiber junior's evidence about the setting up of the appellant and why it did not do what was declared to be its intention in the VAT application to be untruthful. We find it to be deliberately untruthful.

120. The first point leading to that conclusion is that it is inherently implausible that someone who had taken a great interest from an early age in business in general and this business in particular and who was learning at his father's feet so to speak which was the way the case was presented to us, would not have known anything about the problems the business was facing. It is even more implausible that the same person would still have been unaware of those problems after actually running the business for eight months. Add to that the point that the appellant company was supposedly set up for the sole purpose of running this business, then the question arises why Mr Chhiber junior would not, at least before setting the appellant up, have done some real enquiring about how likely it would be that he could make something of that business. Mr Chhiber senior, as a caring father, would surely have warned him of the risks especially as he was making an additional investment himself.

121. Next, although a document was submitted to HMRC asking for a VAT registration on a very particular basis specifying a particular date when the transition would occur we are asked to believe that Mr Chhiber junior was able to decide within nineteen days something he had failed to discover in eight months, namely that the retail business was not viable.

122. We are then also asked to believe that the transition that the appellant claims had been planned and on which PLC had certainly consulted its accountant was simply not effected without the appellant even speaking to his father about the change of plan. Thereafter we are asked to believe that the appellant came up with a new plan altogether and that that was achieved by 13 April when the first wholesale deal occurred. That that was never expected to be a one off transaction is proved by the fact that the appellant asked to go onto monthly returns a few days later and so we find that what the appellant is saying is that it had a new plan for the business by 13 April. We do not believe that assertion either, as the circumstances generally show that the appellant never intended to deal in retail in the Wolverhampton shop but rather its actual intention was to go into the wholesale trade and in particular to export goods. That that is what happened is not irrelevant though not decisive. The lies told by both Mr Chhiber senior and Mr Chhiber junior in their evidence convince us that the intention had always been for the appellant to deal as it did and not as it said it would when it applied to register for VAT.

123. We note again that the very name chosen for the appellant company also bears out our conclusion.

124. Mr Chhiber junior said when being cross examined that when he decided to go into wholesaling "my research, my modelling, was for export I guess". He also said he had intended to go into developing merging markets though the least that can be said about that is that he never did so. None of his customers was in such a market and the prices of the phones he traded in suggest it was unlikely that they were intended for emerging markets even if we assume the appellant's customers may have intended to export them to other countries than their own it seems unlikely they would be emerging market countries.

125. Of the appellant's 101 deals, one was a triangulation deal, one was a sale to another UK company and the rest were dispatch deals in which goods were exported to other EU countries. In all but two of the appellant's deals PLC was its supplier.

126. PLC allowed the appellant credit. It is not surprising that Mr Chhiber junior's company was allowed credit by his father's company. However, Mr Chhiber junior was unable to give any satisfactory evidence of how that credit was managed. He said that the appellant was allowed credit but he also claimed that when he dealt with PLC it was never his father who dealt with the transaction and of course that fits with Mr Chhiber senior's evidence that he only dealt with purchases for PLC and not with sales. It seems obvious that when PLC gave the appellant credit it would have to check that its own funds were such that the credit would not exceed the funds available. Mr Chhiber junior had no idea how that was managed and gave very vague evidence about which staff he dealt with and was able to shed no light on what was said about credit and how it operated. It seems that although the appellant did not always need credit, because sometimes its own funds were sufficient to finance a deal, whenever it did need credit it was always available.

127. Given that PLC were always the supplier to the appellant after 1 September 2004 it is difficult to avoid the conclusion that the true explanation for the credit arrangements was that PLC were only offering stock to the appellant when it had sufficient funds to enable it to await payment. In which case of course the question arises as to why PLC did not simply sell that stock itself. As we have already pointed out, in some cases PLC could have made considerably more profit had it sold the stock to the overseas customer than it had made by selling to the appellant.

128. That conclusion is borne out by this exchange in the evidence, the tribunal asked:

> Judge Barlow: "Did you then ask [your father] for the credit or did you ask [Jennifer Banford – a PLC employee] for credit or did you just assume you would get it"?
>
> Answer: "I would say it was agreed that I would have credit on my stock".
>
> Judge Barlow: "For any amount"?
>
> Answer: "Well any amount I can't say but what they had, what they owned, I could have credit on".

Judge Barlow: "So if you were offered stock you knew that they would be able to give you credit for it".

Answer: "Correct. That was the agreement".

129. The appellant's method of trading included reliance on staff actually employed by PLC for some of the necessary work. The appellant had no employees but Mr Chhiber junior did not do all the work himself as is very obvious from the frequency with which Mr Jangra's name appears on the documents. In particular Mr Mahesh Jangra acted as what Mr Chhiber junior described as a book keeper but his duties clearly went beyond simply recording accounting information and he dealt with paperwork generally including dealing with customers and freight companies on such issues as receiving inspection reports, invoices and the like; though there is no evidence he actually found customers or negotiated with them.

130. Mr Jangra was said to have carried out due diligence checks on Mr Chhiber junior's instructions.

131. Mr Jangra dealt with customs officers on more than one occasion. On one such visit he was mentioned as a director on a written visit report which was clearly an error. Mr Chhiber senior was the only director of the appellant. We do not regard that error as being relevant to the appeal but the fact is that Mr Jangra can only have been dealing with customs officers if either he put himself forward as the right person for them to speak to or Mr Chhiber junior had done so. There was at least one occasion when Mr Jangra was seen as well as Mr Chhiber junior and it appears Mr Chhiber junior may well have been at the premises on other occasions because he said he normally was there and the officers did visit fairly often. In fact he said he was available for every meeting "as far as he could recall". We can only conclude that Mr Chhiber junior was happy for Mr Jangra to speak to the officers.

132. Other staff from PLC also acted on behalf of the appellant and as we have already said when considering Mr Chhiber senior's evidence it is obvious that there was a considerable extent to which the staff, particularly Mr Jangra, must have known both sides of the same deal.

133. Mr Chhiber junior denied, as did his father, that that led to both of them knowing the facts related to the other's side of the transaction.

134. As already noted many of the appellant's deals were sales to Trading Point. Mr Chhiber junior was adamant that, although the first deal between the appellant and that company occurred on the day it began to trade and on which it also traded with PLC, that was not because his father had overtly suggested he deal with Trading Point or had introduced him to that company but rather because Mr Degnegaard had approached the appellant. Mr Chhiber junior did admit he knew it was his father's company and that accordingly he had found it unnecessary to do any due diligence on it.

135. As far as due diligence was concerned we find it unsurprising that Mr Chhiber junior would not have found it necessary to carry out any enquiries on PLC or

Trading Point as they were his father's companies and he knew that to be the case. However his due diligence on any other counterparties was very limited and amounted to little more than checks to see they were registered for VAT and reliance on speaking to their principals on the telephone and being impressed with their manner. When pressed he would assert that he had sometimes taken up references on the telephone though there was no evidence that he had ever noted anything of that or even to show how the referees had been nominated. He claimed to believe that it was impossible to carry out credit checks on overseas customers or at least that he did not know (and presumably did not find out) how to do that.

136. We record that we think it absurd that HMRC suggested he should have carried out due diligence checks on the freight forwarder and warehouse-keeper Kuehne and Nagel of Bremen (a company with nearly 125 years history with 63,000 employees and offices in 100 countries) but the same cannot be said for others of the companies the appellant dealt with.

137. The appellant in effect allowed credit to some of its customers in the sense that it sometimes released goods to them before it had been paid and that does raise the question how it knew it was safe to do that without having made suitable enquiries about them generally and their credit worthiness in particular. However we should also say we place little weight on this aspect of the case because it may have been just that the appellant was prepared to take a risk.

138. Written terms of business with the appellant's counterparties were virtually non-existent. Given the value of the goods in question and the fact that the goods were being sent to the customers' nominated warehouses, albeit 'on hold', and given that the appellant had not necessarily got funds available to pay PLC, it might have been expected that there would be some definite terms about time of payment on the part of the customers. When pressed in cross examination Mr Chhiber junior said he had allowed his customers credit of 14 or 30 days but on the understanding that they would pay as soon as possible within those limits. Such terms were supposed to have been agreed by telephone but were not even noted anywhere. There were apparently no terms about such things as stock returns, delivery dates, disputes about quality of goods, speed at which the customer should arrange inspection and so on.

139. A document was put to Mr Chhiber junior which referred specifically to 'inco terms' but he had to admit he had no idea what that meant.

140. There were many occasions when documents in the appellant's deal packs revealed discrepancies between the goods as ordered and the goods as delivered. Typically comparison of a purchase order and an inspection report would show discrepancies and these were often in relation to such things as chargers and languages in manuals and the like. There appeared to be no case in which any such discrepancy was ever challenged by a purchaser and Mr Chhiber junior's explanation was always the same, namely that these items could be replaced cheaply. But we are not convinced that is a satisfactory explanation because given that the deals often involved several thousand phones, even if a charger and a manual would only cost say 50 pence each, the purchaser might be expected to ask for a worthwhile reduction in

the price when the discrepancy came to light. At that point the goods had been exported to the Continent and if the purchaser rejected them the appellant would have had to bring them back to the UK at its own expense and so the purchaser was in a strong position to ask for a discount in cases where the phones did not meet the agreed criteria.

The commissioners' case.

141. The commissioners' case can be very simply stated. They rely upon all the documentary evidence presented and the oral evidence including that the appellant's witnesses and contend that that evidence proves that the appellant company's disputed transactions were connected with fraud and that the appellant either knew or should have known of that connection in respect of each transaction. So far as the dirty chain transactions are concerned the appellant has admitted that they are connected with fraud albeit the fraud of parties other than the appellant or its immediate supplier and customer. So far as the connection with fraud in respect of the contra-trade transactions is concerned the appellant does not make any admission but the commissioners contend that taking the evidence as a whole we should find that Mr Chhiber senior had acted dishonestly. They contend that all the relevant transactions in the relevant period were contrived and that that applies equally to the contra transactions and the dirty chain transactions. They also rely upon the fact that inputs and outputs matched so closely in the relevant period as further evidence that those transactions were entered into as contra transactions in the sense described above and in furtherance of the fraud.

The appellant's case.

142. The appellant denies that it was dishonest and denies that it knew or should have known that the transactions were connected with fraud. In the case of the contra transactions it denies that they were connected with fraud.

143. Mr Boyden stressed that, if the evidence proved that Mr Chhiber senior had been dishonest, that would not prove that Mr Chhiber junior had been dishonest. He cited to us Ezekiel 18 verse 20[1]. For completeness he also cited Exodus 34 verse 7[2]. We cannot resolve the apparent theological contradiction but we hold that Ezekiel more accurately reflects the correct legal position. Mr Chhiber senior's actions and intentions cannot be attributed to his son as such. However we cannot say that everything Mr Chhiber senior did was necessarily irrelevant to the case against the appellant.

[1] The son shall not bear the iniquity of the father, neither shall the father bear the iniquity of the son: the righteousness of the righteous shall be upon him, and the wickedness of the wicked shall be upon him.

[2] The Lord God merciful and gracious, longsuffering and abundant in goodness and truth, keeping mercy for thousands, forgiving iniquity and transgressions and sin, and that will by no means clear the guilty; visiting the iniquity of the fathers upon the children, and upon the children's children, unto the third and fourth generation.

144.Firstly, it may well be relevant to consider that Mr Chhiber senior being Mr Chhiber junior's father had some relevance in fact. Indeed, the appellant relies on that to some extent to explain, for example, why no due diligence was carried out on PLC and Trading Point, a point in the appellant's favour. On the other hand equally it may be relevant in respect of other aspects of the case in ways that may be unhelpful to the appellant such, as for example, it makes it unlikely that Trading Point really did just happen to find the appellant as a supplier on its first day of trading.

145.Secondly, we should bear in mind that Mr Chhiber senior was the company secretary and 50% shareholder of the appellant when it was set up and registered for VAT on what we have held to be a false basis. Those are actions of the appellant in this case just as much as any things done by the appellant company acting through the agency of Mr Chhiber junior.

146. The appellant attacked the way the Commissioner's officer, Mrs Hudson, had decided on behalf of the commissioners to refuse the input tax claims and make the assessment under appeal. The decision the tribunal is required to make is whether those decisions were right in law and not whether they were reached by a sound process of reasoning. The opinion of the officer making the decision will not be upheld, if it is against the weight of evidence, just because she had adopted a reasonable approach. But neither will the appeal be allowed, just because she had adopted an unreasonable approach to the decision making process, if the decision is found by us to be correct on the evidence presented before us. In fairness we will say that we found little if any of the criticisms of Mrs Hudson were justified so far as the approach to the decision making process was concerned.

147. The appellant contended that the commissioners had alleged a conspiracy on the part of the appellant and/or Mr Chhiber senior and PLC and that therefore they had to prove it. Whilst it may be true that, had it been necessary to allege a conspiracy, the burden of proof would have lain on the commissioners there is no reason why a conspiracy had to be alleged in this case. Proof that the appellant knew or should have known that its transactions were connected with fraud and proof of the connection where it was not admitted did not require proof of a conspiracy. It is true that the evidence did show that multiple parties were involved but conspiracy involves an agreement between the parties to be involved in the illegal activities alleged. Knowledge of involvement does not depend upon any such agreement.

148. Mr Boyden contended that Mr Chhiber senior was "no Keyser S□ze"[3] by which he meant that Mr Chhiber senior was not the organiser of the fraud if indeed the fraud was organised by an individual. We have no hesitation in finding that the fraud or frauds involved in this appeal were organised by someone. They cannot have occurred spontaneously. The evidence does not prove that Mr Chhiber senior was the organiser and we would go so far as to say there is no evidence that would even enable it to be alleged that he was the organiser. Therefore Mr Boyden is right "he is no Keyser S□ze".

[3] The Tribunal was not familiar with it but we were told this is a reference to a criminal mastermind in the film the Usual Suspects who, in the story, may or may not exist.

149. Mr Boyden criticised the commissioners for and urged the tribunal to avoid, placing too much emphasis on what PLC had done and whether it was involved in the fraud or at least knew or should have known of the fraud. We agree that it is necessary to bear in mind the question of relevance when considering what PLC did or knew. Clear distinctions must be made between what is relevant and what is merely impression.

150. Mr Boyden stressed that PLC and the appellant and the people running the two companies were or had been involved in business over a number of years, particularly in the case of Mr Chhiber senior. He sought to draw a distinction between them and the sort of persons known to have been involved in other companies, particularly in the dirty chains. We agree there is a distinction but just as we could not decide this case on the basis of a similarity between the appellant and other MTIC traders we cannot decide the case on the basis of a dis-similarity. We have to decide this case on the evidence in this case.

Tribunal Decision

151. The transactions in the dirty chains were extremely contrived. The same parties repeatedly appear in the most unlikely way. Many parties appear to have been introduced into the chain for no plausible reason. The defaulting parties were almost absurdly blatant in their dishonesty. Clearly it would have suited whoever was behind the fraud if all parties were fully aware of exactly what was going on but in the absence of any evidence that that was the case we do not find it to have been proved that everyone was fully aware of the details of the fraud. We mean by that that any individual party such as PLC or the appellant has not been shown to know details such as who all the other parties in the chain were and how the fraudulent money was being distributed and who gained from it.

152. The extreme contrivance of the dirty chains is relevant to the question whether the contra trading transactions were also part of the fraud. The fact that the fraud is so well organised is a relevant factor in considering whether the contra trading transactions were deliberately contrived. They undoubtedly benefitted the fraud as a whole and so it is most unlikely that they happened by accident to have benefited the overall fraud.

153. PLC's turnover in the relevant period was both enormous and the best it had ever achieved. That turnover was dependent upon the dirty chain and broker transactions which were part of the fraud and in effect in that period PLC was trading as an MTIC trader in the sense that its trade was largely if not entirely conducted for the benefit of the fraud and that applies equally to the contra trades as to any of the others.

154. We find that Mr Chhiber senior was aware of the fact that the business was connected with fraud because it is quite clear that there was no reasonable explanation he could give that explained how his company had managed to achieve that turnover and because of the general circumstances of the trading carried on. We mention again that circumstances can be taken into account and the circumstances were that Mr Chhiber senior was prepared to deal at a loss, in ways that we have described, in

transactions that made little if any sense for his company. We repeat that had he said those transactions were conducted in that way to benefit his son's business for reasons of paternal support that might have been a satisfactory explanation but that was not his explanation for them. He claimed that he had nothing to do with sales and that his company just happened to sell to his son's company sometimes at a loss. He also attempted to deceive the tribunal with a false explanation as to why he was prepared for his company to make a loss on those transactions.

155. The fact that the goods then consistently ended up with Mr Chhiber senior's company in Denmark cannot plausibly be said to have been a coincidence and his explanation that he was not involved at all with sales is inconsistent with some of the evidence. He told Mrs Griffiths that he dealt with sales and although that was after the period in question it was not suggested that he had said that was only the case after the periods in question. He said that he left the running of the Danish company entirely to Mr Degnegaard but the Danish authorities reported that Mr Degnegaard only had some involvement with sales. Mr Chhiber senior's own details were those given to the bank when an account was set up for Trading Point which is inconsistent with his assertion that he had nothing to do with running that company. Mr Chhiber senior lied about the circumstances in which he became a director of Trading Point. If we ask ourselves why he would have given untruthful evidence designed to downplay his involvement in Trading Point, indeed to suggest he had none, then we consider the only explanation is that he knew that Trading Point was deliberately used as the means of exporting the goods in order to obtain a VAT refund while, in effect, retaining ownership of them.

156. We also add that as Mr Chhiber senior also lied to HMRC when he applied to register the appellant for VAT that also entitles us to treat his evidence generally with scepticism. The purpose of those lies appears to be plain and we find that it was to deceive HMRC into allowing a VAT registration both quickly and without asking too many questions.

157. Whether Mr Jangra or other members of staff employed by PLC, who knew about both sides of the relevant transactions, actually maintained the 'Chinese Walls' as alleged by the appellant we cannot say for certain. What we can say for certain is that both PLC and the appellant must have realised there was at least a likelihood that Mr Jangra would have reported to Mr Chhiber senior that he need not sell the goods to the appellant if they were to be sold to Trading Point and that he could avoid making a loss and achieve a profit or a greater profit by selling direct to Trading Point. Equally the appellant must have realised there was a risk Mr Jangra or others of PLC's staff would have reported to Mr Chhiber senior that it was selling to his own company and had trading been on normal terms it might then have been expected that the appellant would no longer be able to sell to Trading Point.

158. That both PLC and the appellant were prepared to continue to use Mr Jangra and other staff and take those risks is strong evidence that the true situation was that both those parties knew what was happening and was happy to continue. The conclusion to be reached from that is that the appellant was simply being introduced to the chains of deals to set up a smokescreen to reduce the chances that HMRC would realise what

would have been the case if PLC had sold directly to Trading Point namely that the goods were being exported to Mr Chhiber senior's own company.

159. The fact that the goods were imported to the UK and then exported again almost immediately, back to the same market, is further circumstantial evidence that the true reason for the transactions was to obtain an input tax claim on the export. Otherwise the transactions seemed to have no rational reason for occurring in the way they did. Both Mr Chhiber senior and Mr Chhiber junior knew about triangulation and must have realised that had the true reason for the deals been to buy goods from one Danish company and sell to another there would have been no reason to bring the goods to the UK at all. This is particularly true of the contra deals where PLC knew with certainty that the goods had been imported from Denmark because it had imported them and they ended back in Denmark at Trading Point almost immediately.

160. We therefore find that Mr Chhiber knew all the relevant transactions were connected with VAT fraud.

161. We then turn to the question whether the appellant knew or should have known that the transactions were connected with fraud.

162. Mr Chhiber senior was not a director or the company secretary of the appellant company at the time the relevant transactions occurred so his state of mind about them at that time is not the issue to be decided.

163. At the time of the formation of the company Mr Chhiber senior lied about the intentions of the company in the application to register for VAT. He was the company secretary and 50% shareholder at that time and his actions are attributable to the company. That is evidence against the company and shows its intentions to have been misrepresented to HMRC and that finding continues to be relevant as long as the company traded in exports because it shows that, contrary to what it stated in the application, it was always its intention to trade in exports and to recover input tax. Its reason for lying is as stated, namely to disguise its intentions from HMRC. The only reason it might have had for doing that is that it knew HMRC would be at east suspicious of any such business starting up. That in itself shows that the company was at least concerned that its transactions might be seen as dishonest and attracting extra scrutiny that would not have applied if it had simply traded in the retail market.

164. Mr Chhiber junior's evidence about the circumstances in which the company changed its mind, as he would have us believe, having genuinely intended to trade in retail was, we find, wholly untrue. We do not believe that he had spent years working and taking an interest in the retail business culminating in eight months when he ran it, without having realised, before the appellant was set up, that the retail business was not viable.

165. He claimed then to have decided within a few days and for the first time that that was the case and then to have totally re-arranged the business plan. It might have been plausible for him to have said he decided the business was non-viable and then to have set about deciding what to do about it but we would have expected that to

have involved discussion with his father. He had agreed the appellant would take over the business as a transfer of a going concern and it is barely credible that, as he now claims, that was cancelled without even a discussion with his father. His evidence about this aspect of the appeal was also inconsistent as we have described above.

166. We are satisfied and find that Mr Chhiber junior, as the director of the company and a 50% shareholder at that time, must have known the terms on which the VAT application was made and that it was untrue.

167. Once the appellant's business did begin to trade that trade had many unusual and uncommercial characteristics.

168. The appellant traded virtually exclusively with one supplier. That may not have been particularly surprising in itself but it was also given very favourable terms so far as credit was concerned. Given that the supplier was his father's company that too might be explicable as simply a favour from his father.

169. However, that does not explain how it came about that the appellant was prepared to supply customers about whom it knew nothing or next to nothing, on virtually non-existent contractual terms and who never complained about the goods not matching their descriptions.

170.It is particularly significant that the appellant made no credit enquiries about the customers even though it always sent the goods to the customers' nominated warehouses before payment risking, at least, the goods having to be repatriated at the appellant's expense if not paid for and, at worst, the goods being diverted.

171.The lack of terms of business is significant because it calls for an explanation of why the parties were prepared to deal in goods of high value on such a casual basis. The most likely explanation for that is that the parties knew or understood that the transactions were not in fact normal commercial transactions. That in itself suggests that the actual reason was that the relevant parties had an understanding, tacit or otherwise, that the transactions were in fact part of the fraud.

172. Mr Chhiber junior claimed to have agreed terms such as '14 or 30 days but as soon as possible' for the payment from the customers. As was shown by the eagerness with which the appellant pursued the application to be allowed to make monthly returns, the appellant knew that it would maximise the opportunity to make profits if it could speed up the claims for input tax but in marked contrast to that it took a relaxed view of payment from its customers. A delay in payment from the customer would not have held up the claim for input tax, which arose on the date of supply not payment, and given that the appellant's supplier was also not pressing for payment the conclusion is that all parties were taking the view they should get the input tax paid and they would sort out the finances between themselves whenever its suited them.

173. That the customers were prepared to accept the goods regardless of divergence from the contractual descriptions furthers the case for saying that the transactions were artificial.

174. These features of the transactions were of course known to the appellant and coupled with the fact that we have found both the persons who ever had any management role in the company lied in their evidence we are satisfied that the appellant knew that the transactions in question were connected with fraud.

175. Accordingly the appeal is dismissed. The commissioners' decisions to refuse the input tax claims and to assess the appellant are upheld.

176. 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.

RICHARD BARLOW
TRIBUNAL JUDGE

RELEASE DATE: 10 March 2015