



TC02387

Appeal number: LON/2008/1507

***TYPE OF TAX – VALUE ADDED TAX – INPUT TAX – MTIC FRAUD –
WHETHER TAXPAYER KNEW OR SHOULD HAVE KNOWN OF
CONNECTION WITH FRAUDULANT EVASION OF THE VAT –
APPLICATION OF TEST IN KITTEL (C239/04)***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MBG ASSOCIATES

Appellant

- and -

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

**TRIBUNAL: JUDGE SIR STEPHEN OLIVER QC
MR HAVERY ADAMS**

Sitting in public in London on 1-5 October 2012

Greg Krieger, Counsel for the Appellant

**Stewart Biggs and Natasha Barnes Counsel, instructed by the General Counsel
and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

1. MBG Associates Ltd (“MBG”) appeals decisions of HMRC denying it
5 entitlement to the right to deduct input tax in two VAT periods: £287,530 in 06/06
period and £211,460 in the 09/06 period.

2. HMRC’s decision to deny input tax for the 09/06 period was notified to MBG in
a letter of 29 May 2008. The decision to deny input tax for the 06/06 period was
notified by letter of 3 September 2009. As a repayment had already been made to
10 MBG for the 06/06 period, and assessment of tax for £287,350 was issued on 15
September 2009. HMRC’s grounds for these decisions were that MBG’s transactions,
in relation to which the input tax was claimed, were connected with the fraudulent
evasion of VAT and that MBG, through its Directors, knew or should have known of
such a connection. The fraudulent evasion alleged is missing trader intra-community
15 (“MTIC”) fraud. The two main versions of MTIC fraud are explained in the
judgment in *Red Twelve Trading Ltd v HMRC* [2009] EWHC2563 (Ch) at paragraphs
2-7. Further details of the variant called “contra trading” are found in the judgment in
R (on the application of Just Fabulous UK) Ltd v HMRC [2008] Stc 2123.

3. In the transactions to which these appeals relate, MBG is alleged by HMRC to
20 have been a “broker” purchasing goods from UK based companies and selling the
goods, zero rated for VAT, to a company based in Spain, Complementos De
Exportacion Multifuncionalessa (“CEMSA”). In the periods 06/06 and 09/06 MBG,
so the case for HMRC goes, entered into three broker transactions the commodity was
mobile phones: the decision of HMRC to deny input tax on those transactions (which
25 we refer to as “the 06 Deals” and “the 09 Deal”) is the subject of these appeals.

Short details of the Deals

4. The first of the two 06 Deals was documented as 30 June 2006. It related to
4,000 Sony Ericsson W81i mobile telephones. These were said to have been
purchased by MBG from Grange Computers Ltd (“GC”) for £862,000 and sold to
30 CEMSA for £904,000, providing MBG with a profit of £42,000.

5. The second of the 06 Deals, also documented as 30 June 2006, are related to
2,400 Nokia N91 phones. These were shown as purchased from GC for £78,000 and
sold to CEMSA for £818,400, making a profit for MBG of £38,400.

6. The 09 Deal is dated 25 September 2006. It relates to 5,300 Nokia N80 phones.
35 These are shown as purchased from Nex Trading Ltd (“Nex”) for £1,208,347 and sold
to CEMSA for £1,261,400, making a profit to MBG of £53,053.

7. Each of the three sale transactions entered into by MBG traced, via a contra-
trader, directly to defaulting traders who, according to HMRC, deliberately failed to
meet their VAT liabilities.

8. HMRC submit that MBG's transactions were part of an overall VAT fraud scheme involving a web of companies ("a cell") and chains of "transactions" where the sole aim was to defraud the Revenue. The transactions had been orchestrated and contrived for such a purpose and it had no ordinary commerciality to them. HMC's
5 primary contention is that MBG knew that its transactions were connected to such a scheme and must have known that that connection had played an integral role in the scheme. HMRC's secondary contention is that, in the absence of actual knowledge, MBG should have known of the connection of its transactions to an MTIC scheme by the cumulative circumstances presented to it, not least that it was able to greatly
10 increase its turnover profits by undertaking deals with companies to which it had been introduced by a competitor.

The issues for the Tribunal to determine

9. The test for the Tribunal to apply in cases such as this breaks down into four parts:

15 (i) Was there a VAT loss;

(ii) if so, was it occasioned by fraud;

(iii) if so, were the relevant Appellant's transactions connected with such a fraudulent VAT loss via the contra-traders; and

(iv) if so, did the relevant Appellant know or should have known of such a
20 connection.

Notice of Issues in the present case makes it clear that part 7 (i) to (iii) are accepted by MBG. The single matter for this Tribunal to determine, therefore, is whether MBG knew or should have known of such a connection. If, therefore, HMRC is satisfy the Tribunal that MBG's transactions were connected with the fraudulent evasion of VAT
25 and that MBG knew or should have known of such a connection, this Tribunal will uphold the Decision of HMRC in accordance with the law as we now summarise it.

The right to deduct

10. MBG relies on Articles 167 and 168 of Council Directive 2006/112/EC of 28 November 2006 and VAT Act 1994 Sections 24 and 26 and paragraph 29 of the VAT
30 Regulations as the basis for MBG's entitlement to the relief for the input tax in relation to the Deals. HMRC rely on the exception to the right as identified by the ECJ in its Judgment of 6 July 2006 in "*Axel Kittel*" (C-439/04) "*Recolta Recycling*" (C-440/04) with particular reference to paragraphs 51-61 of the Judgment. Those decisions have been applied in the UK in numerous tax appeals and have been
35 summarised in the following passages from the decision of the Court of Appeal in *Mobilx Ltd* and others, the HMRC [2010] EWCA Civ 5107 ("*Mobilx*"). Paragraphs 59 and 60 of *Mobilx* read as follows:

5 “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 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*.

10 60 The true principle to be derived from *Kittel* does not extend to the 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.”

15 The Court of Appeal confirmed that the burden of proof in these proceedings lies with HMRC. The standard of proof is the ordinary civil standard, being proof on the balance of probabilities.

11. In an earlier decision of the High Court, *HMRC v Livewire Telecom Ltd* [2009] CWC 15 (Ch), the judgment, in paragraphs 102 and 103 reads as follows:

20 “102 In my judgement in a case of alleged contra-trading, where the taxable person claiming repayment of input tax is not himself a dishonest co-conspirator there are two potential frauds:

(i) the dishonest failure to account for VAT by the defaulter or missing trader in the dirty chain and;

25 (ii) the dishonest cover-up of that fraud by the contra-trader.

103 Thus it must be established that the taxable person knew or should have known of a connection between his own transaction and at least one of those frauds. I do not consider that it is necessary that he knew or should have known of a connection between his own transactions and both of those frauds. If he knows or should have known that the contra-trader is engaging in fraudulent conduct in deals with him, he takes the risk of participating in a fraud, the precise details of which he does not and cannot know”

That decision was not commented on or qualified in *Mobilx*.

The Contra Chains

35 12. MBG accepts that the transactions comprised in the 06 Deals and the 09 Deal were part of larger contra-trading schemes, the sole purpose of which was to cheat HMRC. The Deals were connected with the fraudulent evasion of VAT; moreover those contra trades utilise the number of “contra-traders” in an attempt to disguise or shift the apparent point of the tax loss so as to escape HMRC’s anti-fraud measures.

It is not therefore necessary to provide a detailed account of the contra chains and the contra-traders.

13. We were provided with unchallenged evidence of Nigel Humphries, an officer of HMRC. This contained an analysis of the acquisitions and broker deals undertaken by the three contra-traders (in the relevant periods). Analysis of all the deal chains featuring those contra trades demonstrated that they operated within a cell together with three other contra-traders. The fraudulent nature of that cell is evidenced by the following, among other features:

(i) The overwhelming majority of chains in which these contra-traders acted as UK acquirers lead to the same two EU customers, regardless of number, order and identity of the UK buffers in the chain;

(ii) the sums of input and output tax declared by the contra-traders matched to an extent that it would be highly unlikely to have occurred other than through contrivance;

(iii) all of the chains in which those contra-traders acted as brokers led back to a defaulter or highjacked entity; were they trading legitimate, the expectation would have been for their to have been a complete failure by all the UK acquirers concerned to make any payment to HMRC;

(iv) the relatively small number of traders appeared repeatedly at different positions in the deal chains and presented a clear lack of commerciality in the way in which traders dealt with each other: for example, traders failed to cut out middle men in circumstances in which they themselves had pre-existing relationships with the ultimate customer. Mr Humphrey's evidence concluded that the transactions entered into by the contra-traders and their customers in the schemes examined by him had been contrived to defraud HMRC. In each scheme the goods were passed rapidly through the UK for no apparent commercial reason in two separate, but linked, types of supply: one involved VAT losses occasioned by defaulting traders and another involving VAT repayment claims. The organisers of the schemes had maintained control of the money and money flowing within them by keeping the transactions within narrowly defined groups of traders. The sale so the "brokers" in each scheme conformed to the separate pattern for each scheme, indicating that the traders involved had been operating in concert under the same direction. That pattern Mr Humphrey's observed, could not occur in the course of genuine arm's length trading.

14. Regarding the transaction chains "examined below" involving MPG, there are at least two features of the chains that demonstrate their contrived and fraudulent nature. These are, first, that the goods were all sold back-to-back. In each of the Deals, each trader in the chain purported to purchase a number of phones and then sell exactly the same number to the next trader in the chain. The consignment remained intact throughout the chain. Second, none of the traders in the chain appeared to be either manufacturer or authorised distributor. The goods were sold again and again without ever reaching an end user or consumer.

The Deals and the circumstances in which they were carried out

15. MBG was incorporated on 23 June 2005. It was registered for VAT with effect from 24 October 2005. It declared estimate taxable supplies £500,000 and the declared estimate of EC sales and purchases with £500,000. The principle place of
5 business was given as an address in Haddenham, Bucks. This was the home of the parents of Mr Oliver Murray the Executive Director and sole of MBG. The business activity was declared on the VAT 1 as “general Brokering – essentially within mobiles/telecommunications”.

16. A pre-registration visit to MBG was undertaken by HMRC on or around 18
10 November 2005. The report includes the following information:

(i) Mr Murray, the Director, advised that the main business activity was “the selling of refurbished phones to EC followed by deals in new mobile phones”.

(ii) Mr Murray had no previous experience in the business.

(iii) Mr Murray had received advice and sponsorship from friends of his father who themselves had wanted to start a business selling refurbished phones but had not had the time to do so. (In evidence Mr Murray told us that the particular
15 friend was a Mr Steven Westwall who became a shareholder in MBG and provided finance: Mr Westwall attended the hearing and gave evidence).

(iv) MBG’s business was at that time (and according to Mr Murray until some date at the start of 2006 when it moved to an office in Hammersham) run from
20 Mr Murray’s parents home.

(v) Mr Murray had been advised to look at the regulations regarding dealing in goods for cash over a certain limit. He had also been instructed to read Notice 703 to see what evidence was required by HMRC to show that goods
25 had left the country.

(vi) Mr Murray was asked whether he had approached any freight forwarders, he had asked for clarification of what a freight forwarder was and thereafter confirmed that he had not approached any. He is recorded as having been unsure about the checks that should be made on potential customers and
30 suppliers, although he confirmed that he was aware of Dunn & Bradstreet, a credit reference agency. Mr Murray was also provided with Notice 726, covering “joint and several liability”

17. From the information gained on the visit it was recommended that MBG’s application be registered for VAT be approved.

18. MBG submitted VAT returns on a quarterly basis with their VAT periods ending December, March, June and September. (MBG faxed a written request to be placed on monthly VAT returns on 29 March 2006; on 4 April 2006 HMRC refused that request. In a further letter of 29 June 2006, Clarkes Chartered Accountants,
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wrote to HMRC stating that MBG would prefer to be on monthly returns “on the basis that they are heavily reliant on importing goods”. This application was refused.

Mr Murray’s background

19. In 2002 Mr Murray completed a four year course in European business with German at a UK university. He obtained a degree. He then joint a post-graduate programme for a packaging company. Following that, he worked for a smaller business where he managed a number of retail accounts. At the age of 25 he set up MBG as his new enterprise. At that stage he had no experience of the mobile telephone trade.

10 The 12/05 period

20. The first VAT rendered by MBG was in respect of the 12/05 return. This showed sales of £6,662 of which £4,070 related to EC sales of second hand mobile phones. During that period, Mr Murray told us, he had associated with a friend of Steve Westwall. From that friend he learnt that there was demand for refurbished Nokia 621Os. Some of these were purchased. Some of these were taken to Greece by the friend in a suitcase and apparently sold there. The value of the rest of the Nokia 621Os dropped and these were sold at a loss.

The 03/06 and the 03 Deal

21. Sometime, early in that quarter, a distinguished rugby football player who worked in the clothing business and who is an acquaintance of Steve Westwall, introduced Oliver Murray to a Mr Anthony Rose. Mr Rose, Oliver Murray understood, had a shop in York and traded through a company called GC. Shortly after their first meeting Mr Rose presented Oliver Murray with the opportunity to sell some mobile telephones to a customer of GC’s in France. GC’s customer was France Affaires. Oliver Murray took the opportunity. GC sold to MBG 8,400 Nokia 6,680 units for £459,000 following a purchase order placed by MBG on 18 February 2006. MBG sold all these phones to France Affaires. The invoice issued by GC appears to have been issued on 18 February and MBG’s invoice has 20 February as its date. GC’s invoice requires payment of £459,000 plus £80,355 of VAT to its account with First Curaco International Bank (“FCIB”). MBG’s invoice requires payment to its account with HSBC at Wilmslow. Delivery is to be GR Distributions of Calais. (GC issued a Customer Contract Note dated 25 February 2006). HSBC, which had not been alerted to a receipt of this scale for MBG’s account “froze” that account for a week or more.

22. The 03 Deal resulted in £79,660 being released by HMRC to MGB.

23. We refer later to Oliver Murray’s account of the enquiries he made into GC and its affairs. Oliver Murray said that he understood Mr Anthony Rose’s reason for inserting MBG between GC and France Affaires was because GC “didn’t have the funds do to the export”. Mr Rose had, Oliver Murray explained, directed what price MBG was to charge for the goods.

24. A UK company called Kingswood Trading Ltd was found to have been the acquirer of the goods into the UK. GC had purchased £8,400 Nokia 6680 units from Tradex Corporation Ltd and sold on 2,400 of those units to MBG.

VAT period 06/06: The 06 Deals

5 25. Two deals were undertaken by MBG on the last day of the 06 Period. The first deal related to a consignment of 4,000 Sony Ericsson W810i mobiles invoiced by GC to MBG for £862,000 plus £150,850 of VAT. The second deal related to a consignment of 2,400 Nokia N1 mobiles invoiced by GC to MBG for £780,000 plus VAT of £136,500. These consignments had originated from Kom Team Sarl. Kom
10 Team had obtained the consignments on 23 June 2006. The unchallenged evidence was that the acquiring trader into the UK had been the contra-trader “ORIL” and deal had been traced back to a defaulting trader through ORIL’s broker chain. Invoices dated 30 June were issued by MBG to CEMSA, of Malaga, Spain for £904,000 for the Sony Ericsson consignment and for £880,400 for the Nokia consignment.

15 26. CEMSA was an existing customer of GC. Oliver Murray’s evidence as already noted, was that he understood that GC had not had the funds to do the export. Oliver Murray said that MBG would put its profit on the deal into the VAT amount and Steve Westwall was going to finance the rest of the VAT. Oliver Murray accepted that the prices, the contents of the two consignments, the invoice date (30 June) and
20 the identity of the freight forwarders had been determined by GC.

27. MBG had, until the 06 Deals came its way, conducted virtually no trading activities since the 03 Deal.

28. Since the 03 Deal, MBG had been searching for opportunities to buy phones and to match them with customers. It had been looking at importing equipment from
25 the Middle East and iPods from the US. Those efforts had come to nothing though MBG had imported a small amount of software. The opportunity to do the 06 Deals had not come MBG’s way as the result of any advertising or canvassing on his part. We infer that the initiative for the 06 Deals came through Mr Rose.

29. In preparation for the 06 Deals and account was set up, on 23 June 2006, in
30 MBG’s name with a Bank called ICB with an address in San Marino.

30. MBG had to produce the paperwork covering its part in the arrangements. Oliver Murray acknowledged that he had seen none of the deal documentation save where it involved MBG.

Documentation of the O6 Deals

35 31. MBG prepared a Purchase Order dated 30 June with a Purchase Reference Number of 1002 addressed to Mr Rose of GC and relating to the two consignments of mobiles. The Purchase Order states that “all goods will be paid for 100% after inspection”. A pro forma invoice from GC dated 30 June and addressed to MBG contains the word “Nul” when referring to the number of MBG’s Purchase Order. It

states – “payment due 30 June 2006 100% after inspection” the “beneficiary bank” (ie the GC bank) is FCIB and the currency is said to be sterling. The estimated delivery date is 30 June and MBG is to collect the goods from a freight forwarder called First Forwarding Ltd (“One F”) which has an Essex address. Oliver Murray admitted that the payment was not actually due on 30 June and that the consignments were not to be released to MBG. Oliver Murray’s explanation was:

“Ok, well, yes, but what I meant was 100% after inspection, that we’d been paid as well, and that would have been what was verbally agreed with Anthony Rose.” Asked when the inspection had taken place his answer was – “whenever the inspection report was done by One F”. That, he explained was before it went to France. Commenting on the suggestion that payment was 100% due before the goods went to France, Oliver Murray observed – “yes, granted, I should have asked for this to be, yeah, redone. Responding to the suggestion that it had not mattered to him and that it was completely irrelevant, Oliver Murray responded – “I’d had a verbal agreement with him and I should have looked at this.”

32. An undated document on GC paper headed “Stock release authorisation” authorised One F to release 4,000 W Sony Ericsson 810’s to MBG and to deliver to One F the same goods.

33. An MBG document headed “Commercial Invoice”, dated 30 June 2006, refers to CEMSA as the customer for whom delivery is to be made to GR Distributors of Calais (being the same freight forwarders as handled the France Affaires Deal). It relates to the 4,000 Sony Ericsson W810 mobiles and a price £904,000 (with no VAT) payment of which is to be made to MBG’s account with ICB of San Marino. Payment terms are expressed to be “100% after inspection”. An MBG document headed “shipping instructions” direct One F to “ship on hold the consignment of 4,000 Sony Ericsson’s to GR distributors. It states that “permission for transfer of title will not be exchanged until full payment has been received by MBG”; it ends with these words:

“First Freight Ltd are to contact MBG Associates Ltd when payment has been made in order to obtain consent from Oliver Murray, Managing Director of MBG Associates Ltd”. Questioned about the absurdity of the directions in the Shipping Instructions, Oliver Murray said of One F that – “they knew that they would release the goods when I got paid on a ship-on-hold basis. Oliver Murray went on to explain that – “the agreement with Anthony Rose was: I get paid, I reclaim then I repay him”.

34. The second 06 Deal (relating to 2,400 Nokia N91s) was dealt with in documentation containing substantially similar terms as related to the first 06 Deal. The MBG document headed “Invoice” and dated 30 June 2006 states that payment is due on 20 February 2006.

35. 30 June was the last day of MBG’s 3 month VAT period. MBG’s VAT reclaim was made in mid July and full repayment was made on 10 August 2006. Asked about the dating of the deal documents as 30 June, Oliver Murray said – “I didn’t choose it”. When the deal was put to me with Anthony Rose, that was the date we did all the

paperwork”. As it turned out MBG were not paid for the 06 Deal until a further four months had passed.

36. Our only comment at this stage is to observe that whatever the real deal was, the documents do not appear to have been designed to be relied upon.

5 **Payment for the 06 Deals.**

37. €66,900 were paid from MBG’s ICB account to GC on 10 November 2006. £1,722,400 was paid by CEMSA (from its pacific savings and loan account – see below) to MBG on 23 November 2006. Instead of being paid into MBG’s ICB account (as the invoice had directed) it was paid into an account in MBG’s name with PS&L; that account, Mr Murray accepted, had been set up on 21 November 2006.

Checks

38. Of GC, the supplier of the goods comprised in the 06 Deal, Oliver Murray had no Due Diligence file but, he said – “the information I had received and having met Anthony Rose for me was sufficient enough for me to be, you know, happy with him and them as a company.” Prior to the 03 Deal, a questionnaire had been provided in relation to GC. It contains two references. Oliver Murray said “we would have followed them up”. Asked where the reference letters, he said – “ We would have done it on the phone”. We do not accept that these references were followed up.

39. Of CEMSA, from whom £818,000 plus £904,000 (£172,200) was to become due, the first record of contact was the letter of introduction dated 30 June 2006. Oliver Murray observed that – “CEMSA had been extremely well recommended to me by Anthony Rose” and that CEMSA had, apparently, been a very good customer for a very long time. CEMSA’s “Trade Application Form” gave two trade references, one in Lativa and the other in Estonia. Asked if he had followed those up, Oliver Murray said – “I’m sure I would have done”. He had kept no record or evidence of the reference because “it would have been a phonecall”. Here again, we are not satisfied that any such references were taken up.

40. On 26 September, a request had been made for a EU Validation of CEMSA’s VAT number; this had been validated according to an undated message.

41. Sometime in July 2006, a “Veracis” Due Diligence Report had been obtained on CEMSA. This confirmed that CEMSA had bank accounts with Close Bank in the Isle of Man and with FCIB. The Veracis report enclosed a Dunn & Bradstreet cheque dated 21 July 2006 which gave a score of “3” representing a slightly less than average risk. Oliver Murray claimed to have used Veracis on the recommendation of the distinguished rugby football player who had introduced him to Anthony Rose in the first place. He had no evidence to show that MGB or Oliver Murray had paid for the Report but, when it was suggested to him in cross examination that he had been handed the report by Anthony Rose, Oliver Murray (having admitted that “I would have been in charge of payment”), claim that “I would have paid it”; later he said, “I paid Veracis for the Veracis report”. The fact is that the 06 Deal was on 30 June 2006

and the Veracis report must have been well after that. We infer that the Veracis report was provided two MGB by the organiser of the 06 chain for the purposes of the deal.

42. Regarding One F, an undated letter of introduction says – “One F has over five years of experience in the holding and distribution of high value goods”. Later it says – “full insurance available for goods in storage and transit”. IF it transpired, had been incorporated 25 June 2006 and its first VAT certificate, issued on 14 August 2006, gave 1 February 2006 as the effective date” OM’s explanation of his understanding of the discrepancy between that and the claim that “IF has over five years of experience” was that “I would have taken that as the people that owned One F”.
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10 Regarding the insurance cover while the goods were with One F, Oliver Murray accepted that he had not sought it from One F.

43. As regards GR distributors of Calais, to whom both consignments of the 06 Deals had, according to the deals had, according to the documentation, been “released on 7 July 2006 and with whom both consignments had remained for over 4 months, all Oliver Murray knew was that it was a partner or agent of One F.”
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Why did Anthony Rose/GC need to include MBG as the exporter/broker?

44. The only account given by Oliver Murray of his understanding was that GC did not have the cash flow to do the 06 Deals. He acknowledged that the situation was “unusual” and that it was “possible that Mr Rose was aware that HMRC were subjecting reclaims to extended verification and he deliberately wanted to avoid this and as such took advantage of my lack of experience.” We infer that HMRC’s investigations of the affairs of GC were sufficiently advanced to have made it likely that, had MBG disclosed that GC had been the supplier, its claim for repayment would have been refused.
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Did MBG through Oliver Murray know that the 06 Deals were connected with fraud?

45. At this stage we look at the tell tale signs. The deals came “pre-packed” and there is no rational explanation other than the facilitation of a fraud. There was an exact match between the purchased goods and the sold goods. There was no good reason why GC should have passed on the opportunity of making the profit on the mobiles; the reason given by GC to Oliver Murray gives rise to suspicion. The date chosen is conveniently the last day of MBG’s quarterly accounting period; thus the tax repayment should be obtained with the least possible delay. The documentation prepared by Oliver Murray was so inaccurate that it cannot have been designed for arms-length commercial transactions. The checks were both inadequate or non-existent. No proper insurance had been obtained from the goods while with IF or GR Distributers.
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46. Those observations are based on the position as at the end of June and early July 2006. Since then other things happened to which we now turn.

The 09/06 period

47. During this period three significant things occurred. First, at the end of the period, the 09 Deal took place. This involved MBG ordering a consignment of 5,300 Nokia N80 mobiles from Nex, a company that had been introduced by GC and then selling the consignment, the same day, to CESMA. Second, Oliver Murray became involved with a company called Greener Solutions Ltd (“Greener”). He acted as consultant to Greener and this resulted in Greener acquiring a consignment of Nokia mobiles from Nex and selling them to CESMA. Third, Oliver Murray introduced a friend of his, a Mr Perrin Armstrong, to GC and Mr Rose. Mr Armstrong ran a company called T-Max.

The 09 Deal

48. Oliver Murray had been introduced to Nex by Mr Rose. By September 2009, if not by the end of June 2009, Mr Murray had become aware that Mr Rose and GC had caught the eye of HMRC and that GC’s “VAT had been withheld”. That, Mr Murray acknowledged, would be disastrous to GC’s ability to continue in its previous line of business. Mr Murray asserted that GC’s predicament had not caused him any special concern. Referring to Mr Rose he said - “ he was a stand-up businessman that we had done two deals with that had been successful, therefore there were no problems with customers or them”. Oliver Murray acknowledged that by the time of 09 Deals he had become aware that MBG had not been paid anything (save for the recovery of VAT charged on the 06 Deal invoices).

49. Oliver Murray also acknowledged that Nex was then accounting for VAT on a monthly basis and that this factor had indicated to him that Nex had been exporting. Asked why therefore Nex might want to put MBG between it and the EU purchaser for the then impending 09 Deal, Oliver Murray offered the explanation that it was for reasons of “cash flow”. Nex, he said had told him so. When asked when Nex had told him, he answered – “when I would have asked them why?”

What steps did Oliver Murray take to check Nex as a reliable supplier?

50. A ‘Varisics’ report dated December 2007 was produced. Asked how the report came into his hands, Mr Murray said – “I am sure I would have bought the report” and “I would have paid for it with my own debit card”. He claimed that, although more than nine months of date, the Varisics report was “better than nothing”. The report showed that Nex, like CESMA (a Spanish company) banked with FCIB. Asked if that had caused him any concern at the time, he responded – “No, it didn’t at the time, if I’m honest”. A fax from Nex of 22 September 2006 shows its bank details as Barclays Bank at Harlow and FCIB.

51. A questionnaire apparently issued by MBG produced details of Nex: is confirmed that Nex was usually a VAT reclaimer and offered two referees. One reference was GC, the other was Future Communications Ltd. Mr Murray said that his assistant had done the due diligence.

52. Despite Oliver Murray's efforts, MBG had achieved little in the way of business during the quarter, just £4,000 worth of imported software on which they had lost money. He acknowledged that the opportunity presented by Nex on Mr Rose's introduction was "very unusual"; with hindsight Mr Murray accepted that it was a bit too good to be true.

53. The documentation for the 09 Deal was not significantly different from that used for the 06 Deals. MBG undertook to pay £1,208,347 to Nex (plus £211,460 of VAT). MBG sells the consignment to CEMSA for £1,261,400. The contents of the 09 Deal joined the mobiles of the 06 Deals at GR Distributions warehouse. There was no evidence that GR Distributions had ever charged MBG for the storage.

54. According to a stock release authority, MBG directed stock to be released to CEMSA (being the stock comprised in the 06 Deal) on 8 November 2006 without receiving payment from CEMSA from goods comprised in that deal. Some two weeks later, payment was received from CEMSA. Moreover, MBG had received payment for the 09 Deal before then. This lack of control on the part of MBG over consignments with a huge value is consistent with HMRC's case that MBG's participation in the transactions in the relevant mobiles really amounted to steps in the facilitation of the wider fraudulent enterprise.

55. Our attention was drawn to MBG's banking arrangements. At the time of the 03 Deals (when the receipt of £483,000 from France Affaires had caused HSBC to freeze MBG's account). HSBC was MBG's only Bank. On 29 June 2006, MBG set up an account with ICB (address in San Marino) and that address was set out on the payment invoice issued by MBG to CEMSA in relation to the 06 Deals.

56. On 25 September 2006 the documentation shows:

(i) Nex, being owed some £1.4 million (inclusive of VAT) by MBG in respect of the 09 Deal, note advised MBG that payment should be made to Nex's account with Barclays Bank in England or with FCIB in Queriso???

(ii) MBG, being owed some £1.2 million by CEMSA notifies Nex that the payment should be addressed to its ICB account at Ryusongdon in North Korea.

(iii) By 21 November 2006;

(i) MBG had set up an account with a Bank called Pacific Savings and Loans (PSL) This was apparently based in the Comoro Islands in the South Indian ocean. A bank statement showed 21 November as the first MBG transaction on its PSL account.

(ii) Nex had an account with PSL.

(iii) CEMSA had an account with PSL.

The relevance of those details is (among other inferences) that Oliver Murray was not telling the truth when, having explained his problems when HSBC froze the MBG account following receipt of payment for the 03 Deal from France Affaires, he said:

5 “One problem with the France Affaires deal was that HSBC account was frozen. I therefore asked CEMSA which bank they were using. CEMSA used both ICB and Pacific Savings & Loan Company. CEMSA recommended their Pacific Savings & Loan Company. I contacted the bank by telephone, provided the details and it was set up two to four weeks later”

10 57. The first point is that the 06 Deals were to be discharged by payments to and from MBG's ICB (San Marino) account. MBG's PSL account was not set up in response to any “recommendation” to use PSL by CEMSA relating to the 06 Deals. Nor (and this is the second point) did MBG adopt CEMSA's “recommendation” when the documents for the 09 Deal were dated: MBG was even at that stage specifying ICB (North Korea) as its Bank for payment. FCIB were Nex's Bank. The third point
15 is that all three parties to the 09 Deal set up accounts with PSL subsequent to the date of the deal (ie 25 September 2006). How did this all happen and why did Nex and GC (both outstanding creditors of MBG) switch from FCIB to PSL? Oliver Murray said he remembered knowing nothing about FCIB; he conceded that sometime after the deals FSIB's name might have been mentioned in correspondence. That does not,
20 however, explain why MBG, Nex and CEMSA all had PSL accounts by November 2006. The first explanation Mr Murray gave in evidence as to why CEMSA paid to MBG's PSL account was – “I would have been advised that that's where his funds where and that's I needed to get paid and why I would have opened up the account.” We do not accept that that explanation throws any light on the reality. The reality lay
25 in Oliver Murray's admission that “when it came to the banking side of it, I didn't have any control in the business”.

30 58. The banking arrangements for both 06 and the 09 deals, show that MBG though Oliver Murray knowingly participated in the machinery for making the payments in the manner dictated by those individuals who are running “cell” through which the chains of transactions went via contra-traders and defaulting traders.

Oliver Murray's Greener

35 59. A company called Greener caught the attention of HMRC in late 2006 following a repayment claim for VAT paid in respect of the export of a consignment of mobile phones purchased from Nex and sold to CESMA. Greener had been introduced to Nex in September 2006 (before any suggestion of extended verification of MBG's 06 and 09 deals had been announced). He introduced Nex as supplier and CESMA as the customer in relation to a consignment of Nokia mobile, why, when MBG was not alerted to HMRC's concerns about MBG, should Oliver Murray have been passing the opportunities of a lucrative deal? That calls aloud for an answer. His
40 answer was that MBG did not have the money. HMRC suggested that he had done so to spread the number of brokers for the benefit of the cell. He received an £11,000 fee from Greener. That was the equivalent of a 4.5% profit margin which appears to have been standard as regards all the deals referred to us. He did not just advise

Greener on suppliers and customers, he undertook to carry out due diligence. Moreover, as will appear, Oliver Murray's advice went well beyond seeing Greener through a bona fide commercial deal. A letter from Mr Murray to Greener dated 28 September 2008 reads:

5 "Please see attached the Purchase Order from our customer in Spain. Please
note: they chipped us on price. However, I have spoken with Russell at Nex and he is
adjusting his prices in order for us to maintain our agreed 4.5% profit margin. He
will be sending us a new invoice shortly. We will need this for our records and will
10 receive the new invoice from Russell that would be great. We need to redone the
clearance with HMRC as well – given that this is a separate deal with a different
customer."

15 MBG had, we note, itself achieved a profit margin of between 4.2 and 4.97%
throughout its own period of trading. What this shows is that the Greener deal was
being operated with the collusion of Nex, as supplier, Mr Murray, as consultant in
order to generate the right margin for Greener.

Oliver Murray's introductory work for T-pas

20 60. Oliver Murray had a university friend called Perrin Armstrong. Mr Murray,
knowing that the Perrin Armstrong was an e-tailer of mobiles, gave Perrin Armstrong
information that let to his making contact with Mr Rose of GC. He was advised by
GC to set up an off shore bank account that he (Perrin Armstrong) thought was ICB; it
was explained to him that GC had had its UK bank account frozen.

25 61. The inference to be drawn from Oliver Murray's relationship with Greener and
T-pas was that, by the time of the 09 Deal, Oliver Murray was using his know-how
and contacts to bring in other company's as facilitators of deals that were connected
with chains of transactions that went via contra-traders and defaulting traders.

Summary of MBG's case

30 62. Before expressing conclusions, we summarise the main points taken by Mr
Greg Krieger in support of MBG. Essentially, the case for MBG is that the
circumstances of its participation in the deals can fairly be explained as Oliver Murray
being duped into making MBG the "broker". MBG had, it was stressed, been
registered for VAT after the pre-registration visit of November 2005. There was no
evidence that Mr Murray knew of the defaulting or contra-traders in any of the chains.
Nor was there evidence that he knew that the goods comprised in the 06 and 09 Deals
35 had come into the chains of transactions from the EU. The 09 deal was never
challenged and the relevant VAT reclaim was met without questioning on HMRC's
part.

40 63. Put positively, it was stressed that Oliver Murray/MBG had done what was
advised in the IR Notices and carried out the required checks and, in good faith, done
the due diligence procedures. The checks had revealed no connections with such a

fraud. Commenting on the fact that the 09 deal consideration had been discharged before the 06 one, it was pointed out that Nex was the greater creditor and it was therefore understandable that it would have been paid first. The circumstances must be examined at the time when the transactions were carried out and not with
5 hindsight. So examined and having regard to the gravity of HMRC's accusation, it would (it was argued for MBG) be inappropriate to conclude that MBG through Oliver Murray had been a knowing participant in transactions connected with the fraudulent evasion of tax. Nor should MBG have known that it was participating in such transactions.

10 **Conclusions**

64. The conclusion that MBG through Oliver Murray knew of fraud when the 06 and 09 Deals were implemented is, in our opinion, inescapable.

65. Oliver Murray, as Executive Director and sole manager of MBG, had been warned of fraudulent activities in the mobile exporting field and the signs by which
15 those activities could be recognised. That happened at and following the November 2005 visit by HMRC. Moreover he came to the Deals with four years study of business at University and at least two jobs in commerce. He is evidently no slow learner.

66. The Deals presented to MBG were all "pre-packed"; that includes the 03 Deals.
20 The supplier, the customer and the exact amount of goods as well as the date and the freight forwarder were provided as part of the offer. MBG, which was really Oliver Murray on his own, did not have the means or contacts to trade on the scale that the Deals provided. The profit on the Deals was fixed in advance at an amount in the region of 4.5%. Each profit was substantial and the work required by MBG was
25 minimal. In fact the documentation that Mr Murray did provide was so misleading as to raise real doubt as to whether it had any function other than window dressing. The checks were, as we have pointed out, so transparently casual as to be mere window dressing for the purpose of presentation to HMRC when questioned in relation to the relevant VAT repayment notices.

30 67. Oliver Murray knew from the start that GC was having difficulties with HMRC in recovering VAT on repayment claims. That was the explanation for MBG being given the opportunity to participate (and that was what Perrin Armstrong had understood when introduced by Oliver Murray to Mr Rose).

68. The deal dates were evidently fixed at the end of MBG's accounting period to
35 enable speedy recovery of the VAT. That happened with the 03 and the 06 Deals. Once the dates of the 06 and the 09 Deals had passed, the goods, unpaid for, lay in a warehouse, apparently in Calais, (uninsured and with a freight forwarder GR Distributors) which had never been checked out by MBG, seemingly getting more and more obsolete as the months passed by.

40 69. All those features raise a strong inference that MBG through Oliver Murray knew that its participation in the transactions was connected with the fraudulent

5 evasion of VAT. That is the only reasonable explanation. MBG had the opportunity to displace that inference. There were plenty of witnesses who might have been called to reinforce Oliver Murray's evidence. We have in mind Mr Rose, Perrin Armstrong, Russell Williams of Nex, the Directors of One F and Steven Russell of CEMSA. But they and other participants in the Deals provided no evidence for the Tribunal. We are therefore bound to conclude that, to adopt the words in paragraph 59 of the Mobilx Decision of the Court of Appeal, MBG through Oliver Murray knew from the circumstances that surrounded the Deals that they were connected with fraudulent evasion. That was the only reasonable explanation.

10 **Decision**

70. For those reasons we dismiss MBG's appeals. The parties are at liberty to make applications relating to costs; if the issue and quantum of costs has not been resolved within 60 days, it should be referred back to the Tribunal.

15 71. 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)" 20 which accompanies and forms part of this decision notice.

SIR STEPHEN OLIVER
TRIBUNAL JUDGE

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