



TC02829

Appeal number: TC/2011/00315

VAT – Appellant’s transactions connected to MTIC fraud – Whether appellant should have known of connection – Yes – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ILFORD CELLULAR LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE JOHN BROOKS
HARVEY ADAMS FCA**

**Sitting in public at 45 Bedford Square, London WC1 on 10 – 14, 17 and 20 June
2013**

Liban Ahmed of Controlled Tax Management Limited for the Appellant

**David Bedenham, counsel, instructed by the General Counsel and Solicitor to
HM Revenue and Customs, for the Respondents**

DECISION

Introduction

1. Ilford Cellular Limited (“ICL”) appeals against a decision of HM Revenue and Customs (“HMRC”) to deny its claim to deduct input tax in the sum of £750,925 incurred in relation to three transactions during its monthly VAT period ending 31 March 2005 (03/06), one transaction in its VAT period ending 31 July 2006 (07/06) and two transactions in its VAT period ending 31 August 2006. HMRC contend that these six transactions were connected to Missing Trader Intra-Community (“MTIC”) fraud and that ICL, through its director Sajid Umarji, should have known of that connection.

2. ICL was represented by Liban Ahmed of Controlled Tax Management Limited and David Bedenham of counsel appeared for HMRC. Although throughout this decision we have referred to the respondents as HMRC this should also be read, where appropriate, as a reference to HM Customs and Excise.

3. HMRC had originally, in a letter dated 3 December 2010, denied ICL recovery of its input tax in relation to 49 transactions or deals undertaken over its 03/06, 07/06, 08/06 and 09/06 VAT periods. However, following its appeal to the Tribunal on 10 January 2011, HMRC wrote to ICL, on 20 May 2011, in the following terms:

Dear Mr Umarji,

**AMENDMENT TO PREVIOUS NOTIFICATION OF A
DECISION TO REFUSE ENTITLEMENT TO THE RIGHT TO
DEDUCT INPUT TAX**

As a result of work undertaken by HMRC in preparing for the defence of the appeal, the Commissioners have decided to withdraw the decision to deny input tax in relation to 43 deals listed in the first annex to this letter. In relation to the remaining deals (6 in total and listed in the second annex to this letter) the Commissioners will continue to defend the denials.

The Commissioners remain satisfied that you should have known that these transactions were connected with the fraudulent evasion of VAT and accordingly your right to deduct input tax was denied.

Arrangements are currently being made to refund the amounts due as a result of this amendment to deny, subject to the off-setting of any existing amounts due to HMRC from you.

I will write to you again as soon as possible to confirm these arrangements.

Yours sincerely,

Dean Watson

Higher Officer, HM Revenue and Customs

The first annex to this letter is included as an appendix to this decision. However, it is not necessary for us to append the second annex to the decision as we have set out the six deals in which input tax was denied in some detail below.

4. Mr Ahmed invited us to have regard to all 49 transactions submitting that the 43 transactions in which input tax has been repaid were “identical” to those in which it was denied.

5. In support of his invitation to consider all 49 deals, Mr Ahmed referred us, in his closing submissions, to the following passage from the judgment of Christopher Clarke J in *Red12 v HMRC* [2009] EWHC 2563 (Ch), which we note was cited and adopted by Moses LJ giving the judgment of the Court of Appeal in *Mobilx & Ors v HMRC* [2010] STC 1436, at [83]:

10 “109 Examining individual transactions on their merits does not, however, require them to be regarded in isolation without regard to their attendant circumstances and context. Nor does it require the tribunal to ignore compelling similarities between one transaction and another or preclude the drawing of inferences, where appropriate, from a pattern of transactions of which the individual transaction in question forms part, as to its true nature e.g. that it is part of a fraudulent scheme. The character of an individual transaction may be discerned from material other than the bare facts of the transaction itself, including circumstantial and “similar fact” evidence. That is not to alter its character by reference to earlier or later transactions but to discern it.

15 20 25 30 35 110 To look only at the purchase in respect of which input tax was sought to be deducted would be wholly artificial. A sale of 1,000 mobile telephones may be entirely regular, or entirely regular so far as the taxpayer is (or ought to be) aware. If so, the fact that there is fraud somewhere else in the chain cannot disentitle the taxpayer to a return of input tax. The same transaction may be viewed differently if it is the fourth in line of a chain of transactions all of which have identical percentage mark ups, made by a trader who has practically no capital as part of a huge and unexplained turnover with no left over stock, and mirrored by over 40 other similar chains in all of which the taxpayer has participated and in each of which there has been a defaulting trader. A tribunal could legitimately think it unlikely that the fact that all 46 of the transactions in issue can be traced to tax losses to HMRC is a result of innocent coincidence. Similarly, three suspicious involvements may pale into insignificance if the trader has been obviously honest in thousands.

40 111 Further in determining what it was that the taxpayer knew or ought to have known the tribunal is entitled to look at the totality of the deals effected by the taxpayer (and their characteristics), and at what the taxpayer did or omitted to do, and what it could have done, together with the surrounding circumstances in respect of all of them.”

6. He contended that we should not simply look at what happened in the six transactions with which this appeal is concerned but look at the trading practices of ICL as a whole, taking all circumstances into account. On doing so, he argued, it is clear that, by making the repayment of input tax, HMRC accepted that ICL neither knew nor should have known of the connection to a fraudulent tax loss in these deals.

7. Mr Ahmed submitted it is “simply incomprehensible” that the six remaining transactions under appeal should be treated any differently.

8. However, as Mr Bedenham emphasised no formal concession has been made by HMRC in relation to the transactions for which input tax was repaid.

5 9. He contends, and we accept, that the reasons for re-paying the input tax relating to the 43 transactions are irrelevant to the decision in this appeal and that our task is to consider whether, in relation to the six transactions, HMRC have established ICL should have known that they were connected to fraud. However, he accepts that we
10 in terms of quantities of mobile phones traded, the financial value of deals and the type of phone involved, there are similarities between the deals in which input tax was repaid and those in which it was denied, eg it is not disputed that all but one of the 49 deals was connected to a fraudulent loss of tax, that in five of the repaid deals the ICL had the same supplier as it did in two of the denied deals and that the same customer
15 appears in seven deals in which repayment was made as it did in two of deals in which it was denied.

10. As MTIC fraud has been described in many times, not only by this Tribunal but also the appellate Courts and Tribunals (eg by Roth J at [1] – [3] of *POWA (Jersey) Ltd v HMRC* [2012] UKUT 50 (TCC)), it is not necessary for us to explain either its
20 operation or variations, such as contra-trading, in this decision. In the present case the first four transactions are alleged to have been “typical” or “basic” MTIC fraud and the fifth and sixth “contra-trading”.

Law

11. It is not disputed that the burden of proof in this appeal is on HMRC and that
25 the civil standard of proof, the balance of probabilities, applies.

12. There is also agreement on the applicable law, namely Articles 167 and 168 of Council Directive 2006/112/EC of 28 November 2006 which has been implemented into UK domestic law by ss 24-26 Value Added Tax Act 1994 and Regulation 29 of The VAT Regulations 1995 under which an exporter is, in principle, entitled to claim
30 a deduction of input tax. An exception to this right was identified by the European Court of Justice (“ECJ”), in the joint cases of *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL* (C-439/04 and C-440/04) [2006] ECR I – 6161 where the Court stated:

35 “[51] ... traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud, be it the fraudulent evasion of VAT or other fraud, must be able to rely on the legality of those transactions without the risk of losing the right to deduct the input VAT.

...

40 [56]. ... a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent

evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.

5 [57] That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.

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

10 [59] Therefore, it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and do so even where the transaction in question meets the objective criteria which form the basis of the concept of “supply of goods effected by a taxable person acting as such” and “economic activity”.

15 ...

20 [61] ... where it is ascertained, having regard to objective factors, that the supply is to a taxable person who knew or should have known that, by his purchase, he was participating in a transaction connected with the fraudulent evasion of VAT, it is for the national court to refuse that taxable person entitlement to the right to deduct.”

13. This decision was considered by the Court of Appeal in *Mobilx* where Moses LJ, giving the judgment of the court, said:

25 “[59] The test in *Kittel* is simple and should not be over-refined. It embraces not only those who know of the connection but those who “should have known”. Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in *Kittel*.

35 [60] The true principle to be derived from *Kittel* does not extend to circumstances in which a taxable person should have known that by his purchase it was more likely than not that his transaction was connected with fraudulent evasion. But a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion.”

Evidence

14. In addition to the extensive documentary evidence relating to the deals We were provided with witness statements made by the following officers of HMRC:

- (1) Dean Walton – in respect of ICL and Vision Soft Limited.

- (2) Daniel O’Neil – in respect of Global Roaming Limited.
- (3) Daniel Outram – in respect of The Callender Group Limited
- (4) Barry Patterson – in respect of Goodluck Employment Services Limited.
- (5) Fu Lam – in respect of West 1 Management Limited.
- 5 (6) George Edwards – in respect of Phone City Limited.
- (7) Juan Jose Loureiro – in respect of the First Curacao International Bank (“FCIB”).
- (8) Philippa Purnell – in respect of Dolphin Telecom UK Limited.
- (9) Matthew Quinn – in respect of Cybersol Limited.
- 10 (10) Claire Sharkey – in respect of A/C Electrical Limited.
- (11) Fiona Weldon – in respect of Southern Phonecare Limited.
- (12) Terrance Mendes – in respect of FX Drona Limited.
- (13) Stewart Yule – in respect of Activmind Limited.
- (14) Vivien Parsons – in respect of Alpha Sim Limited.
- 15 (15) Ian Henderson – in respect of ET Phones Limited.
- (16) Huw Gingell – in respect of Storm 90 Limited.
- (17) Steve Paling – in respect of Sourthern Phonecare Limited.
- (18) Paul Cole – in respect of Realtech Limited.
- (19) Jon Read – in respect of Parfums UK Limited.
- 20 (20) Susan Hirons – in respect of Zoom Limited.

15. We were also provided with the witness statements of Catherine Clark of Nokia UK Limited regarding the Nokia 8801 mobile phone handset and Gary Taylor, a director of PricewaterhouseCoopers (“PwC”) whose statement was in the form of an expert report into the grey market for UK-based distributors of new mobile handsets in 2006 and also assessed a selection of ICL’s invoices in the light of grey market “indicators” outlined in the report.

16. Of the HMRC officers only Dean Walton gave evidence before us. We also heard from Gary Taylor. Both were cross-examined by Mr Ahmed. Although we did not hear from any other witnesses on behalf of HMRC their evidence was not challenged and their statements were admitted in evidence.

17. Mr Umarji, the director of ICL, having made two witness statements also gave oral evidence on its behalf. He was cross-examined by Mr Bedenham.

18. There was little, if any, conflict over most of the evidence. However, in one area there was a clear divergence between the parties. This was in relation to the Nokia 8801 handset and whether it could be used in Europe and it is to this issue we now turn before setting out our findings of fact.

Nokia 8801

19. It was not disputed that the Nokia 8801 is a “high end” mobile phone that was manufactured for the American (ie USA, Canada and Latin American) market and that a European specification 8801 did not exist, the European equivalent was the
5 Nokia 8800 which was the same model destined for the European market. The evidence of Catherine Clark of Nokia was that sales of the 8801 were small, the Nokia Profitability Reporting System, which shows sales and volume details, indicates that 144,541 phones were sold in North and Latin America. There were no sales from Nokia to Nokia Authorised Distributors in the UK or Europe.

10 20. In one of the transactions with which this appeal is concerned ICL purchased 6,000 Nokia 8801s from Euro-Spec Telecom Limited which it sold to a Danish company, Phone Trade APS.

15 21. In its purchase order Phone Trade APS had requested all models of the 8801 to be “European spec”. Ms Clark in her witness statement says that she had not heard of such a description in connection with the 8801. Mr Taylor in his evidence said that there is no such thing as a European specification for the 8801, it does not exist.

20 22. With regards to the use of the 8801 in the UK and Europe, Ms Clark explains in her witness statement that it covered three GSM bands, 850, 1800 and 1900 with the 850 and 1900 GSM bands being used for North America, whereas the 1900 and 1800 GSM bands are used for Europe.

23. This meant that the Nokia could be used most European countries as it had the GSM 1800 band. Ms Clark understood that no conversion would be needed for the 8801 to work on the European 1800 GSM band.

25 24. However, while Mr Taylor accepted that the 8801 could technically be made to work in the UK and Europe “if you knew some specialist knowledge” such as which operators work on which frequencies and which SIM card to put in it the phone, in practical terms it could not be said to work as it “would be playing a game of chance and coincidence” to get it to do so. However, Mr Taylor said that as he was in the industry he had some specialist knowledge and knew which operators work on which
30 frequencies he would know what SIM cards could be put into an 8801 to make it work in the UK and Europe. When asked in cross-examination whether the frequency of handsets was his area of expertise Mr Taylor confirmed that it was and that he “could speak to it”.

35 25. Mr Umarji disagreed with Mr Taylor that a certain level of expertise was required to use the 8801 in the UK and Europe. He said that when mobile phones are manufactured and programmed the network setting is automatic so whatever frequency the SIM card supports it would be picked up by the automatic function within the phone.

40 26. Given Mr Taylor’s experience and technical knowledge of the mobile phone industry, especially as his answers regarding the frequencies used was not challenged,

we prefer his evidence over that of Mr Umarji, whose experience was derived from wholesale trading.

27. As such, we find that while it is technically possible for a Nokia 8801 to be used in the UK and Europe, in practical terms it would not have worked in the UK and Europe.

Facts

Background

28. Mr Umarji first became involved with sales of mobile phones shortly after he left college where he had studied information technology. In 1992 he was employed by a company in Regent Street, Latchborder Communications, a BT and Vodafone airtime distributor. Mr Umarji's role was to rent out mobile phones to large corporate firms and he had responsibility for clients such as the BBC, Ministry of Defence and the Conservative Party. He later became involved in wholesale transactions in large quantities of mobile phones, eg 12,000 to a Hong Kong based company.

29. Following the acquisition of Latchborder by another company in 1993 Mr Umarji looked for alternative employment and found it with a company called Moving Connections on Tottenham Court Road in 1994 becoming Area Manager with responsibility for three shops. In due course Moving Connections became the authorised dealer for Mercury One-2-One with Mr Umarji responsible for sales to overseas customers.

30. His involvement with these companies gave Mr Umarji the confidence and belief that he could run his own business and in the summer of 1996, after a break of six months which he used to improve his knowledge of Global Systems for Mobile Communications ("GSM"), Mr Umarji started trading by selling accessories in car boot sales in Stratford, East London. However, as a result of his success he was able to establish an office in Ilford from which he sold accessories and handsets not only in the UK but to customers in France, Poland, the Netherlands, Italy and Slovakia who would purchase up to 200 handsets at a time.

31. In 1998 he stopped dealing in accessories as the margins were not as good as they were for handsets and the stock took up a lot of space.

32. ICL was incorporated on 22 October 1999. It registered for VAT on 30 June 2000. Its main business activity as described on its application for VAT registration (form VAT1) was "wholesale mobile phones". Mr Umarji is the sole director of ICL and its Company Secretary is Mohamed Bhad.

33. On becoming registered for VAT ICL was required to submit its VAT returns on a quarterly basis. However, due to the nature of its trade ICL received VAT repayments and, after two years trading, following a request by ICL HMRC agreed that it could switch to submitting monthly VAT returns.

34. Since registration ICL has been involved in the wholesale purchase and sale of mobile phones making purchases in the UK and then selling either to UK traders or dispatching the phones to customers in the other EU member states or exporting outside the EU. At first it operated from premises within a business centre in Ilford but in 2004 moved to larger premises, in a newly built industrial estate in Barking. Six people were employed increasing to 12, including Mr Umarji, by the time it entered into the transactions with which this appeal is concerned.

35. The Barking premises, which Mr Umarji described as a “corner unit”, included a warehouse of approximately 11,020 square feet on the ground floor and an office, of approximately 1,080 feet in size, on the first floor, each with separate entrances. Mr Umarji said that “over the years” 60% of the goods he purchased were either delivered to the warehouse or collected by ICL and brought to the unit.

36. ICL would be contacted by suppliers and customers. Mr Umarji put this down to its reputation and advertising in Loot International, Mobile News, through Google and online trading platforms. He explained that he and his staff would browse the International Phone Traders (“IPT”) website and call traders from this “to see if we could do business”.

37. In its corporation tax returns ICL declared the following turnover:

	Year Ending	Turnover (£)
20	28 February 2001	9,922,732
	28 February 2002	11,783,535
	28 February 2003	10,484,234
	28 February 2004	15,423,739
	28 February 2005	30,139,844
25	28 February 2006	9,908,990
	28 February 2007	22,117,022
	28 February 2008	2,311,364
	28 February 2009	1,169,408
	28 February 2010	5,169,408

30

38. Until 2006, in which the deals with which this appeal is concerned occurred, ICL did not have a great deal of contact with HMRC. However, it did receive the following three letters from HMRC.

39. The first, dated 7 March 2001, warned ICL of “a number of cases of significant evasion of VAT by businesses in your industry”. The second letter, dated 20 June 2002, repeated the warning of significant VAT fraud in ICL’s trade sector and the third, dated 28 June 2004, stated that:

Missing Trader Intra-Community (MTIC) VAT fraud constitutes one of the most costly current forms of VAT fraud within the EU. It is a serious problem for the UK and is Customs' top VAT fraud priority ...

5 Amongst the commodities regularly involved are computer chips and mobile phones and the VAT loss from this type of fraud in the UK alone is between £1.7 and £2.6 billion per annum.

The letter continued, explaining that HMRC were experiencing problems in ICL's trade sector and that it should, from 4 August 2003, verify the VAT status of new or potential Customers/Suppliers with HMRC's Redhill office providing the following information:

- (1) The name of the new or potential customer/supplier.
- (2) Their VAT registration number.
- (3) Their contact numbers (including telephone number, fax number, e-mail address and mobile numbers if known).
- 15 (4) Copies of any supporting documentation (ie VAT certificate, letter of introduction, certificate of incorporation etc.).
- (5) The Directors and/or responsible members.
- (6) Whether they are buying or selling goods.
- (7) The nature of the goods.
- 20 (8) The quantities of the goods.
- (9) The value of the goods.
- (10) Their bank sort code and account number.
- (11) A request to forward, on a monthly basis, a purchase and sales listing with identifying VAT Registration Numbers against the suppliers/customers to the traders your local VAT office.

40. Although ICL was a "repayment trader", on 3 December 2010 HMRC issued the decision against which ICL appealed and, as noted in paragraph 3 above, this was varied on 20 May 2011 to deny ICL its input tax in respect of the following six deals undertaken during the periods 03/06, 07/06 and 08/06.

30 *Deal 1*

41. On 2 March 2006 Sarl M S Enterprises, a French company, purchased 1,100 Nokia N70s from ICL for £288,200. ICL had acquired the goods on the same day from TM Global Limited trading as Team Mobile International. It had been supplied, also on 2 March 2006, by Global Roaming Limited. Global Roaming had acquired the
35 N70s from Anderson Data and Components Limited which had, in turn been supplied by the Callender Group Limited all on 2 March 2006.

42. The evidence of Officer Daniel Outram that the Callender Group has fraudulently defaulted on the relevant VAT liability was not challenged.

43. Although Mr Umarji explained that 60% of the goods purchased by ICL were either delivered to the warehouse or collected by ICL the traders in this and the five subsequent deals in which input tax was denied did not take physical possession of the goods which remained at Pauls Freight, a storage and freight forwarding company, throughout the transactions being allocated and released to each of the traders in turn before being shipped to ICL's customer. The goods were not insured by ICL in any of the six deals.

44. Other than purchase orders and invoices there was no documentation or detailed written contractual terms and conditions in this and the other five deals on which input tax was denied. The stock specification on the documents in all of these did not include such matters as colour, charger type, battery CD manual and scope of warranty, items which Mr Taylor described as being "pretty standard" on an invoice. Mr Umarji said it was not necessary as the goods would have been orally described before entering the deal and compared it to selling a car saying, "it's like you selling a car, offering a car to someone and then going into details, 'oh, the car's got seats and steering wheel and a gearbox'. You both know you're buying a car."

45. ICL paid TM Global for the goods on 7 March 2006 and these were shipped to the premises of Prologic in Paris in accordance with the instructions of its customer Sarl M S Enterprises on the same day.

46. A 'Due Diligence Report' dated 22 July 2005 on TM Global Limited, ICL's supplier in this and deals 4 and 5, prepared by Veracis Limited for ICL stated:

Last accounts filed were for a small business ... No current financial information turnover is now in excess of £50 millions.

The Report also stated that TM Global acquired its stock from "UK wholesalers and EU".

Deal 2

47. On 7 March 2006 ICL sold 2,000 Nokia 9300s to XL Corporation LLC a company based in the United Arab Emirates ("UAE") for £378,000. ICL had been offered and acquired the phones from Silver Birch Corporation which ICL paid on 14 March 2006 after the goods had been shipped. The invoice issued by Silver Birch to ICL, dated 6 March 2006, states:

Goods remain property of Silver Birch Corporation Ltd until full settlement has been made.

48. Silver Birch had been supplied by T M Global Limited, its supplier was Mobile Magnet and it had acquired the goods from Hexamon Limited. Hexamon had been supplied by Goodluck Employment Services Limited ("Goodluck"). Other than the sale to XL Corporation by ICL all transactions took place on 6 March 2006.

49. The evidence of Officer Barry Patterson that there has been a fraudulent loss of VAT as the result of the default of Goodluck was not challenged by ICL.

50. ICL obtained a Veracis Report dated 17 May 2006 (after the transaction had taken place) on Silver Birch. This stated that the company is:

... established with nominal capital and that its turnover “is currently running at £5 million to £6 million per month.

5 *Deal 3*

51. On 20 March 2006 ICL sold 6,000 Nokia 8801s to a new customer, the Danish company Phone Trade APS for £3,192,000 shipping the goods to a third party warehouse in France on the same day.

52. In evidence Mr Umarji confirmed that this ICL’s largest ever deal. As we have noted (in paragraphs 20–28 above) the Nokia 8801 was not manufactured for the European market and its use in Europe would have been limited.

53. ICL had acquired the 8801s after receiving an offer of the goods from a new supplier, Euro-Spec Telecom Limited (“Euro-Spec”). Its invoice, dated 20 March 2006 stated:

15 Goods remain the property of Euro-Spec Telecom Ltd until full payment has been received.

Payment was made by ICL on 21 March 2006 after it had received funds from its customer and after the goods had been despatched. ICL used its FCIB account to make and receive funds as did all other participants in the deal, something Mr Umarji described as a “deal breaker” as Euro-Spec did not have an account other than with FCIB.

54. Although ICL had not previously traded with Euro-Spec Mr Umarji explained that he knew its director Iqbal “Iky” Gandham who used to work for Ace Line which before it had ceased trading in 2003 were, Mr Umarji said “renowned” for holding in large quantities of stock. However, when asked if how he thought Euro-Spec had managed to acquire the stock and whether it concerned him Mr Umarji replied:

30 “No, I mean it would've crossed my mind but it's - I mean it happens. I mean I'll get stock offered, you know, thousands of stock offered from various suppliers throughout the day. It's just how it is. You know, someone knows someone, there's various mediums of communication. Obviously, you've got phone, text, email, fax.”

55. A Dun and Bradstreet (“D&B”) Report, dated 20 March 2006, gave Euro-Spec a “tangible net worth” of £1,875 and “maximum credit £900”. Mr Umarji explained that he asked for the D&B Report as it was:

35 “... just a formality because HMRC at that time spoke about due diligence of suppliers and customers, and it was sort of common practice throughout the industry.”

56. ICL also obtained a Veracis Report on Euro-Spec. Mr Umarji explained that this was because it was “just common practice and something everyone did on everyone.” He said that he read “most” of the Report which described a visit to the business

premises of Euro-Spec on 2 December 2005 and that the company was incorporated in 2002 but ceased trading in April 2003 as the director, Mr Gandham “had concerns over VAT fraud”. It recommenced trading in May 2005 initially from Mr Gandham’s home address before moving to a serviced office complex on a six month renewable lease. Its turnover was estimated to be £100 million for the first half year.

57. Euro-Spec had been supplied by Real-Tech Distribution Limited which, in turn had been supplied by West 1 Facilities Management Limited (“West 1”). Officer Fu Sang Lam provided evidence, which was not challenged by ICL. That West 1 has defaulted on the relevant VAT liability and that the default was fraudulent.

10 *Deal 4*

58. The following transactions all took place on 18 July 2006. ICL sold 2,000 Nokia 9300s to Buy and Cell Trading LLC of the UAE for £289,000 having bought them from TM Global. TM Global’s supplier was Global Roaming Limited which had acquired the 9300s from KK Electrical, Plumbing and Building Services Limited which in turn has acquired them from Phone City Limited.

59. ICL paid TM Global for the goods, which had been despatched to its customer on 18 July 2006, on 26 July 2006.

60. It was not disputed that Phone City Limited was a fraudulent defaulter

Deal 5

20 61. On 11 August 2006 ICL sold 2,000 Nokia 9300s to Singapore based Raduga PTE Limited for £280,000, 500 Nokia 9300s to Charlie International in India for £70,000 and 500 Nokia 9300s to Emjay Enterprises PTE a Singapore based company for £69,250.

25 62. ICL had acquired the 3,000 Nokia 9300s, on 7 August 2006, from TM Global which it paid after the goods had been transported to its customers. TM Global had been supplied by Global Roaming which had acquired the goods from a Cypriot company, Etecom.

63. The evidence of Officer Daniel O’Neil that Global Roaming was a knowing and dishonest a contra-trader was not challenged by ICL.

30 *Deal 6*

35 64. On 23 August 2006 Emjay Enterprises PTE, in Singapore, bought 1,000 Nokia 9300i mobile phones from ICL for £140,000. ICL’s supplier on 22 August 2006 date was Zain Communications Limited which ICL paid on 29 August 2006 although the goods were shipped and released to Emjay on 22 August 2006. Zain had acquired the phones from the contra-trader Global Roaming which had been supplied by Etecom.

65. ICL had acquired a Veracis Report on Zain, Mr Umarji explained “it was the proper procedure” to obtain such a report as “Customs require you to do due diligence” and for a “better insight into the company”. The Report referred to a visit on 19 May 2006 and stated that the company’s latest accounts filed as at 31 August 2004 “show a dormant company” but that at the time of the visit work was “well underway” to produce a first set of “meaningful” trading figures which were expected to show turnover of £600 million.

ICL’s Profits from the Deals

66. ICL made the following profits in the above six deals:

	Deal	Profit (£)
10	1	13,000
	2	19,000
	3	291,000
	4	29,000
15	5	35,000
	6	20,000

Discussion

67. In *Midland Mortgages & Ors. v HMRC* [2011] UKFTT 631 (TC), to which we were referred by Mr Bedenham, the Tribunal identified the following issues to be determined in an appeal such as the present:

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

68. These were the questions that had been asked by the Tribunal in *Blue Square Global v HMRC* and were approved by the Court of Appeal in *Mobilx*, at [69]. However, in the present case it is accepted that there had been a loss of tax due to fraudulent evasion and that ICL’s transactions, with which this appeal is concerned, were connected with that evasion. Therefore, as actual knowledge is not alleged by HMRC, the issue before the Tribunal is whether ICL, through its director Mr Umarji, should have known that its transactions were connected to that fraudulent evasion of VAT.

69. In reaching a conclusion on this issue it is clear from *Mobilx* and *Red12* that we should not examine the individual transactions in isolation but have regard to their attendant circumstances and context. It is also clear from *Mobile Export 365 v HMRC*

[2007] EWHC 1737 (Ch), at [20], that we are entitled to rely on inferences drawn from the primary facts.

70. We also note, as Roth J said in *POWA (Jersey) Ltd v HMRC* at [53], that:

5 “... no special approach is needed in a case involving contra-trading. The correct test as regards knowledge is always the same. It is the test derived from *Kittel* as set out in para [59] of Moses LJ’s judgment [in *Mobilx* which is set at paragraph 12, above].

71. However, before considering whether Mr Umarji and ICL should have known of the connection with fraudulent evasion of VAT we first examine the extent of Mr Umarji’s knowledge of MTIC fraud during the periods in which ICL entered into the broker deals with which this appeal is concerned.

72. Mr Ahmed submitted that the HMRC had provided ICL with inadequate warning of the risk of it becoming involved in MTIC fraud. He referred to the fact that only three generic letters had been sent by HMRC and that ICL had not been provided with a copy of Notice 726.

73. However, during cross-examination Mr Umarji confirmed that he knew that there was widespread fraud in the wholesale mobile phone industry in 2006 and that the prevalent form of that fraud was known as missing trader or carousel fraud which involved intra-community trade. He also stated that he was aware of Notice 726.

74. In addition Mr Umarji had commissioned “Due Diligence Reports” on his suppliers and from Veracis. Such Reports are primarily concerned with VAT compliance and due diligence and refer to a directors awareness of MTIC fraud, eg the Veracis Report on TM Global states:

25 “Understands the problem of Missing trader fraud and Re-circulation of goods”

Similar comments are to be found in each of Veracis Reports which Mr Umarji confirmed he had read when he was cross-examined by Mr Bedenham.

75. In the circumstances we find that Mr Umarji, and therefore ICL, was aware of the prevalence of MTIC fraud in the wholesale mobile phone market at the time ICL entered into the deals and that it cannot place any reliance on either its lack of contact with or warnings from HMRC.

76. As Floyd J said in the High Court in *Mobilx* (at [87]) a “company has to exercise independent judgment, not delegate its judgment to HMRC”. In *Eurosel v HMRC* [2010] UKFTT 451 (TC) the Tribunal (Judge Porter and Ms Tanner), with which we agree, said, at [29]:

40 “We consider that the advising of traders of a potential MTIC situation is not a ‘public law obligation’ and we do not believe that it is necessarily prudent for HMRC to advise all individuals, who might be involved in MTIC fraud, of that fact. We do not, therefore, accept that it is either an abuse of HMRC’s powers or a breach of Eurosel’s

‘legitimate expectations’ for them not to have been informed that they might be involved in an MTIC fraud.”

77. We now turn to whether ICL, through Mr Umarji, should have known that the deals in which input tax was denied were connected to MTIC fraud.

5 78. Mr Ahmed urges us to focus on the similarities between the deals in which input tax was denied and the other transactions entered into by ICL in which the decision to deny input tax was reversed. He refers to the lack of insurance, that the deals were mainly based on oral agreements, the lack of a full description on the invoices, and that they involved purchases from UK suppliers and sales to overseas customers.

10 79. However, as Mr Bedenham submits, this cannot assist ICL. Its case is not that in previous periods it undertook identical deals to those now denied and has been repaid, but that in the same period it undertook identical deals and has been repaid. In those circumstances, ICL cannot derive any comfort as a result of the repayment as this occurred after the six deals in which input was denied had taken place.

15 80. In any event, as we have previously noted (in paragraph 9, above), although there are similarities between the six deals in which input tax was denied and the 43 in which it was repaid they are not identical. Significantly, as can be seen when comparing the six deals from those in Annex 1 to HMRC’s letter of 20 May 2011 (which is appended to this decision), the deals in which input tax was denied are the
20 largest in terms of financial value and also involved large quantities of high specification, as opposed to “mass market”, mobile phones.

81. We have already considered the Nokia 8801 (at paragraphs 19-27, above) a high end phone manufactured for the American market with low sales which in practical terms could not be used in the UK and Europe which was the subject matter of deal 3.
25 With regard to the phones in the other deals, Mr Taylor described the Nokia N70, the type of phone traded in deal 1 as “high end and expensive” and “the Maserati of mobile phones”.

82. The differences between the Nokia 9300, which was traded in deals 2, 4 and 5 and Nokia 9300i, traded in deal 6 were described by Mr Taylor as “fairly small”. He
30 said that this type of mobile phone was “the defining smart phone of the year” and that the quantities traded in these deals would not have been a common stock offering from a non-Authorised Distributer. Mr Taylor explained said that even an Authorised Distributer (ie a Distributer with a formal agreement to source handsets directly from a Manufacturer) would not have dealt in the quantities of this type of phone traded by
35 ICL saying:

“We are talking about dozens and aggregating into hundreds. The largest operators, or distributers, are talking in those orders of magnitude.”

83. Mr Umarji, who we found to be knowledgeable on issues relating to the
40 wholesale market in mobile phones, would have been aware of the nature of these goods and the quantities available. However, he gave the impression that he was not

too concerned about either the type of goods, the source of the supply or who his customer was so long as ICL could make a profit on a transaction.

84. In relation to the deals we note that the invoice template used by Silver Birch, ICL's supplier in deal 2, was identical to that used by Euro-spec, its supplier in deal 3.
5 ICL's customer in deal 2, XL Corporation LLC, also used almost exactly the same template for its purchase order.

85. Only in deal 1 was ICL required to pay its supplier before it had received payment from its customer. In all other deals, including deal 3 notwithstanding it was a new supplier with whom it had never previously traded, the goods were shipped out
10 of the UK prior to payment being made.

86. In deals 1, 4 and 5 Mr Umarji would have been aware from the Veracis Report that TM Global's last filed accounts were for a small business yet in 2006 its turnover was "in excess of £50 million".

87. In deal 2 the Veracis Report states that ICL's supplier Silver Birch, which had
15 been established with "nominal capital", had a turnover of £5 million to £6 million a month. The Veracis Report on Euro-Spec, ICL's supplier in deal 3, which had recommenced trading in May 2005 estimated its turnover to be £100 million for the first half year. This can be compared to ICL's turnover for the equivalent period which was considerably lower than this (see paragraph 37, above) despite Mr Umarji
20 being, as he confirmed, a knowledgeable and experienced mobile phone trader.

88. The D&B report on Euro-Spec, ICL's supplier in deal 3, gave it a "tangible net worth" of £1,875 and "maximum credit £900". When asked how in these circumstances it was able to acquire some £3 million worth of stock Mr Umarji replied:

25 "I think you need to look more into the director himself rather than Euro-Spec. I know Euro-Spec is the company in question, but he's got his contacts and it's not really my business how and where they've got – they've acquired this stock. He may have, well, not paid for it. He might have got it ship on hold. I don't know. I really don't know, like a
30 lot of other deals I do."

89. As deal 3 was the largest deal in which ICL had ever participated and it had never previously traded with Euro-Spec we would have expected a more credible answer from Mr Umarji

90. The Veracis Report on Zain, ICL's supplier in deal 6, showed that it had filed
35 "dormant accounts" in 2004 but expected to show a turnover in excess of £600 million in its next accounts.

91. It is also clear that ICL's participation in the deals did not add any real value to the transactions. This was confirmed by Mr Umarji who, when asked about the "value" ICL added to the deal 2 replied:

5 “How did I add to the - I didn't add anything to the transaction. I've got a customer at one end and I've got a supplier at one end. I've got history with the supplier. I've got history with the customer. I've put a deal together and that's my prerogative for being in the industry for a while and having the contacts.”

92. Given the nature of the deals, the type and quantity of handset traded and the other matters described above we consider that Mr Umarji should have realised that the only reasonable explanation for the transactions was their connection to fraud.

10 93. As such, having regard to all the circumstances taken together with his knowledge and awareness of MTIC fraud in the wholesale mobile phone market, we find that Mr Umarji should have known that the only reasonable explanation for the six transactions in which input tax was denied was their connection to fraud. accordingly he, and therefore ICL, should have known that these transactions were connected to fraud.

15 94. We therefore find that HMRC were correct to deny ICL its claim to recover the input tax attributable to these deals.

Conclusion

95. For the above reasons the appeal is dismissed

Right to Apply for Permission to Appeal

20 96. 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
25 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

30 **JOHN BROOKS**
TRIBUNAL JUDGE

RELEASE DATE: 14 August 2013

35

40

Appendix

ANNEX 1 [to HMRC's letter of 20 May 2011] The 43 Deals on which HMRC are withdrawing the decision to deny input tax

10

Period 03/06

Date in VAT Account	Supplier Name	Iford Purchase Ref	Supplier invoice Number	Goods Supplied	Input Tax Claimed £
03/03/06	New Way Associates	TT3330	10144	200 x Nokia 7610	4,445.00
03/03/06	London Cellular Acc.	TT3328	008032	300 x Nokia 6230i	6,405.00
07/03/06	New Way Associates	TT3330	10190	400 x Nokia 6680	11,060.00
07/03/06	New Way Associates	TT3330	10190	210 x Nokia 7610	4,593.75
07/03/06	New Way Associates	TT3330	10182	100 x Sony Ericsson W800i	2,765.00
07/03/06	New Way Associates	TT3330	10182	100 x Nokia 6280	2,765.00
07/03/06	New Way Associates	TT3330	10190	10 x Samsung D500	218.75
08/03/06	New Way Associates	TT3334	10201	1,000 x Motorola V3 Black	16,625.00
23/03/06	New Way Associates	TT3334	10270	500 x Nokia 7610	10,543.75
08/03/06	New Way Associates	TT3332	10261	200 x Nokia N70	7,525.00
08/03/06	New Way Associates	TT3332	10261	300 x Nokia N70	11,287.50
08/03/06	New Way	TT3332	10261	250 x Samsung	5,250.00

	Associates			D500	
23/03/06	New Way Associates	TT3334	10301	400 x Motorola Pink	7,000.00
17/03/06	New Way Associates	TT3334	10311	220 x Sony Ericsson W800i	5,890.50
22/03/06	New Way Associates	TT3334	10352	300 x Sony Ericsson W800i	7,980.00
22/03/06	New Way Associates	TT3338	10366	400 x Nokia 7610	8,540.00
21/03/06	TM Global	TT3335	13805	700 x Motorola V3 Black	66,500.00
31/03/06	Lexus Telecom UK	TT3339	1799	1,000 x Motorola V3 Black	15,925.00
31/03/06	New Way Associates	TT3342	10460	600 x Motorola V3 Black	9,686.25
22/03/06	New Way Associates	TT3338	10352	100 x Nokia 7610	2,135.00
22/03/06	New Way Associates	TT3338	10366	200 x Nokia N70	7,490.00
14/03/06	London Cellular Accessories Ltd	TT3333	008092	350 x Nokia 6230i	7,227.50
	Total for 03/06				£221,858.00

Period 07/06

Date of Purchase	Supplier Name/VAT Registration	Iford Purchase Ref	Supplier Invoice Number	Goods Supplied	Input Tax Claimed £
11/07/06	Lexus Telecom UK	TT3388	1914	630 x Nokia N70	18,191.25
13/07/06	New Way Associates	TT3391	7609	440 x Motorola	6,429.50
14/07/06	Lexus Telecom	TT3380	1922	399 x Nokia N70	11,730.60

	Export				
17/07/06	Lexus Telecom Ltd	TT3389	1921	1,000 x Nokia N70	29,400.00
18/07/06	Broadcast Ltd	TT3393	P12006-134	2,000 x Nokia 7610	37,100.00
18/07/06	TM Global	TT3394	19795	2,000 x Nokia 9300	45,500.00
17/07/06	Lexus Telecom	TT3389	1924	724 x Nokia N70	21,285.60
25/07/06	Broadcast Ltd	TT3404	P12006-139	1,000 x Nokia 8800	44,625.00
27/07/06	New Way Associates	TT3405		1,850 x Nokia N70	10,902.50
31/07/06	Lexus Telecom UK Ltd	TT3399	51690	2,000 x Nokia 6630	35,000.00
31/07/06	TZ Mobile Comms	TT2409	13907	441 x SE W810i	10,843.09
31/07/06	TM Global Ltd	TT3408	19865	2,000 x Samsung D600	35,500.00
31/07/06	Economic Factors	TT3407	E23780	1,000 x Nokia 1600	4,550.00
	Total 07/06				£314,057.54

Period 08/06

Date of Purchase	Supplier Name/VAT Registration	Ilford Purchase Ref	Supplier Invoice Number	Goods Supplied	Input Tax Claimed £
01/08/06	New Way Associates	TT3411	9855	1,000 x Samsung D820	22,050.00
04/08/06	New Way Associates	TT3412	11435	2,000 x Samsung D820	44,100.00
08/08/06	New Way Associates	TT3414	11470	1,000 x Motorola V3 Black	13,650.00

09/08/06	Broadcast Ltd	TT3415	P12006-150	2,500 x Nokia N70	70,000.00
07/08/06	TM Global	TT3418	19880	198 x Nokia N70	5,647.95
17/08/06	Lexus Telecom Ltd	TT3417	1972	1,000 x Motorola V3 Black	13,037.50
31/08/06	Zain Communications	TT3423	7279	220 x Nokia 9300	4,620.00
	TOTAL				£173,105.45

Period 09/06

Date of Purchase	Supplier Name/VAT Registration	Iford Purchase Ref	Supplier Invoice Number	Goods Supplied	Input Tax Claimed £
06/09/06	Broadcast Ltd	TT3433	I2006-163 P2006-163	690 x Nokia 6233	13,644.75
	TOTAL				£13,644.75