TC03608

Appeal number: LON/2009/0555

Value added tax – MTIC fraud – whether transactions of appellant connected with tax losses caused by fraud of others – whether appellant knew or should have known of fraud by others

Precedent – whether a First-tier Tribunal should take account in a decision of other decisions of the First-tier Tribunal about related factual issues – whether a First-tier Tribunal should follow the procedure in the civil courts of ignoring related fact decisions – Tribunal Rules applied – related decisions not binding in any way but not to be ignored if relevant

FIRST-TIER TRIBUNAL

TAX CHAMBER

IAN CHARLES

t/a BOSTON COMPUTER GROUP EUROPE Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S

REVENUE & CUSTOMS Respondents

TRIBUNAL: JUDGE DR DAVID WILLIAMS

DR MICHAEL JAMES

Sitting in public in Cardiff on 14 to 18 and 21 to 25 November 2011 and

in London on 17 and 18 January 2012

Rob Willis of MLM Cartwright, solicitors, for the Appellant

Daniel Margolin of counsel, instructed by Howes Percival, solicitors, for the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

1 This decision is about two linked appeals. Both are appeals where the Respondents take the view that the Appellant knew or should have known that in his business activities he was trading with other traders who were defrauding the revenue by means of a Multiple Trader Intra-Community (MTIC) fraud. The Respondents, Her Majesty's Revenue and Customs (HMRC), contend that for this reason the Appellant is not entitled to recover value added tax (VAT) as input tax on some of his supplies of goods.

The Appellant

2 The Appellant has been referred to as Boston Computer Group Europe (BCGE). That is only a trading name. Further, it is only one of the trading names used during the relevant period by the Appellant. The activities carried out under the other trade names are not relevant to this appeal (save for the fact that they were part of the Appellant's overall engagement in business). It is therefore important to clarify at the outset the status of the Appellant and his business activities.

3 The tribunal makes the following findings about the Appellant. The Appellant, Ian Charles, was at all relevant times a sole trader. Unusually in MTIC fraud cases, he did not incorporate any part of his business activities during the relevant period (or, indeed, since). Nor is there evidence that he held shares in any other business engaged in this area of activities. Nor did he operate the business with any partners, either active partners or sleeping partners. Nor did he have any creditors that were entitled to any charge over, or any say in, the control or management of, his business. The tribunal was given evidence that the Appellant borrowed amounts of money for use in the trading activities challenged here from friends and contacts through a series of private arrangements. But it accepts the Appellant's evidence that all such loans were repaid to the satisfaction of the lenders some time ago. It also accepts that those lenders were not in any way part of any business transaction with which this decision is concerned. Nor was any evidence offered of the active involvement of any other person in the business.

4 The tribunal further finds that the Appellant conducted other business activities during the relevant period at the same time as undertaking the transactions that are the subject of this appeal and other similar transactions that were not questioned by HMRC. Throughout he had a single VAT registration and made income tax returns of his income as a self-employed individual to HMRC. The tribunal takes the view that it is entitled to have all the Appellant's business activities of those periods (and the tax periods of which they form shorter periods) in mind when considering these appeals. That, on the evidence, includes supplies of services in addition to supplies of goods, and includes supplies outside the scope of the United Kingdom VAT as well as supplies within the jurisdiction. He was, for example, briefly engaged in a business venture intending to sell bicycles acquired in another EU state. The Appellant conducted his trades in the area of activity relevant to these appeals under the name Boston Computer Group Europe (BCGE). Other names were

used for other activities. That is also somewhat unusual in MTIC cases, where the appeals often concerned incorporated businesses focussed only on the relevant kinds of trade. In this decision we refer to the Appellant as "BCGE" in some places to emphasise that we are concerned in detail only with that part of the Appellant's business activities. But we also emphasise that BCGE was the Appellant and none other.

6 The tribunal was asked by both parties to draw conclusions from the evidence of and about the Appellant, and not specifically BCGE. He was subject to extended cross-examination before the tribunal over several days and attended the tribunal throughout the hearing. He was clearly fully engaged throughout the period and at no time deliberately obstructed the conduct of the hearing. While he was not entirely consistent in his evidence throughout the period or as between his oral evidence and the documented evidence, the tribunal did not draw from those inconsistencies any impression that the Appellant was trying to mislead or invent. He had chosen to conduct his business with only limited contemporary records and was unable six years after the event to recall in crisp detail what had happened. That is not unusual or surprising in itself.

7 More generally, the tribunal accept the Appellant's evidence of that of someone who had chosen to go into business on his own as an intermediary - in that sense an entrepreneur - and had varying degrees of success in his chosen fields of trade. As a "one man band" there were clear limits on what he did, what he achieved, and what he could be expected to do. He was an opportunist, as might be expected of someone engaged in his kind of business activities. But the tribunal makes the clear finding there was no evidence that he had sought himself to engage in any criminal activities, such as tax fraud, in any part of his business. The tribunal considers below whether he knew or should have known about the fraud of others in the transactions challenged in this appeal.

The decisions under appeal

8 There are two sets of decisions by HMRC under appeal. The first decision, given by letter dated 30 01 2009, was a refusal of an input tax claim for £92,491 for the VAT period 09/06 in respect of five transactions undertaken in that period. In each case HMRC concluded that there were tax losses caused by fraud in the deal chain leading to each of the transactions, and that BCGE knew or should have known of that fraud. These were, in the standard jargon used about MTIC deals, straight chains. The second decision, given by a letter of the same date, was a refusal of a further £13,713 for the VAT period 12/06. These were in respect of two deals where, HMRC concluded, the Appellant had traded with another trader who was engaged in contra-trades. That is, the chain of deals leading to the Appellant's deals included a trader who had defrauded the revenue by offsetting deals in a "clean chain" involving no fraud with other deals in other chains that did involve fraud.

9 However, the tribunal takes the view, explained below, that in reality it is required to look at three sets of transactions, detailed as follows.

The Sceptre deal

10 This was a purchase on 8 08 2006 of 3,000 Apple iPod Nano 4GB from a UK resident company named Sceptre Services Ltd (Sceptre) sold in two batches to companies resident elsewhere in the European Union: Tradius BV (Tradius), a Dutch private limited company, and Nintrend Europe BV (Nintrend), another Dutch company. HMRC contend that there was fraud in the chain of transactions leading to this transaction in that a supplier in the chain, E-Management Solutions Europe Ltd (EMS), a UK resident company, was a fraudulent defaulter. The Appellant did not dispute that there had been tax losses from EMS but did dispute both the issue of fraud and the links in the chain.

The Maystar deals

11 BCGE purchased computer parts manufactured by Intel from Maystar Enterprises Ltd (Maystar), a UK resident company, by three deals dated 12 09 2006, 15 09 2006 and 26 09 2006. The goods were sold by BCGE to Tradius and Nintrend, the same companies as in the Sceptre deals. HMRC contends that the fraudulent defaulter in this case was Maystar, and that there is no relevant chain of transactions between the defaulter and the appellant. The Appellant did not challenge the tax loss but did challenge the issue of fraud by Maystar.

The Grandbyte deals

12 BCGE made two purchases of Intel 945 Retails from a UK resident company named Grandbyte Computers Ltd (Grandbyte) on 26 10 2006 and 3 11 2006. The goods obtained under the first of the purchases were sold to Nintrend, and those obtained under the second purchase were sold to Tradius. It is contended by HMRC that a supplier in the chain of supply to BCGE in both cases was a UK company known as A-Z Mobile Accessories Ltd (A-Z) and that that company was a contra trader. In its contra chains (or "dirty chains") there was a defaulting taxpayer known as Nationwide Services Ltd (Nationwide). The Appellant challenged the analysis of HMRC of these events and the existence of any connection between Nationwide and the Appellant.

13 It follows from the above, that HMRC must establish, for these appeals to fail, that the three companies named above as defaulters, namely EMS, Maystar, and Nationwide, were all responsible for VAT losses caused by fraud within the scope of the legal tests set out below. And the links required to show that Nationwide is relevant to the analysis of the Grandbyte deals must also be shown.

14 It also follows that the tribunal is concerned only with the two customers dealing directly with BCGE in these deals, Nintrend and Tradius. There was evidence of the onward sales by those companies of the items involved in the deals discussed in this decision. But no evidence was offered of circularity, that is, that any of the companies being supplied by Nintrend or Tradius were involved in any of the other chains or were involved in bringing those goods back to the United Kingdom after the transactions in question. It was not alleged by HMRC that either of those two

companies or their customers were part of any fraud undertaken by suppliers in the chains of supply to BCGE, and the tribunal so finds.

15 The Appellant gave evidence about those two customers indicating a trading history with both. There were contradictory elements in that evidence, such as the commission paid to a third party for an introduction to Tradius in connection with the Sceptre deal and the absence of any visit by the Appellant to the trading premises of that company. But HMRC did not contend, and the tribunal saw no evidence to suggest, any links between these customers and the suppliers in the chains leading to BCGE in the transactions in issue or the more general evidence that indicate that the tribunal should look more closely at this choice of customer.

16 While the tribunal accepts that the evidence about how the Appellant handled his business relationships with Tradius and Nintrend forms part of the general evidence about the conduct of his business activities, it finds nothing specific arising from his dealings with those customers that calls into question the finding, which tribunal makes, that these were genuine customers based elsewhere in the European Union.

17 The tribunal also finds, in respect of each of these deals: that these were actual deals; that in all cases goods of, or approximating to, the description of the goods said to be the subject of a deal did exist; that they were in the ownership of BCGE at a relevant time; that they were present in the UK at a relevant time; and that they were sent to another European Union state by means of an intra-Community supply and acquisition when this was said to have occurred; and that payments of the appropriate amounts were made both to and by BCGE in respect of the deals. It further finds that the VAT invoices necessary for the transactions were properly issued by and to the Appellant. It follows that none of these issues forms a basis for challenging the entitlement of the Appellant to recover the input tax recorded by those invoices. The challenge must be based on different grounds.

MTIC frauds and MTIC traders

18 Both parties were fully aware at the time of the hearing of these appeals of the relevant law and standard phraseology now used in this much litigated area. Save for specific comments on points made to or by the tribunal in the hearing, this tribunal does not seek to add to what is in its view already overlengthy jurisprudence in the First-tier Tribunal about MTIC cases. No substantive new point of law was taken by either side, save again on one point on which the tribunal comments below and which arises out of the previous First-tier Tribunal jurisprudence. As the tribunal indicated to the parties at the hearing, this decision therefore refrains from setting out at length matters of law or fact that are part of the essential background to any MTIC case but were not in issue in these appeals.

19 The tribunal must, however, comment on the ambiguous use of "MTIC trader" in the documentation leading to these appeals. The phrase was used in wider and narrower senses: the wider sense was that of a trader (individual or company) engaged in supplies of specified goods to traders elsewhere in the European Union. "Specified

goods" were those goods within the scope of section 77A of the Value Added Tax Act 1994 at the relevant times. They were described in the then current version of VAT Notice 726 as follows:

> "telephones and any other equipment, including parts and accessories, made or adapted for use in connection with telephones or telecommunications; computers and any other equipment, including parts, accessories and software, made or adapted for use in connection with computers or computer systems."

20 The tribunal finds that the goods involved in the Spectre deal were not specified goods, but that those in the other deals were specified goods. Although no strong point was taken about this in this appeal, the tribunal remains conscious that the Appellant was also trading in other goods that could by no stretch of the imagination be regarded as specified goods, and also that the services he was providing at relevant times that were linked with specified goods did not fall within this provision either.

21 The description "MTIC trader" was, in the view of the tribunal, used as something of a label in some of the evidence in this case. It was used to describe traders who engaged in supplies of these goods even though at the same time they also engaged in supplies of other goods or in supplies of services and also engaged in supplies that were not intra-Community. There was, the tribunal considered, a labelling effect in the sense that once it was considered that a trader had dealt with an intra-Community trade in specified goods, that trader was "an MTIC trader" regardless of the other activities of the trader or the extent of those other trades. That ambiguity is important when the narrower meaning of "MTIC trader" is applied.

22 The narrower meaning of MTIC trader is a trader who was not only engaged in relevant intra-Community trades but was also a trader within the scope of MTIC fraud in the sense that the trader either was directly engaged in fraud or knew or should have known that chains of supplies in which the trader was involved also involved other MTIC traders engaged in defrauding the public revenues.

23 In between those two usages is an intermediate usage implying that because the trader was an MTIC trader in the wider sense there was a reasonable suspicion that the trader was an MTIC trader in the narrower sense. That intermediate sense was in evidence, for example, in the description by an officer in a report of a supplier to the Appellant being an "MTIC" trader. The officer, asked about the use of this label by the tribunal, replied that the trader "would have been on our electronic database and if there were any concerns about the MTIC activity, it would have been on the database. That is how I would know that the MTIC would be listed against (the trader)". The same officer put the point another way in re-examination: "The term "MTIC trader" basically signifies that it's a trader dealing in high value goods, either in mobile phones or computer chips, which is the high-risk area of VAT fraud, those goods being specified goods in joint and several liability. And, as those goods are high risk, they are looked at in more depth because of the risk to the revenue."

24 Behind that intermediate meaning of "MTIC trader" lurks a danger in cases such as this. It is that there has been a reversal – possibly unconscious and unintended – in the burden and onus of proof by officers conducting investigations into the activities of "MTIC traders". In this case it is appropriate to note again that burden is on HMRC, not a trader labelled in this way. The standard is the civil standard of probability.

25 The tribunal also emphasises that it considers the case, and applies those tests, in the light of all the evidence. HMRC witnesses repeatedly used the phrase "no evidence" in their statements and oral evidence to mean, and mean only, "no documentary evidence". The Appellant repeatedly relied on evidence of verbal communications with others and oral evidence given by him at all times to HMRC, in the context that he did not keep written notes or records. This is illustrated by the following exchange during evidence of an officer:

> Mr Willis: "... you are not in a position to refute that he made verbal checks, are you?
>
> Officer: We can't refute it, because we have no evidence, that's what he says.
>
> Tribunal: Can I pick one point up: when you say there is no evidence, do you mean there is no documentary evidence?
>
> Officer: Yes, sir. There was not produced any documentary evidence to me."

It was clear to the tribunal that this mismatch had given rise to misunderstandings and friction between the Appellant and officers of Revenue and Customs because they were perceived by him, rightly or wrongly, to be ignoring his oral evidence totally because of this approach.

26 It was also clear to the tribunal both from the approach taken by the Appellant and those taken by officers when giving evidence to the tribunal and in the documentary evidence that there was a clash of cultures between the way the Appellant conducted his activities and the way the officers conducted theirs. As the tribunal established in the findings at the start of this decision, the Appellant did not have to answer to anyone else for his business decisions, and as he was the direct and only gainer or loser from any individual decision as a sole trader that was sufficient for him. Nor did he have to produce and file the reports and accounts required even of the smallest companies. The tribunal accepts the Appellant's evidence that he relied on his own gut feelings and instincts, and made oral enquiries or visual inspections, and saw no reason to record them. Nor, for that reason was he required to keep any particular records save those required for VAT and income tax purposes. And the tribunal adds that no point has been made against the Appellant that he did not keep those records.

27 The officers, by contrast, were acting under limited authority (and in some cases with limited experience) with strict instructions as to what deals they were to examine and how they were to examine them. Matters that the Appellant considered relevant were sometimes matters that the officers found themselves unable to consider

while by contrast documents that the officers expected the Appellant to produce did not exist, never had existed, and in the view of the Appellant never needed to exist.

28 The tribunal must itself consider whether in its view the Appellant should have kept further records for current purposes. But the tribunal emphatically rejects an approach to these appeals that puts no weight on oral evidence simply because it is not supported by specific documentary evidence save where, as with the need for a valid VAT invoice or specific documentation, further documentary evidence was directly required by law.

29 The tribunal also notes that in this appeal, in common with other cases in this area, there is a repeated misuse of the terms "import" and "export" in the evidence and submissions. None of the supplies relevant to these appeals went through a customs frontier. All were intra-Community. So in this case no point arises from the misuse of language save that there was no occasion for a necessary customs declaration or necessary customs examination of goods involved in these deals entering or leaving the United Kingdom.

The Appellant's general approach

30 Unusually, as noted above, the Appellant is a sole trader. It is part of the Appellant's case – and no part of the case for HMRC – that he conducted other supplies of goods in the same and other periods that were similar to these supplies but beyond the scope of the United Kingdom VAT, and that he traded under other trading names. They are, he submitted, relevant to his business activities as a whole. He also made linked supplies of services which are again factually relevant to the Appellant's business as a whole but are not claimed by HMRC to give rise to any relevant disputed tax liability in the two relevant quarters.

31 The tribunal agrees with the Appellant that it should look at the specific deals challenged in these appeals in the context of his business activities as a whole, including the history of those activities leading to the disputed VAT periods. They are all activities that were, or could have been, within the scope of United Kingdom VAT within the one registration. And the tribunal puts weight, in assessing the evidence, on the fact that the Appellant in this case declined to run his activities through a company or companies, but retained personal liability throughout for all his business activities.

The evidence

32 The tribunal heard initial submissions and evidence from the parties over ten days, with closing submissions made later. It was given 25 volumes of witness statements and documents. It heard evidence on oath from the Appellant over several days. The Appellant did not present evidence from any other witness.

33 The tribunal heard evidence on oath from the following witnesses for HMRC, all of whom were officers of Revenue and Customs at the relevant times:

(1) Lisa Wride. She gave evidence of a visit to the Appellant's place of work on 29 11 2005 and subsequent reports and actions following up on this visit.

(2) David Phillips. He gave extended evidence about the deals in the 09/06 VAT period.

(3) Roderick Stone. He gave evidence of HMRC policy with regard to MTIC traders.

(4) Patricia Morgan-Davies. Her evidence related to the transactions in the VAT period 12/06 and the linked evidence of contra-trading.

(5) Gerard Marescaux. He was the officer responsible for one of the defaulting companies in the deal chains, EMS, during the relevant period.

(6) Katrina Wheatcroft. She gave evidence as the officer responsible for A-Z, alleged to be a contra-trader, during the relevant period.

34 HMRC tendered written evidence in proper form from other witnesses. The tribunal had directed that all witnesses should be available to give oral evidence unless their evidence remained unchallenged by the Appellant. The witnesses listed below all tendered evidence without challenge. Their evidence, summarised briefly, is therefore accepted as unchallenged evidence:

Tracey Beard gave evidence about Nationwide, including about visits, correspondence, and conversations.

David Booth gave evidence with regard to A-Z based on visits and meetings.

Simon Devine gave evidence about A-Z based on both visits and analysis of documents obtained

Susan Hill gave evidence about Nationwide.

Kevin O'Reilly gave brief evidence of a visit by the appellant on 9 01 2007.

Vivien Parsons also gave evidence about A-Z.

Susan Payiatis gave evidence about EMS.

Ghazalah Shah also gave evidence about EMS.

Ian Webster also gave evidence of visits to EMS and conversations and discussions about that company.

These were all officers instructed by HMRC to investigate the named companies, including those companies being identified in this appeal as defaulters. This evidence therefore supports the submissions by HMRC that the presence of EMS or A-Z in the

chains of deals relevant to these appeals shows a ground on which to find fraud in those chains.

35 Separately, uncontested evidence was also given by Tatjana Harris, an operational accountant working with HMRC. This was evidence about the investor loan agreements reached by the appellant with third parties and about his accounts to March 2006. However, this did not take into account the accounts produced for a later period to the tribunal at its request. The tribunal found little assistance in this evidence as it did not consider that the arrangements made by the Appellant to borrow working capital for BCGE activities was of much assistance in deciding the issues in this case.

Applications about the evidence

36 The tribunal rejected applications by HMRC in the period before the hearing to admit late evidence from new witnesses, and to admit further evidence from some witnesses who had already tendered evidence. The tribunal accepted some of the new evidence only, directing that other new evidence be excluded. Some bundles had been prepared ahead of those directions, including evidence that was directed to be excluded. As a result various witness statements and documents were withdrawn from the bundles of evidence. The tribunal is satisfied that the evidence before it at the hearing did not include any of the excluded evidence.

37 The tribunal received a specific late application in respect of one witness, officer Devine. Mr Willis, for the Appellant, applied for the officer to be called to give oral evidence. Mr Margolin, for HMRC, objected to this application at this late stage in the appeals. Having heard from both parties, the tribunal ruled that the evidence remain admitted, but that the application that the witness give oral evidence be rejected. It did so because it was satisfied that the evidence of that officer had been served properly on the Appellant and that had the Appellant acted in accordance with the relevant case management directions at the appropriate time then the witness would have been available for cross examination. The tribunal noted that the Appellant had given proper notice in respect of other witnesses of whose evidence he was notified at the same time as this evidence. It also noted that the case management directions under which objections to evidence were to be made had taken the evidence of this witness specifically into account. Acceptance of the evidence of the witness without cross-examination was therefore entirely in accordance with the Tribunal Rules as expressly modified for these appeals by case management directions. The tribunal could see no overriding interests of justice that justified changing the procedure at this late stage in respect of one witness.

38 The tribunal records that it did not read any part of that evidence or any documents produced as exhibits to it until it had ruled on the application not to admit. The evidence was about the company contended to be a contra-trader, A-Z, about which officer Wheatcroft (who was subject to cross-examination) also gave evidence. It is noted in paragraph 32 above.

The law

39 The tribunal agrees with HMRC that the principle to be applied in this case is essentially quite simple and is that laid down throughout the European Union in the European Court of Justice in *Axel Kittel v Belgium; Belgium v Recolta Recycling* [2006] ECR 1-6161:

> "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 person entitlement to the right to deduct."

40 That test was recently thoroughly considered by the Court of Appeal of England and Wales in its decision on the joined appeals in *Mobilx Ltd (in administration) v HMRC, Calltell Telecom Ltd v HMRC* and *Blue Sphere Global Ltd v HMRC* [2010] EWCA Civ 517. In his judgement in that case, Moses LJ concluded that:

> "The [European] Court must have intended the phrase "knew or should have known" which it employs in ... *Kittel* to have the same meaning as the phrase "knowing or having the means to know" which it used in *Optigen* ..."

and that:

> "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 fraud then he should have known of that fact."

and that:

> "If it is established that a trader should have known that by his purchase there was no reasonable explanation for the circumstances in which the transaction was undertaken other than that it was connected with fraud then such a trader was directly and knowingly involved in fraudulent evasion of VAT."

41 The tribunal also accepts from that case that the task in this case is to consider whether on all the evidence the deals were connected with fraud, not the lower test whether or not it is more likely than not that this was so.

42 HMRC put its submissions in this case in the same terms for each of the three sets of deals. It was contended in each case that BCGE must have known, and therefore in law did know, that each deal was connected with fraud. Its case in the alternative was that BCGE should have known this.

43 The tribunal accepts the further guidance from Moses LJ in *Mobilx* that in considering the timing of any fraud contended to be linked to a purchase by a trader said to be involved in a chain linked to fraud caused by evasion by contra-trading that:

> "it cannot matter a jot that that evasion precedes or follows that purchase."

44 The tribunal also takes into account the guidance by Briggs J in *Megtian Ltd v HMRC* [2010] EWHC 18 (Ch):

> "... there are likely to be many cases in which a participant in a sophisticated fraud is shown to have actual or blind-eye knowledge that the transaction in which he is participating is connected with that fraud, without knowing, for example, whether his chain is a clean or dirty chain, whether contra-trading is necessarily involved at all, or whether the fraud has at its heart merely a dishonest intention to abscond without paying tax, or that intention plus one or more multifarious means of achieving a cover-up while the absconding takes place..."

and

> "there are likely to be many cases in which facts about the transaction known to the broker are sufficient to enable it to be said that the broker ought to have known that his transaction was connected with a tax fraud, without it having to be, or even being possible for it to be, demonstrated precisely which aspects of a sophisticated multifaceted fraud he would have discovered had he made reasonable enquiries. "

Case law of the First-tier Tribunal

45 Those representing HMRC before this tribunal presented the tribunal with 8 volumes of authorities. A cursory examination showed that all but one of the volumes comprised a large collation of decisions of the First-tier Tribunal in MTIC trader cases. Two of those decisions, those in *Sceptre Services Ltd v HM Revenue and Customs* [2011] UKFTT 265 (TC) and *Coracle Ventures Ltd v HM Revenue and Customs* [2011] FTT 630 (TC), were factually connected with the deals undertaken by the Appellant. The tribunal discusses these decisions below.

46 61 other First-tier Tribunal decisions about MTIC traders that went no further are listed in the skeleton argument for HMRC with no other comment than that "the vast majority" of those appeals were ones in which HMRC was successful. Specific reference was made in argument to limited extracts from a small sample of those decisions. None of them are of precedent value before this tribunal, and the tribunal is little assisted by the argument. As the tribunal indicated to both parties at the hearing, there is no precedent value in citing these authorities and – save for the two cases below – little of factual interest. To burden the tribunal and the Appellant and his representatives with many volumes of these decisions in this way is a waste of time and therefore of costs and of resources. Nor is it clear why those representing HMRC presented the tribunal with the choice of First-tier Tribunal decisions they chose to photocopy into the bundles of authorities rather than those they did not, as the bundles do not contain a complete set of such authorities, and comments could have been made about some that were omitted.

47 If the tribunal was meant to be impressed by the number of cases HMRC had won, then that failed. This case is to be judged by the established law and by its own

facts, and not by some sort of suggested consensus outcome. It is assisted by reference to First-tier Tribunal decisions only where those decisions have lead to appeals or references to the Upper Tribunal or higher courts and the initial decision helps explain the later decisions, or where the tribunal decision deals with a relevant new issue that has yet to be considered in those courts. A few years ago the help of other First-tier Tribunal decisions could be of value for those reasons in this area of law. As counsel for HMRC himself put it, this jurisprudence is now increasingly mature and settled. The tribunal places on record that it sees no need in this case to refer to any of the jurisprudence of this tribunal save as follows.

48 The decisions in *Coracle* and *Sceptre* raise a different issue, and one that was accepted for both parties to be one on which the Upper Tribunal and higher courts had not commented in this context. The context arises as follows. In the Sceptre deal (but for the purposes of this case only in that deal), the evidence is that Sceptre purchased from another company, Coracle Ventures Ltd (Coracle). Evidence before the tribunal shows that BCGE took part in a number or transactions where goods were supplied to BCGE by Sceptre where those goods had been supplied by Coracle to Sceptre. There were also transactions where Coracle supplied BCGE. In the view of the tribunal, that is a most unusual set of circumstances. On what reasonable grounds would company A sometimes be buying goods to be sold on to company B and then to company C for export when the reverse, namely a sale by B to A then C for export, was also happening? Why did each company bother to sell through the other company, or alternatively why did they not act in commercial partnership?

49 One or more explanations are offered by two recent decisions of the First-tier Tribunal. In *Sceptre Services Ltd v HMRC*, [2011] UKFTT 265 (TC), a decision released on 20 04 2011, the tribunal found that, in respect of transactions undertaken for the periods 7/06 and 8/06 , HMRC was entitled to refuse repayment of VAT to the company on the grounds that the company knew or ought to have known that there was fraud involved in chains of transactions in which it was also involved. Shortly after that decision was issued, a differently constituted First-tier Tribunal heard and decided *Coracle Venture Ltd v HMRC* [2011] UKFTT 630 (TC), a decision released on 27 09 2011. There the tribunal dismissed appeals by Coracle against the refusal to refund VAT in connection with transactions undertaken in the period VAT 7/06. Again the test in *Kittel* was found to be satisfied on the evidence.

50 The issue for this tribunal is the question whether, and to what extent, the tribunal can and should take those two decisions into account. One relevant point can be dealt with immediately. There is no issue of double recovery here. In other words, the transactions in which those companies were refused a refund of VAT were not the same transactions, or transactions in the same chains as those immediately in question in those appeals.

51 Another point can also be dealt with in similar short form. The Appellant is mentioned in the *Sceptre* decision. But HMRC did not seek to rely on, nor did it in any way ask the tribunal to rely on, findings of the tribunal in that case about the conduct of the Appellant in this case.

52 But there is much evidence about those parties and about third parties recorded in those decisions, together with the findings of the Tribunal in those cases. That evidence and those opinions are on the public record – indeed are published on a number of websites including the official site maintained for the tribunal. And they were both included in full as authorities to be considered by the tribunal in this appeal.

53 Should this tribunal (which, for the record, is differently constituted again) nonetheless completely ignore those decisions? The tribunal places on record that it informed the parties that it had not considered them in any detail ahead of consideration of that issue of principle. But it has taken them into account since, as explained below.

54 If the tribunal follows the same procedure as that of the High Court and the other civil courts, then it should ignore those decisions in entirety. The rule of evidence in use in the civil courts is that in *Hollington v Hewthron & Co Ltd* [1943] KB 587, a decision of the Court of Appeal. Subject to defined exceptions, findings of fact made by one court are not admissible in other proceedings. That rule has been affirmed on a number of occasions, including by the House of Lords in *Three Rivers DC v Bank of England* [2003] AC 1. It was not suggested that any of the exceptions to that general rule would apply in this case if the rule itself applied. The question is therefore whether, in considering whether HMRC has established its case in the Sceptre deal it can rely on any of the findings of this tribunal in either *Sceptre* or *Coracle*, or whether this tribunal should follow the rule of civil evidence and entirely exclude any consideration of those findings.

55 In the view of this tribunal, it must take a clear view on that matter as the issues are such that the findings of the tribunal in those other cases are likely to be of significant weight in the decision in this case about the Sceptre deal. And, as that deal preceded the other deals in chronological order, they may be of weight in connection with the later deals.

56 With this in mind the tribunal asked the parties for submissions on this point as part of the closing submissions heard in this case.

57 The point was fully argued before the tribunal by Mr Margolin. He contended that the tribunal was not bound by the strict rules of evidence that applied in the civil courts, and it should not be tempted into introducing them into tribunal procedure. The tribunal's procedure was governed by the Tribunal Procedure Rules. This was emphasised in rule 15 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 , paragraph (2) of which provides:

> "The tribunal may –
>
> (a) admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom; or
>
> (b) exclude evidence that would otherwise be admissible where –
>
> ... ."

This, he submitted, should be read with the tribunal's case management powers in rule 5, and the overriding objective in rule 2 including "avoiding unnecessary formality and seeking flexibility in the proceedings" (rule 2(2)(b)).

58 Applying those rules, the tribunal should not consider itself bound by the rule in *Hollington v Hewthorn* but should consider any submissions made about findings by the tribunal in other cases in any case where it is relevant by reference to the circumstances of the case in which those other decisions are cited, with particular attention being paid to the fairness of relying on any finding in any such decision.

59 For the Appellant, Mr Willis did not demur from the general submission put forward by HMRC. However, he considered it of little importance in this case because in his view the decision in *Coracle* was of little if any help to this tribunal. The decision in *Sceptre* could still be subject to appeal and therefore any finding in it should be treated with extreme caution.

60 The tribunal certainly takes note of the point about any appeal. It accepts from counsel that there was no appeal against *Coracle.* It noted at the hearing the submission from Mr Willis that the appellant in *Sceptre* did give notice of appeal. That, of itself, does not preclude the tribunal from taking findings into account in this case. But it does mean that this tribunal should indicate clearly what weight, if any, it puts on what findings, if any, drawn from *Sceptre* so that in the event of any appeal of that decision proper consideration can be given to whether, and to what extent if any, that would affect this decision.

61 In considering that submission, this tribunal has in mind that these rules apply in almost identical terms to all chambers of both the First-tier Tribunal and the Upper Tribunal. Although the decision was not cited to this tribunal, it also has in mind – and must have in mind – the decision in *RC v SSWP* [2009] UKUT 62 (AAC), a decision of the Administrative Appeals Chamber of the Upper Tribunal. In that decision the tribunal, commenting on the use of findings of fact by others, commented:

> "Tribunals must make the best findings they can on the information and evidence before them. The information may include findings made by previous tribunals and family courts. The significance of those findings will depend on their reliability and relevance. In assessing their reliability, tribunals must consider (i) the evidence on which they are based; (ii) the nature of the fact-finding process (for example, whether the parent was subject to cross-examination); and (iii) the evidence now available. If there is no evidence to the contrary, tribunals may be entitled to conclude that the findings previously made are sufficient and reliable in the child support context."

While that decision was made about the extent to which a First-tier Tribunal could and should rely, when dealing with child support appeals, with decisions of other tribunals or the family courts, the same point arises here. And the same approach should therefore be taken here.

62 With that in mind, the tribunal agrees with Mr Margolin that it should take its approach from rules 2, 5 and 15 of the Tribunal Procedure Rules. In principle, the tribunal should therefore have regard to the findings in both *Sceptre* and *Coracle* in so far as they are relevant to the decisions before it. But it should be careful not to place too much weight on those decisions by themselves.

The deals under appeal: are there tax losses caused by fraud and linked to the appellant?

63 The tribunal now turns to the evidence about the three sets of deals. In each case it is concerned with establishing on the evidence the answers to the following questions:

- Was there a VAT loss in the transactions leading to the deals?
- If so, did that loss result from fraudulent evasion of VAT?
- If so, were the transactions involved in the deals directly connected with that evasion?

It is only if the answer to each of those questions in turn is "yes" that HMRC has established the necessary preconditions that require the final issue to be established:

- If the appellant engaged in transactions directly connected with evasion of VAT, did he know of this or should he have known of this?

The tribunal deals with those three questions first and then turns to the final question.

The Sceptre deal

64 The relevant evidence from HMRC is: the documentary evidence presented by, and the oral evidence of, officer Phillips about BCGE, and the evidence of officers Marescaux, Payiatis, Shah and Webster about EMS, the contended defaulter. The tribunal must also consider the evidence from the Appellant together with consideration of the general findings of the tribunals in the *Sceptre* and *Coracle* decisions. However, it emphasises that it bases its findings on the evidence before the tribunal and puts only secondary reliance on the findings of the tribunal in the other appeals save where there is a clear overlap between the evidence presented in those appeals and in this appeal.

65 The tribunal has some of the same evidence before it as was before those tribunals. In taking into account the tribunal decisions in the other appeals, it therefore must recognise that it is relying on evidence assembled by HMRC before any of the appeals were made about the general conduct of BCGE, Sceptre and Coracle. Mr Margolin informed the tribunal that that this had led to HMRC approaching the three appeals, in his phrase, as a trilogy. This was because of the strong view formed and put forward by HMRC that in reality the taxable persons in all three appeals had close commercial (and in particular locational) and personal links.

66 This appeal is concerned with one deal only involving Sceptre. It was a deal involving goods purchased by Sceptre from Coracle. The evidence put before this tribunal shows that HMRC had been concerned with a series of transactions involving both Sceptre and Coracle dating back to February 2006, all dealing with similar products such as iPods and Intel computer components. In some of those cases Sceptre had purchased from others and then sold to Coracle which then "exported" them. In other cases Coracle was the initial purchaser while Sceptre "exported" them. So this deal is to be viewed against a background of an active history of trading between Sceptre and Coracle in this field.

67 In this transaction, the tribunal finds the following chain to have occurred. Goods identified as 3,000 Apple iPods Nano 4GB were shown to have been released by a company called Bruins with Maltese links to a company called Papoose in the UK on 8 8 2006. The goods appear then to have been in the custody of freight forwarders in the UK, and they remained in that custody throughout until sent out of the UK following the sales by BCGE. The goods were transferred from Papoose to EMS; from EMS to a company called Connect; from that company to a company called Maximise; from that company to Coracle; from that company to Sceptre; and from Sceptre to BCGE. All these transfers took place on 8 08 2006 in back-to-back transactions in quick succession.

68 All those transactions took place in a chain that shows what HMRC submitted were all the usual hallmarks of an MTIC trading chain. The goods were moved from the contended defaulter, EMS, through four buffers to BCGE in a very brief time with each buffer making a small mark-up on the price, which was originally £106.70 (the mark-ups being 10p, then 20p, then £.75 then £1.50).

69 The sales by BCGE seem at first sight less obviously to be part of such a chain. The goods were sold in two transactions, not one, by BCGE. 1,000 were sold to Nintrend for 169 Euros. The other 2,000 were sold to Tradius for £113. The purchase documents from Tradius distinguish between the sale of 1,360 black iPods and 640 white iPods. But there is no mention of this distinction being of any importance in the documents leading to the sale to BCGE or indeed on its part in the sale on to Tradius.

70 The transactions clearly took place at a fast pace. The documentation put before the tribunal was of erratic quality, with poor photocopying leading to the loss of margins of some documents and obscurities such as hole-punch marks on others. So the tribunal treats with some caution the weight to be attached to any finding based on a single document. But there was clearly a cumulation of minor mismatches and errors in timing that are questionable in a genuine commercial deal, if proper regard is had to the commercial significance of the underlying operation. It was the sale of 3,000 items intended for consumer use each worth around £100. They were all items clearly manufactured outside the United Kingdom which were imported, it was said, as part of the grey market, but then sold on for "export" so had only a transient presence in the United Kingdom.

71 BCGE's paperwork for the deals is weak, even taking into account the basis on which the Appellant traded. The documents show, for example, that the release of

the goods from EMS to Connect took place at 11:16 am, but that BCGE had already at that time paid a first tranche of £200,000 to Sceptre for the goods. BCGE had told HMRC's Redhill office that the deal would take place on 4 08 2006, and that both customers would be paying £113. (This was later accepted as a typographical error). BCGE heard from Redhill by fax at 10.46.

72 BCGE later paid a company called Coastal Components LLC in the USA a commission of $US 2,000 (or $1 a unit) in respect of the units sold to Tradius. Although the Appellant gave evidence about this, the tribunal remains puzzled about this aspect of the transaction.

73 Was there a VAT loss in this chain of transactions? The evidence for this was produced by officer Marescaux supported by the evidence of other officers noted above that EMS (E-Management Solutions Ltd) had failed to account for the VAT at that stage of the chain of transactions, and that that VAT had been assessed on EMS but not paid. There was no challenge to that evidence. The tribunal accepts it and finds that there was a VAT loss linked to EMS in the chain leading to this transaction.

74 Was that a result of fraudulent evasion of VAT? Officer Marescaux gave evidence that in his opinion it was. Again, although the Appellant put HMRC to proof on this issue, there was no serious challenge to this evidence. Reading that evidence together with the other evidence produced by HMRC (and not challenged), the tribunal finds as fact that there probably was fraud on the part of EMS at the relevant times.

75 Was that linked to the purchase by BCGE? This submission by HMRC was challenged. Mr Willis contended there was no link to the purchase by BCGE, and that the documents produced linked to a failed transaction and not to his client's actual purchase and sale. The weak link, he submitted, was in the contended transfer of the relevant goods from EMS to a company called Connect.

76 The key documents put in evidence show this transaction taking place on 8 08 2006, a Tuesday. All the documents said by HMRC to evidence the deal chain bear that date, starting with the release note from Bruins to Papoose. All concern transfers of a quantity of 3,000 Ipod Nano 4gb, though there inconsistent detail about the colours of the individual Ipods in the transactions. The goods were held throughout at the same freight forwarders: Tech Freight Ltd. And the unit prices, as already noted, were raised by small margins on each deal in the chain. The tribunal sees nothing in that documentary evidence to suggest that the goods were swapped, or that there was a break in the chain in some other way. It puts little weight on the mismatch of information about the colours of the units, as it has seen no significant evidence to suggest that unit prices would vary significantly with colour variation. The tribunal is satisfied on the balance of probabilities that there is a continuous chain here, and that therefore there is a link between the defaulting trader and BCGE.

The Maystar deals.

77 There are three Maystar deals in question. They are unusual in the context of MTIC fraud cases in that in all three deals the contention by HMRC was that the Appellant dealt directly with the company said to be the defaulter. That is Maystar Ltd. There were no buffers. And it is not contended for HMRC that Maystar is a contra-trader.

78 The Appellant's customers for the deals were either Tradius or Nintrend, so no new element arises in their identity. The tribunal takes the view set out above that there are no grounds to consider those customers as part of any arrangements with the supplier that call into question that aspect of the chain involved with each deal. .

79 The first of the deals took place on 11 09 2006 (a Monday) according to the sales and purchase invoices exchanged between Maystar and BCGE, and on 12 09 2006 according to the return to HMRC. That is the day on which the records show that the Appellant paid Maystar. The goods traded were 1,000 "930 retails", which the tribunal understands to be Intel processors. The goods were purchased by the Appellant at a unit price of £80.50 and sold on at a margin of £1.50.

80 The second of the deals took place on 15 09 2006 (a Friday) according to the sales and purchase invoices exchanged between Maystar and BCGE. The goods are identified as 500 930 retails (the same items as in the previous deal). As with the previous deal, the goods were held by Forward Logistics Ltd. The Appellant paid Maystar that day.

81 The third of the deals includes further unusual features when judged by the common features of MTIC deals. Again, there is little evidence of what happened before the goods came to be held by Maystar and the evidence that BCGE purchased directly from the alleged defaulter. In this case the deal concerned goods identified as Intel P4 3.0 SL7Z9. An exchange of sales and purchase invoices on 18 09 2006 (a Monday) was for 945 units, and BCGE paid Maystar that day. But this was not an immediate onsale as the onward sale to Tradius was apparently only made on 26 09 2006, the goods being released that day from Forward Logistics to the purchaser. In this case the release of the goods by BCGE was notified to Redhill by Colin Evans of Sceptre, although there is no evidence that Sceptre were otherwise involved in the deal. Tradius paid for the goods on 29 09 2006.

82 There is other evidence that BCGE had traded with Maystar during earlier periods without, so far as HMRC were concerned, any incidents or unusual features.

83 Was there a VAT loss occasioned by the involvement of Maystar in these deals? The evidence for HMRC was of assessments raised or to be raised against Maystar for the non-declaration of transactions by that company in the sum of £35, 134. The appellant did not challenge that evidence, although he did challenge when and how this happened. The tribunal finds that there was a tax loss.

84 Was that loss of VAT as a result of fraudulent evasion? HMRC contended that it was. Mr Willis responded by contending that this had not been shown to have occurred on the evidence produced to the tribunal. Evidence was offered by officer

Jelenke, and not challenged by the appellant. But the tribunal agrees with Mr Willis that while that evidence was of a VAT loss (which the tribunal accepts) that evidence did not clearly establish fraud. Officer Jelenke did not produce specific evidence of fraud. Rather, it was suggested in the absence of other evidence that the company never intended to pay its VAT. But the actual evidence was that the company "disappeared" from its registered address and thereafter failed to respond to attempts by HMRC to communicate with it. Here it is relevant that the alleged defaulter was a company and not, like the Appellant, a sole trader. In a practical sense, a company can "disappear" in a way an individual cannot.

85 Officer Stone gave evidence that he surmised that Maystar was a failed contra-trader. That might explain the absence of any buffer between Maystar and BCGE. But that does not answer the question that now concerns this tribunal. If this was a failed contra-trade, was Maystar responsible for fraudulent evasion rather than that it simply ran out of cash and went out of business with those running the business simply leaving the business premises and moving on? On either explanation the tribunal accepts the evidence that BCGE paid Maystar for these deals, so was not responsible for any failure by Maystar to account for the VAT on the deals or otherwise to comply with its VAT obligations. .

86 The tribunal also agrees with Mr Willis that it has been offered limited evidence about these deals. That evidence should be seen in the broader context that the appellant had traded with Maystar on previous occasions without the tribunal being given any evidence of any previous problem. Nor is there more specific evidence of fraud by Maystar.

87 In the view of the tribunal it is not enough for these purposes for it to be shown only that Maystar went into liquidation, or asked to deduce that as a matter of probability, without Maystar paying the relevant VAT. There must be evidence of something more deliberate than that. This is the point made in the authority cited at paragraph [41] above. What the tribunal has here is little better than semi-informed guesswork. And in those circumstances the tribunal is not prepared to find that Maystar Ltd defaulted because of fraud on its part.

88 The link between Maystar and BCGE in these cases is clear. There were no buffers. But that is part of the concern held by the tribunal about the evidence of these deals. The tribunal is fully cognisant of the way in which contra-deals were put together at that time. But there is no clear evidence that Maystar was at this stage engaged or attempting to engage in contra-trading, only speculation. For example, the tribunal was not taken to any alleged contra-trades. Nor was it alleged that Maystar had acted as a contra-trader in its previous dealings with the Appellant. And even if the speculation was accurate, if Maystar failed as a company at the wrong stage of an attempted contra-trade then the contra-trading itself would fail. So that also would not establish fraud.

89 The tribunal therefore finds on this issue that it is not satisfied on the balance of probabilities that Maystar's failure to account for the VAT it owed was because of fraud in its part.

90 It follows that HMRC are unable to establish on the evidence the necessary preconditions for disallowance of the Appellant's claim in respect of these deals. So the Appellant's appeal must succeed on these deals without the tribunal having to consider any further issues about them.

91 The tribunal also considers that this should be taken into account as part of the total context of those deals where HMRC has shown a tax loss and fraud.

The Grandbyte deals

92 The tribunal finally turns to two deals in the quarter 12/06 in which it is contended that the Appellant knew or should have known that he was dealing with chains of deals affected by contra-trading. The contention is based on the allegation by HMRC that A-Z (A-Z Mobile Accessories Ltd) was the contra-trader; that the "clean chain" was for the sale in both deals of items from A-Z to Tradex Corporation Ltd, then to Grandbyte Computers Ltd and then to BCG, with BCG selling on to Tradius outside the United Kingdom.

93 The "dirty" chain ran through A-Z involving a defaulting company, Nationwide.

94 As the customer is again Tradius, the tribunal takes the same view as above about the relevance of the customer to consideration of the chain of transactions leading to the supplier to the appellant – it is not relevant.

95 The first of these deals involving the Appellant took place from 24 10 2006 (a Tuesday). On that day A-Z sold 2,500 Intel P4 3.4GHz 945 SL9QB 945 retail units to Tradex for £78.00. The matching purchase invoice by Tradex is dated the following day. On the next following day again 500 SL9QB units were sold on to Grandbyte at £79.00. Grandbyte and BCGE exchanged sales and purchase invoices that following day (26 10 2006) for 500 SL9QB at £80.00. BCGE sold the units on to Tradius, making a margin of £1.50 (though paid in Euros) a unit, and paying Grandbyte that day. The goods were held by Forward Logistics.

96 The second deal has similarities with that deal. Indeed, the evidence and schedule produced by HMRC for this deal suggested that they started in the same place On 24 10 2006 (a Tuesday) A-Z sold Tradex 2,500 SL9QB units at £78 a unit along with 500 SL9QB units at £74 a unit, though the purchase invoice is dated 26 10 2006. The contention by HMRC is that Tradex then sold these on to Grandbyte on 3 11 2006 (a Friday). The documents produced show the sale on of 500 SL9QQ on that date, with Grandbyte paying Tradex on 6 11 2006. There is an onward sale to BCGE dated 3 11 2006, as evidenced by a sales invoice and a purchase order of that date, for 500 SL9QQ. The price paid by BCG was £76.75 and the sale price, again to Tradius, was £78.50 (though it was actually expressed in Euros). According to the documentation the goods were release on 3 11 2006 and Tradius paid on 6 11 2006. The goods were again held by Forward Logistics.

97 The officer responsible for these deals was officer Morgan-Davies, from whom the tribunal heard evidence. Officer Wheatcroft gave evidence about A-Z There was also unchallenged evidence from officers Devine and Parsons about A-Z.

98 It was accepted by HMRC that it was unable to produce any direct documentary evidence of the source of the supply of the goods to A-Z that were onsold by A-Z in these transactions.

99 Was A-Z engaged in tax fraud, as a contra-trader or otherwise? The tribunal accepts and puts weight on the evidence produced for HMRC of the pattern of turnover and the pattern of the balance between input tax and output tax of A-Z during 2006. In reaching a conclusion on this point, it takes into account the evidence of officer Devine which was the subject of the application detailed at the start of this decision and which, therefore, the tribunal did not consider at all until that application was determined. That evidence now stands as uncontested evidence. The tribunal puts weight on it in finding that the extremely large turnover of trade in the VAT quarters 5/06 and 8/06, involving as it does a near match of inputs from the EU and outputs to the EU, are best explained by a deliberate series of steps to ensure that balance, and that the most probable explanation of such a balance at that time was that the company was deliberately facilitating fraud by others through the process of contra-trading.

100 The tribunal accepts the submissions from Mr Margolin and the evidence of officer Devine that the adjustments evidenced in the quarter to 11/06 to ensure a similar balance by retrospectively "cancelling" transactions from the previous quarter are confirmation that this balancing was not a coincidence but was clear evidence that the whole pattern of trading of A-Z was being manipulated deliberately to make it appear VAT-neutral. The tribunal can think of no other explanation for the suggestion that otherwise a transaction undertaken several months before in what the tribunal considers it may reasonably assume to be a typical MTIC style purchase and sale can be "cancelled". It is certainly not a normal commercial procedure.

101 The tribunal has also seen, and accepts, the evidence of HMRC that Nationwide was a defaulting trader in other chains (in the relevant terminology, "dirty chains") involving A-Z in the same quarter as the chain of deals in which BCGE was involved.

102 The tribunal is therefore satisfied on the balance of probabilities that the evidence shows that the two conditions of tax loss and that the loss was caused by fraud are both present in so far as A-Z is in the same chain of transactions as BCGE.

103 There are a number of other points on which the above evidence is not so clear. The main one is that, on the contentions put forward for HMRC, the goods in the second deal appear to have started life described as SL9QB units in the hands of A-Z and then become SL9QQ units. The description of a unit as SL9QB or SL9QQ was, the tribunal was told, known as a step code. The tribunal accepts and finds that the step codes SL9QQ and SL9QB describe different computer units, though it was given only limited evidence (and no expert evidence) about the differences. For

example, it was inferred that these different units would have different values, but that was not shown by clear evidence. Nonetheless the tribunal finds that the technical differences will have been significant to an end user. But it is unable to find whether the values were different nor is it able to make any findings about any other importance in the difference of the parts.

104 The question therefore is whether the second of the deals is, as Mr Willis contended, not in fact a chain linked as suggested at all or, as HMRC contended, is a chain in which someone became muddled or mistaken (or simply was not bothered) about the accurate description of the goods but in which the same actual physical units passed through the chain with a step code misidentification in the paperwork occurring at some stage and then being repeated.

105 The documentary evidence of itself does not answer this question clearly. The documents produced show that the deal between A-Z and Tradex is said in both cases to start with sales invoice 1364 from A-Z to Tradex on 24 102 006. This is for 2,500 INTEL PD 3.4GHZ SL9QB 945 retail at £74, and 500 INTEL PD 3.4 GHz SL9QB 945 retail at £78. The purchase order from Tradex of 25 10 2006, invoice number A-Z 10006, repeats this save that the abbreviation PD becomes P4. The tribunal is left wondering whether this is a distinction without a difference as it understands PD refers to Pentium D, while P4 is a part of the full technical description. Save for that, the purchase and sale documents identify the same goods.

106 The documents supporting the first deal then include the forward sale by Tradex of 500 SL9QB. This starts with the Grandbyte purchase order 00540, and Tradex invoice Grandbyte10005. The documents supporting the second deal show Grandbyte purchase order 00541 on 3 11 2006 (ie, if correct, the next in time from the order the previous week) for 500 SL9QQ, matched by an invoice from Tradex numbered Grandbyte 11001 (the first Grandbyte invoice of November?) again for that quantity of SL9QQ.

107 It is not usual to find gaps of a week occurring in this way between transactions that are part of one MTIC trade chain. Why were the goods not all sold on at the same time? So the gap in the dates must invite the question whether it is correct to identify the transaction of 24 or 25 10 2006 as the transaction immediately previous to that of 3 11 2006. It also invites a question about the genuine nature of the transaction.

108 Mr Margolin explained this by reference to the evidence of officer Morgan Davies and inspection reports in evidence of the goods at ASR Logistics and then at Forward Logistics. These showed that the original 200 boxes of Intel units consisted of 101 boxes of SL9QQs and 99 boxes of SL9QBs. There was an identifying consignment number of HW1915B. That consignment number is mentioned on the release note of 26 10 2006 from Grandbyte to BCGE for 500 SL9QBs in deal 1. The reference in the release request dated 3 11 2006 in connection with the sale from Tradex to Grandbyte on 3 11 2006 in respect of 500 SL9QQ is HW1917B. Mr Margolin submits that the only explanation that rationalises this information is that some of the goods described as SL9QQ in the sale by A-Z to Tradex that formed, it is

contended, the starting point of both deals were in fact SL9QBs. This, he suggested, explained the price differential in that sale between 2,500 units at £78 and 500 units at £74.

109 Mr Willis offered a different explanation. This is that the goods in the second of the deals were not linked to the goods in the first of the deals. That being so, no link back to A-Z had been established. And that being so, there was no link established between his client BCGE and any tax fraud.

110 The tribunal does not consider that this price difference is shown to be the only explanation as it has had no evidence of any price differential at the time between SL9QB and SL9QQ units. Further, if the goods were, as examined, 101 boxes of one of those units and 99 boxes of the other, why would the price differ in the way suggested? The tribunal also notes evidence that the goods were in marked packages in the sense that the quality of the packaging was fair bearing evidence of knife marks and resealing, which suggested previous Customs inspections.

111 The tribunal therefore turns in more detail to the evidence of officer Morgan-Davies to see if it assists. The officer, who gave oral evidence to the tribunal, was allocated responsibility for these deals in May 2008, so her evidence was of her later investigation. The tribunal records that it was satisfied that her evidence to the tribunal was given conscientiously and with an endeavour to be cooperative and to answer all questions put. It therefore regards her evidence as reliable, and the opinions she formed on that evidence as deserving weight. But equally it accepts the matters on which she commented under cross-examination, including her withdrawal of the suggestion that there was any evidence that these goods had been subject to full circularity between the first of these deals and the second (in other words, that they were the same goods).

112 In her evidence, the officer herself noted other problems with these transactions. For example, the records that purported to show "export" of the first of the sets of goods included a travel record of a truck carrying vegetables not computer parts.

113 The officer gave evidence that Grandbyte had been an active buffer trader in the relevant period, but that this was the only deal undertaken with the Appellant. The business relationship between BCGE and Grandbyte was therefore new. Grandbyte had, however, conducted many deals with Sceptre. Further, Grandbyte had been sent direct information about tax losses in its chains by HMRC in July 2006 and again on 7 11 2006. In her second witness statement the officer dealt specifically with the argument that there were errors in the alleged supply chains. her further evidence, based on the deal logs of Grandbyte, was that during the relevant period it only bought from Tradex, and that Tradex only bought from A-Z.

114 What did the Appellant know of Grandbyte and Tradex? This again was investigated by officer Morgan-Davies and is detailed in her evidence. She detailed what was received by the Appellant and what was not received in carrying out due diligence tests about Grandbyte.. The latter included any searches in official records

or websites. That is consistent with the general evidence given by the Appellant to the tribunal. Her opinion was that the Appellant "merely went through the motions" for due diligence tests. No evidence was offered that the Appellant had any dealings or other trading connections of any kind with Tradex. It is a minor point, but this is confirmed to some extent by the fact that there is no recorded check by the Appellant about any company called Tradex with the HMRC office at Redhill, although the Appellant made a long series of checks on many other traders. The tribunal returns to the issue of how BCGE came to trade with Grandbyte below.

115 The tribunal therefore approaches these deals on the basis that they were not part of any pattern of trade between Grandbyte and BCGE and that the Appellant had no knowledge of Tradex.

116 There are therefore a series of unknowns and of other problems with this evidence, but no specific evidence of circularity, or of the Appellant dealing otherwise than directly with Grandbyte in transactions with no relevant trading history between the two traders. So the tribunal must be satisfied on the evidence produced by HMRC that both deals are linked with the contra trader.

117 What has been established? Had the matter stopped there, the tribunal would have had difficulty in accepting the HMRC evidence. In the view of the tribunal, the critical evidence is that of officer Morgan-Davies in her second witness statement. The tribunal, having heard her oral evidence, accepts this evidence. This is that during the two months directly relevant here Tradex and Grandbyte were acting purely as buffers for onward sales from A-Z. Grandbyte bought only from Tradex, and Tradex bought only from A-Z. That, rather than the evidence explored above, establishes in the view of the tribunal and to the necessary level of proof that any goods sold by Grandbyte to the BCGE were linked to A-Z even if it could not be shown (and the tribunal is not fully satisfied that it was shown) that the goods were derived in the precise way contended for by Mr Margolin.

118 The conclusion of the tribunal, after considerable doubt, is that the link to A-Z is made good by HMRC.

119 So the tribunal now turns to the final critical question.

The knowledge of the appellant

120 The tribunal has approached its analysis of these appeals by considering separately whether the Appellant was connected to fraudulent activities before considering the actual or constructive knowledge of the appellant of any fraud. It did so because at the conclusion of the full hearing the tribunal took the provisional view that while it was satisfied about the links in some of the transactions, it was not at that stage satisfied about all of the transactions. It also took the view that any attempt to look at the position of the Appellant should, as both sides submitted to it, be a matter to be approached broadly and not by reference to individual deals or sets of deals considered in isolation. It therefore examined the evidence before it again before reaching the findings and conclusions in this decision.

121 The conclusion above is that not all those transactions said by HMRC to link the Appellant with fraud do in fact do so. At the same time, the tribunal has in mind the evidence it accepted that HMRC had challenged only some of the Appellant's trading activities in the relevant area during the periods in question. It must also consider that the Appellant was engaged in other activities within the scope of VAT but outside the scope of even the widest-ranging MTIC enquiry (such as the provision of services and the failed bicycle business).

122 The other conclusion with which the tribunal must start when considering the Appellant's actual or constructive knowledge is that this must be judged by his own actions and knowledge alone. There was no corporate envelope or other person involved. And at no stage could it be said that the appellant's business activities as a whole were such that one person could not deal with them properly. His approach remained throughout that of the small scale opportunistic entrepreneur.

123 The final starting point is the view the tribunal took of the evidence given by the Appellant. As noted above, he was subject to extended and at times heavy cross-examination over many hours. Indeed, the tribunal anticipates that the Appellant will have spent considerably more time in 2011 considering these deals than he did in 2006. If in that context there were times when the Appellant was clearly feeling the strain of the examination and was at times unable to give precise, consistent, repeated answers to questions, then the tribunal is not surprised. Nor does it read much into such inconsistencies. Indeed, it would have been more questioning of his credibility if his evidence appeared to be so consistent that it seemed scripted. The tribunal repeats that it did not form any impression that the Appellant was seeking consistently to hide things from the tribunal. Rather, there were times when the Appellant's evidence and his reactions suggested that he himself was only realising for the first time how others might have been behaving in 2005 and 2006 and how others might have seen his actions then. Its overall assessment of the Appellant's evidence is therefore that it is to be approached as genuine, spontaneous rather than prepared, and generally credible if not always reliable. But where, as with the evidence of officer Wride, there was a contemporary note against which someone could give evidence about a meeting or incident, and that evidence conflicted with the recollections of the Appellant, that evidence was preferred to the evidence of the Appellant about the event.

124 What did the Appellant know about MTIC fraud by the time he undertook the deals in question? There are two important aspects to this. The first is the non-specific evidence that he was or reasonably should have been aware of fraud in the market generally. The second is the specific evidence about the Appellant's knowledge about fraud in the chains of transactions in which he was engaged.

125 In considering the evidence of this, the tribunal must return again to what it termed at the start of this decision as a clash of cultures: the paper-based and instruction-focussed approach of officers and the intuitive approach adopted by the appellant. Their approach was: where is the documentary evidence? His approach was: why did you not come to see me? His answer was: I did not need the documents. Their answer was: it was not within our authority or instructions. And implicitly if not explicitly more than one officer appeared in the view of the tribunal to have acted as if

the absence of documents meant the absence of evidence. That effectively discounted the personal evidence of the Appellant. Rightly or wrongly, he drew adverse conclusions from this. As a result, tempers frayed. And the tribunal has to record that bad feeling between the Appellant and the official side was evident in the tribunal room on more than one occasion.

126 The relations between the Appellant and officers formed the subject of a considerable part of the hearing by the tribunal. The evidence starts some time before the events now the focus of these appeals. Officer Wride gave evidence of a meeting in November 2005. There is contemporary evidence of that visit in the form of her report. The tribunal accepts her evidence, including her report, as an accurate summary of what occurred on that day. She did not attempt to over-embroider her limited evidence or to defend the report for what it did not contain (and what the meeting did or did not cover) as against its actual content. But it did alert - or should have alerted - the Appellant to dangers of trading in certain high value goods. And it is clear from her evidence that issues about MTIC trading were raised with the Appellant at that time.

127 The tribunal also heard evidence, in particular, from officers Phillips and Morgan-Davies about the follow-up by HMRC of the concerns about the Appellant, both with him and otherwise. The tribunal must record that it was little assisted by the evidence of officer Phillips. He was in particular someone who wanted to see documents that the Appellant, for whatever reason, did not have. But at the same time he felt unable because of his instructions (and a finding that he was acting within his instructions as he saw them is not a criticism of him) to follow up approaches that the Appellant considered appropriate, such as visits to his office or consideration of matters not immediately within the focus of the officer's enquiries. The tribunal has already indicated, however, that it has been helped specifically by the evidence of officer Morgan-Davies and it notes her evidence on this issue also of the knowledge of the Appellant about MTIC fraud generally.

128 But it is clear in any event that the Appellant was fully aware of the issue of and contents of VAT Notice 726 once it had been drawn to his attention in January 2006. Indeed, the tribunal specifically noted his evidence that although he was given a copy of it directly he also went out to get himself another copy to see if it was the same as the copy he had been sent. That suspicion itself suggests that the Appellant was taking the detailed content of the Notice seriously. The text of VAT 726 was referred to on a number of occasions by both parties. A full copy was put in the skeleton argument for the Respondents. The tribunal does not propose copying any part of it here. It is sufficient to note that the Notice applies to "specified goods" as explained above, and that it warns of the power to impose joint and several liability for VAT on wholesale traders. It offers suggested safeguards and protection for such traders. It is of course a matter for individual traders to what extent they took that advice, but the tribunal is satisfied that the Appellant had had that advice and was aware why it was given and indeed why Parliament had agreed to impose joint and several liability on transactions dealing with specified goods.

129 From that and from the Appellant's own evidence, the tribunal finds that it is satisfied that the Appellant had general knowledge of fraud in the markets in which he was trading. That should have put him on alert when dealing with individual transactions. The evidence of his more general trading activities at that time suggests that it did. He did not trade only in the suspect areas. Indeed both he and his counsel put weight on the fact that some of his transactions were outside the scope of UK VAT – and so outside the scope of Notice 726 and joint and several liability. The tribunal finds that a reason for this was so that the Appellant could reduce the risk of being caught by fraud. The tribunal finds that that itself is evidence of the Appellant's awareness of the risks he would confront if he had dealings in relevant products.

130 Turning to those transactions in which the Appellant did trade within the United Kingdom, the tribunal accepts that the Appellant did not need to keep the sort of records that others, including in particular corporate entities with multiple shareholders, or those with outside active investors, feel obliged to keep either because the law formally required it or because the involvement of a number of people in a business required it in practice.

131 The tribunal finds that the Appellant's approach was to rely on those with whom, for whatever reasons, he felt comfortable doing business. He restricted those with whom he traded as both suppliers and as customers. He inspected some premises and he met some individuals and, in his own evidence engaged in "general fact-finding" and "general due diligence". But this was without a system or a specific set of points to be satisfied. In particular, there was no systematic attempt to engage in credit checks or checks on the companies' register or similar use of official records to look beyond or behind what could be deduced from visits, inspections or conversations. Even the Redhill inspections, of which there was evidence, were not entirely systematic. For example, the Redhill check on Tradius in connection with the onward sale on 11 and 12 09 2006 was received on 13 09 2006, after the goods had been released and after payment was made by the appellant to Maystar, but before payment had been received from Tradius. That left the appellant exposed to risk as he neither had the money nor the goods in his control for a period.

132 That, the tribunal finds, was a flawed approach, particularly when it came to dealing with those he thought he knew well. It is common ground that the Appellant worked closely with individuals who traded with him through the envelope of Sceptre Services Ltd. Both Mr Rayer and Mr Evans were people he plainly thought he knew very well, and whom he was prepared to trust. They were his neighbours where his office was based and shared business facilities with him and. They even witnessed and signed things for him that were an integral part of his business, so risking the leak of commercially valuable information. The tribunal has noted this being shown by specific evidence in its analysis set out above. But at the same time the tribunal is satisfied that Sceptre Services Ltd was engaged in transactions in which it – or more accurately Mr Rayer and Mr Evans – should have known there was fraud. That was the finding of the First-tier Tribunal that decided the appeal by that company against the decisions of HMRC withholding repayments of VAT from it.

133 This tribunal does not merely follow that decision. But it does not ignore it. It takes that as support for the conclusions that this tribunal has drawn from the evidence put before it – though clearly some of that evidence is the same evidence as that shown to the tribunal dealing with the Sceptre appeal. One striking aspect of that evidence, as already noted, is the unusual way in which Sceptre intertraded with another company the appellant knew well, Coracle. The tribunal puts weight on the HMRC evidence that shows that sometimes Sceptre acquired goods and sold them to Coracle, and at other times it was Coracle that acquired the goods and sold them to Sceptre. On each occasion when that happened in 2006 it was by way of deals following the low-margin, quick-moving pattern that alerted HMRC to the possibility of fraud. In the one deal in question here Sceptre had purchased from Coracle in just that way. To that unusual pattern of activity must be added the clear evidence that Coracle lent Sceptre money to be used as working capital and the equally clear evidence of other close links between those involved in the two companies.

134 The tribunal is persuaded by those aspects of the evidence in particular that the pattern of trade between Coracle and Sceptre was not an ordinary commercial pattern. Rather it was a pattern that strongly suggested that there was knowledge that there was a ready profit in these deals in a way that also clearly suggests knowledge of fraud elsewhere in the chains of transactions. It can see no other reasonable explanation for the way those two businesses conducted their activities. That view is not based on, but is strengthened by, the decisions of the tribunals dealing with the appeals by those two companies.

135 Did the appellant know this? The tribunal is not fully persuaded that he did. Nor is it clear that he was aware just how closely Coracle and Sceptre had been working. For example, it is not clear that he was aware of the loan of working capital by one to the other. He himself raised his own additional working capital by other informal means. Another explanation for the evidence is that it might suggest that for all the help he gave those other companies and those involved in them, their repayment was to use him as a broker without telling him. On the Appellant's own evidence, it does not appear to have occurred to him that the risks he faced included the risk of trading with Sceptre and Coracle.

136 Whether or not that is so, the tribunal finds it unlikely that discussions did not take place between the Appellant and those involved in Sceptre in particular, but also with Coracle, about the problems of fraud, the dangers of trading in this area, and the risks against which they needed to protect themselves. The evidence, in passing, of the involvement of the Sceptre personnel in aspects of the day-to-day running of the BCGE business is persuasive evidence that each knew what the other was doing, and that the Appellant did not seem unduly concerned to protect any confidential information he had about deals from leaking informally to Sceptre. In that context, the tribunal finds that it was probable that the Appellant discussed the risks of the market with Sceptre personnel if not Coracle personnel. That finding is strengthened by the evidence that the Appellant in person had previously acted as a consultant to Sceptre about trades in this market. Why would they not then have discussed the risks?

137 In that context, it should, the tribunal finds, have occurred to the Appellant that he was trading with companies that were or might be taking excessive risks of being involved with fraudulent trades. And he should have taken precautions accordingly. If it did occur to him, then that was not his evidence to the tribunal. Nor is there evidence of any precautions being taken beyond token enquiries and reports to Redhill that, from evidence of timing noted above, the tribunal finds were not serious checks undertaken by the Appellant but rather checks he felt he ought to conduct to meet HMRC enquiries. Had he made those enquiries, then he would have had good reason, in the tribunal's view, to question why Sceptre and Coracle were conducting their business in what appeared to be a non-commercial way. But he did not.

138 The tribunal was left to conclude that the Appellant thought he knew them too well for that, but in taking that view he was wrong. They were "in the know" if not in the fraud. Further, the tribunal finds that if he had proceeded as he should have done he would probably have realised he was wrong. The test to be applied at this stage is the test in *Mobilx* at para [68]:

> "the question then arises as to whether, on the application of the correct test, the true and only reasonable conclusion is that the trader knew or should have known that his transactions were connected with fraud or that there was no reasonable possibility other than that they were connected with fraud."

Applying that test, the tribunal finds no actual knowledge but finds the test satisfied to the required standard of proof that the Appellant should have known not only of fraud in the market but fraud in the deal through Sceptre and Coracle.

139 The tribunal therefore finds that HMRC has established its case in full with regard to that part of the appeal.

140 The tribunal does not need to consider further the Maystar deals, so it must turn to the contra-deals involving Grandbyte. In doing so, it takes expressly into account that so far HMRC has established only that the Appellant did not succeed in his appeal with regard to one deal, and that was a deal conducted in somewhat unusual circumstances with other businesses with which the Appellant had particularly close connections.

141 To satisfy the tribunal about the Grandbyte deals, it must be shown that the Appellant knew or should have known about fraud either in the dirty chain or on the part of the contra-trader. The key to this is what the Appellant knew or should have known about Grandbyte. The tribunal is satisfied that the Appellant had no dealings with Tradex. But it has also accepted the evidence from officer Morgan-Davies that Tradex was a buffer and that it was, and was only, a go-between between Grandbyte and A-Z. The absence of any link between BCGE and Tradex is entirely consistent with that. But it also means that in trading with Grandbyte the Appellant was effectively trading with A-Z even if he did not know it.

142 The Appellant's evidence was that he had come to deal with Grandbyte through contacts made before the relevant period with a Mr Solanki. This was

therefore not a new contact. It was a case where, to use the Appellant's own phrase in evidence, he had a "good gut feeling" that this was a good contact to pursue. However, it was clear both from the documentary evidence and the cross-examination that the Appellant had done little to pursue details of his actual supplier, Grandbyte. On this, as already noted, the tribunal relies on the evidence of officer Morgan-Davies. There was no evidence that the Appellant has sought to carry out any of the usual checks with public agencies about Grandbyte such as a check in the Companies' Register or with credit agencies or other commercial analysts. While there may have been some argument about how far the Appellant needed to carry out all these checks with neighbours such as Sceptre, the context of this part of the appeal is different. He might have known Mr Solanki, but he did not know the company nor – on his own evidence – was he really aware who else was involved in the company. Nor, as has been clearly established, was there any previous trading history with Grandbyte. Nor, separately, was Grandbyte ever in the market save as a buffer.

143 Further, the Appellant seemed to take something of a cavalier approach to the due diligence documents he did collect and keep about Grandbyte. The letter of introduction in the usual form seen in MTIC cases from this period was produced and kept, according to the Appellant's evidence because: "*Irrelevant as it may seem*, it's part of the due diligence I'm expected to keep." The tribunal notes in particular the words it has put in italics. Why were these checks irrelevant? Why did he only keep this documentation because he wanted (to quote the immediately preceding evidence) avoid having his knuckles rapped by HMRC? Why would he be worried about having his knuckles rapped? Nonetheless, the tribunal was asked to find that the Appellant had given credible testimony about why he did and did not conduct any enquiries into this supplier.

144 The tribunal accepts the evidence in the factual sense, but does not find this to be an adequate explanation of the reason why the Appellant considered that he had conducted these trades in an efficient and effective manner. The commercial context is again important. The Appellant was trading in his own name as BCGE. The whole risk was entirely his. There was no corporate envelope or other device to absorb it. In the first of the two deals, BCG acquired £40,000 worth of stock (500 units at £800), and expected to show a margin of £750. But that relied not only on the sale going ahead without a hitch but also on the Appellant receiving back the VAT he paid on the stock to Grandbyte, but did not receive back from Tradius. So there was a double commercial risk: that of the sale going bad in some way (such as the goods incurring an uninsured risk) and the VAT not being recovered (in which case the Appellant would lose considerably more than the margin he made on the transactions). The tribunal finds he was aware of both those risks. It also finds that his conduct in terms of the checks undertaken and the evidence he gave the tribunal fail to explain why, as an experienced entrepreneur, the Appellant took both these risks without protecting himself further against them.

145 It again applies the test set out above. On the balance of probabilities, the tribunal finds in this case that the true and only reasonable explanation of the Appellant's conduct of these deals was that he had reason to believe or he persuaded himself that there was no substantial risk or a hitch or of default. How did he come to

that view? One explanation is that he was aware of unrecorded information that did give him reason to believe that the transaction would proceed without problems. Another is that he had some knowledge and did not wish to enquire further. In other words either the deals were not at arms length, or the Appellant suppressed his doubts. The tribunal does not accept that without some additional unexplained element the Appellant conducted his involvement in a way that suggests an arms length transaction in conditions such that there was probably neither knowledge of connection with fraud or factors such that the Appellant should have been aware of fraud.

146 The Appellant's appeal therefore fails on this.

Summary

147 In summary:

(a) The Appellant's appeal against the Sceptre deal fails;

(b) The Appellant's appeal against the Maystar deals succeeds;

(c) The Appellant's appeal against the Grandbyte deals fails.

148 As this is a result in which both parties succeed to some extent, the tribunal makes no further order in respect of these appeals at this stage. The parties may apply to the tribunal if there are any further matters, such as costs, to be decided.

. **DR DAVID WILLIAMS**

TRIBUNAL JUDGE

RELEASE DATE: 12 June 2012