[2013] UKUT 0432 (TCC)
Appeal number: FTC/89/2011

VAT – missing trader intra-community (MTIC) fraud – extent of challenge by appellant to HMRC's case before the First-tier Tribunal ("FTT") – whether certain evidence was properly admitted by the FTT – whether there was sufficient evidence to support the FTT's finding that the appellant should have known that its transactions were connected to fraudulent evasion of VAT – held, there was – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

EYEDIAL LIMITED — **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS — **Respondents**

TRIBUNAL: JUDGE ROGER BERNER
JUDGE CHARLES HELLIER

Sitting in public at Darlington Magistrates Court, Parkgate, Darlington, County Durham on 16 – 18 January 2013 and at Durham Civil and Family Justice Centre, Old Elvet, Durham, County Durham on 8 – 12 April 2013 and following final submissions on behalf of the Appellant delivered on 10 May 2013

Miss Deborah Field, director of Eyedial Limited, for the Appellant

For the Darlington hearing: Andrew Macnab,
For the Durham hearing: Vinesh Mandalia,
in each case instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

© CROWN COPYRIGHT 2013

DECISION

1. This is the appeal of the Appellant, Eyedial Limited ("Eyedial") from a decision of the First-tier Tribunal ("FTT") released on 13 January 2011. The FTT dismissed Eyedial's appeal against the decision of the Respondents ("HMRC") to refuse to pay to Eyedial input tax of £670,075, which Eyedial had incurred in its VAT quarterly accounting period March to May 2006 (period 05/06).

2. The appeal is brought with permission of the President, Warren J, who, following a hearing on 28 September 2011, granted permission on a limited number of grounds only. The President gave his reasons in a decision of some length, in which he discussed the submissions made by Miss Field, Eyedial's director, in some detail, and explained why permission to appeal had been granted in respect of some matters, but not others.

3. We mention the process by which permission to appeal was obtained, as it sets the framework for this appeal. Not unnaturally, as effectively a self-represented appellant, Miss Field on occasion stepped outside the confines of the permissions that had been given. We do not consider it would be right in the circumstances to apply too rigid a procedural approach to this case, and we have therefore considered all Miss Field's submissions.

4. On the other hand, we believe that Miss Field to some extent failed to appreciate the distinction between the proceedings on application for permission to appeal, and these proceedings to consider the appeal itself. The purpose of this Tribunal is to determine the appeal and not, as appears to have been Miss Field's understanding from her notes at the conclusion of the hearing before Warren J, to strike out HMRC's case on the basis of Miss Field having satisfied Warren J that permission to appeal ought to be granted in certain respects.

5. The same introductory comment needs to be made in respect of Miss Field's reliance on comments made by tribunal judges, and indeed by members of the FTT's administrative staff, in the course of the case management of the FTT proceedings. Comments made at that stage in the proceedings are not material to the question whether the FTT's decision discloses an error of law, which is the question before this Tribunal. This Tribunal must consider the FTT's decision and, where relevant, the conduct of the hearing before the FTT. Other matters, including complaints that Miss Field has made, and we understand intends to make, against HMRC officers and those advising HMRC in this case, are not material to our determination.

The appeal to the FTT

6. The decision of HMRC to deny Eyedial payment of the input tax in question was made on the basis that Eyedial's trades were connected to what has become known as "missing trader intra-community", or MTIC, fraud. Eyedial's claim for input tax arose from seven deals in which Eyedial acted, in the terminology commonly employed, as "broker" in the purchase and sale of large numbers of mobile phones.

In those seven deals, Eyedial bought goods from VAT registered traders in the UK and sold them to VAT registered traders in other EU member states. Three of the deals (described in the proceedings as deals 51, 62 and 63) formed part of "straight" or "dirty" chains alleged by HMRC to lead directly back to defaulters; the remaining four deals (deals 65, 66, 67 and 68) were said to trace back through a "contra trader" and thereafter, via offsets of input tax against output tax, to defaulters.

7. The FTT dismissed Eyedial's appeal. It concluded, briefly stated, that the seven deals under appeal were "connected with the fraudulent evasion of VAT" and that Eyedial, through its director Miss Field, should have known that Eyedial's transactions were connected with those VAT frauds. It did not find that Eyedial knew of the connection; only that it should have known.

Grounds of appeal

8. The grounds on which this appeal is brought were refined by the decision of Warren J in granting permission to appeal. Because the proceedings before us were conducted within the framework of that permission, and addressed the separate matters permitted by Warren J to be raised, we set out in full the scope of the permission he granted:

> "… permission to appeal IS GRANTED on the ground that the Tribunal [the FTT] was in error as a matter of law in concluding that Eyedial knew or ought to have known that it was involved in the fraudulent evasion of VAT but Eyedial shall, in the pursuit of such appeal, only be permitted:
>
> > a. To demonstrate that Miss Field did challenge HMRC's case that there had in fact been a loss of VAT attributable to fraud in the three chains which led back to defaulters and in the related chains where Eyedial's purchases were from a contra-trader and to demonstrate that her cross-examination of the HMRC officers who attended to give oral evidence about the transactions was not limited to satisfying herself that there remained an outstanding VAT debt.
> >
> > b. To argue, if successful on one or both of those points, that [there] (sic) the evidence was insufficient to establish a loss of VAT or that the matter should be remitted to the Tribunal to make a finding whether or not there was such a loss.
> >
> > c. To demonstrate that it was not 'effectively conceded' that there was fraud in every one of the relevant chains.
> >
> > d. To demonstrate that there was no documentary evidence of payments to defaulters.
> >
> > e. To establish precisely which documents emanating from Miss Parikh were properly before the Tribunal.
> >
> > f. To argue that there was no, or no sufficient, evidence to establish that the missing trader had not in fact itself received

the tax but had arranged for the price of the goods to be paid to a third party.

g. To argue that there was no, or no sufficient, evidence to establish that any of the traders in each chain had entered into the transactions for no purpose other than to commit fraud and that the conclusion that there was fraud was not one which the Tribunal could properly have reached on the evidence before it.

h. To demonstrate that the notes referred to in [27], [28] and [29] of the Decision were challenged by Eyedial at the hearing.

i. To demonstrate that it was disputed at the hearing that, at the meeting on 24 March 2005, Mr Armstrong explained the risks of the wholesale trade in mobile phones and HMRC's policy in relation to imposing joint and several liability.

j. To identify the evidence before the tribunal to establish that Miss Field had verified her belief that the consignments of mobile phones were insured by the freight forwarders not only while they were at their premises but while they were in transit.

k. To argue that, by reason of all or any of the above, the evidence was insufficient to establish that Eyedial knew or ought to have known of the fraudulent nature of the seven chains of transactions identified by the Tribunal."

9. It is convenient at this stage also to record certain matters on which permission to appeal was not granted. We shall return to certain of these when considering the submissions of Miss Field under certain of the headings described above, but we think it is useful to set the scene by assembling all these matters in one place:

(1) Before Warren J Miss Field had argued that two of HMRC's witnesses, Mr Armstrong and Miss Hays, had lied on oath, and Miss Field disputed the evidence of Mr Armstrong concerning his having gone "off the record" and what he had said to Miss Field about being "safe" if she followed his advice. The FTT made findings of fact in this respect at [46] of its Decision. In brief, the FTT found that any reassurance which Miss Field felt she had been given by Mr Armstrong was inadvertent on his part, and that Miss Field had been too willing to believe that Mr Armstrong was "on her side" than to pay attention to what he told her about the risks of the trade and the warning signs she should heed.

Warren J concluded that these were findings of fact that the FTT was entitled to make. He was not satisfied that an appeal in relation to these findings had any real prospect of success. Nor did he consider that Eyedial could reasonably establish that Miss Field was told that she could ignore letters from HMRC warning of the risks inherent in the trade.

(2) Complaints were raised by Miss Field that there were discrepancies between the manuscript notes of meetings with Mr Armstrong and others

and the typed-up notes subsequently prepared. Warren J found that to the extent these were the subject of cross-examination or submission, the FTT would have had material on which it was entitled to make its findings; and to the extent that the alleged discrepancies were not brought to the attention of the FTT it would not be right to allow them to be raised in order to attack the overall assessment of the evidence by the FTT.

(3) Miss Field complained that the notes of the meeting on 24 March 2005 on which the FTT relied were not Mr Armstrong's own notes but were prepared by others attending. The FTT made a finding, in reliance on the meeting notes, that Mr Armstrong had said that there needed to be inspection of mobile phones bought and sold by Eyedial, that records of their IMEI numbers should be kept, and that any request to make a third party payment could itself be an indication of fraud. The maker of the notes was not called as a witness and there was no opportunity for cross-examination of that individual. But Warren J rejected this as a ground of appeal, on the basis that Mr Armstrong had himself adopted the notes. If Miss Field had disputed the notes before the FTT, then the FTT's finding of fact in this respect could not be disturbed. If, on the other hand, Miss Field had not disputed or cross-examined Mr Armstrong about it, it was, found Warren J, far too late to make such a challenge on appeal.

(4) Miss Field sought to challenge the FTT's reasoning in [51] to [58] of the Decision. In those paragraphs the FTT described its findings in relation to the conduct of Miss Field in relation to the trades and the nature of the trades themselves. These challenges were not allowed as a separate ground of appeal, Warren J remarking that he did not consider that Eyedial had any real prospect of success in overturning the reasoning of the FTT in these respects. However, Warren J also acknowledged that this would be subject to the consequences of a successful appeal by Eyedial on the matters for which permission to appeal was granted. In particular, permission was granted in relation to the FTT's conclusion (at [54]) that there was no evidence that Miss Field had verified her belief that the consignments of mobile phones were insured by the freight forwarders not only while they were at their premises, but while they were in transit (see para j above).

The role of the Upper Tribunal

10. There was no dispute about the appellate role of this Tribunal. An appeal is on a point of law only: see s 11, Tribunals, Courts and Enforcement Act 2007. There was no dispute on the underlying law, or to the decision of the FTT in that respect. It is not disputed that the FTT identified the correct legal test. What is in dispute is whether, as Eyedial submits, the FTT made findings of fact that were not open to it, and thus made an error of law. In that connection the dispute also covers procedural issues as to the admission of evidence, and the extent of Eyedial's challenge to HMRC's case.

11. The grounds on which permission to appeal have been granted are to enable Eyedial to argue that, to the extent so permitted, the FTT reached its decision either on the basis of no evidence or on a view of the facts that no reasonable tribunal, acting judicially and having properly instructed itself as to the law, could have reached. That is the familiar test derived from *Edwards v Bairstow* [1956] AC 15 (see per Viscount Simonds at p 29 and per Lord Radcliffe at p 36). The position is well-summarised in *Georgiou and another (trading as Marios Chippery) v Customs and Excise Commissioners* [1996] STC 463, where at p 476 Evans LJ said:

> "There is a well-recognised need for caution in permitting challenges to findings of fact on the ground that they raise this kind of question of law. That is well seen in arbitration cases and in many others. It is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure to the High Court to be misused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but, was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled.
>
> It follows, in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and, fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong. A failure to appreciate what is the correct approach accounts for much of the time and expense that was occasioned by this appeal to the High Court."

12. The factors identified in *Georgiou* guided the granting of the permission to appeal; and they likewise inform our approach to the submissions on this appeal.

The applicable law

13. Although there was no dispute on the applicable law, we record by way of introduction the constituent elements of the case that HMRC, on whom it was recognised the legal burden of proof lay, would need to have proved to the FTT on the standard of proof of the balance of probabilities.

14. As *Mobilx Ltd (in administration) v Revenue and Customs Commissioners* [2010] STC 1436 explains, as a general matter, the right to deduct input tax is integral to the

system of VAT. It is designed to ensure fiscal neutrality of the system by ensuring that the charge to VAT is limited to the value added at each stage of the supply. In principle, therefore, where the objective criteria for deduction are met, the right to deduct cannot be limited.

5 15. By progressive decisions of the ECJ, the Court has developed the principle that the objective criteria for deduction of input tax are not met where tax is evaded, either by the taxable person himself, or by those who knew or should have known by their purchase that they were taking part in a transaction connected with fraudulent evasion of VAT. The leading authority is *Axel Kittel v Belgium; Belgium v Recolta Recycling*
10 *SPRL* (Joined cases C-439/04 and C-440/04) [2008] STC 2123, where the ECJ said (at paras 55-59):

> "… It is a matter for the national court to refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent ends (see *Fini H* [1](para 34)).
>
> 15 56. In the same way, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.
>
> 20 57. That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.
>
> 58. In addition, such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them.
>
> 59. Therefore, it is for the referring court to refuse entitlement to the
> 25 right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and to do so even where the transaction in question meets the objective criteria which form the basis of the
> 30 concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity'."

16. There was accordingly no dispute as to the issues requiring to be proved by HMRC if Eyedial's right to deduct, and consequently recover, its input tax on the transactions in question was to be denied:

35 (1) Was there a VAT loss?

(2) If so, did this loss result from a fraudulent evasion?

(3) If there was a fraudulent evasion, were Eyedial's relevant transactions connected with that evasion?

(4) If such a connection was established, did Eyedial know or should it
40 have known that its purchases were connected with a fraudulent evasion of VAT?

---

[1] *I/S Fini H v Skatteministeriet* (Case C-32/03) [2005] STC 903, [2005] ECR I-1599

We emphasise, because some of Miss Field's submissions suggested a different understanding of the tests: (i) in relation to the test in (2) that the question is whether someone fraudulently evaded VAT, not whether Eyedial itself was fraudulent, (ii) that the requisite connection can be proved to exist even if Eyedial did not deal with or know the fraudster - connection through a chain of transactions or through some arrangement can be enough, and (iii) that the test in (4) is an objective test which is not determined by what Eyedial, viewed subjectively, actually knew or by assurances given to it by other persons.

Eyedial's appeal

17. We heard argument from Miss Field on behalf of Eyedial and from HMRC on each of the matters identified in Warren J's permission to appeal. We shall address each one individually, but we start out of sequence with an issue that permeated much of Miss Field's submissions, and which impinges on a number of other matters. It is at point e of Warren J's list and is an issue about which Miss Field was particularly concerned, and which forms a substantial element of her complaint over the conduct by HMRC of the proceedings before the FTT.

What documents were properly before the FTT (point e)?

18. The dispute on what documents were admitted into evidence principally concerns the evidence of Officer Smita Parikh, for HMRC. Ms Parikh's evidence related to the analysis of data relevant to accounts maintained by a number of persons at First Curacao International Bank ("FCIB"), and the production of flowcharts exhibited to Ms Parikh's witness statement dated 10 March 2009 as exhibit SP2.

19. The starting point of the analysis was the request made to Ms Parikh by Officer Armstrong for Ms Parikh to access and analyse the FCIB data in relation to the transaction chains for each of Eyedial's deals. For each deal a spreadsheet had been prepared showing the tracing exercise already undertaken in respect of trades in mobile phones culminating in Eyedial's purchase and export sale. Ms Parikh accessed the FCIB customer accounts and traced the money movements by reference to the invoice dates of Eyedial's transactions. The flowcharts were produced from the information extracted from this data.

20. Ms Parikh's witness statement, dated 10 March 2009, described the tracing process in the following way:

> "15. If I could match the money to the amount of an invoice on the date of a transaction, I inferred that it related to that transaction generally, all receipts from EU or Third Country customers will match the value and date shown on the invoices concerned. This gives a base money movement to follow. The normal stated procedure in back-to-back MTIC type transactions is that the money flows down the transaction chain on the day of invoice in order to prompt the release of goods up the chain and to allow the Broker to ship the goods. This is because traders further down the transaction chain do not have the funds to buy the goods until they are paid for those goods by their

> customer. Once I have positively identified one money movement in a chain, namely the receipt by Eyedial of the price I have allocated the next consecutive payment of a similar amount or amounts as relating to the payment for the purchase of those goods. Often the full amount of a UK purchase (including the VAT) does not immediately flow down the chain, as the EU/Third Country customer is paying exclusive of VAT, so the UK supplier does not receive sufficient funds to pay for its purchase (including VAT) and so on.
>
> 16. Without the transaction narrative contained in the E-banking system (which HMRC have not obtained at the date of this statement, but expect to receive in the near future), I cannot say with complete certainty that the money I have allocated to each transaction does relate to that transaction. I can, however, say with complete certainty that the money I have allocated to each transaction involving Eyedial does relate to those transactions. There are approximately 22,000 FCIB accounts for 9,600 different customers and if I had incorrectly allocated a payment the chances of it still producing circularity or flowing in the same way for every chain I examined would be very remote indeed. The transaction narratives had been requested from the Dutch fiscal prosecutor and from the French examining magistrate and it is expected that they will comply with this request for disclosure shortly."

21. In July 2010, while preparing HMRC's skeleton opening for the hearing before the FTT, HMRC's counsel, Mr Macnab, checked the exhibit SP2 flowcharts against FCIB bank information provided by HMRC and against the documentary evidence relating to the chains of transactions exhibited to the statements of HMRC's witnesses. As a result it appeared to counsel that there were some discrepancies in exhibit SP2 and in the narrative description of the flowcharts in Ms Parikh's statement in relation to deal 51 and deals 65 to 68; the discrepancies concerned dates and amounts of payments. Counsel therefore asked HMRC to raise these matters with Ms Parikh.

22. As a result, Ms Parikh prepared amended versions of the flowcharts in exhibit SP2. For the hearing the original version of exhibit SP2 was included in the bundles prepared by HMRC at Vol 10, tab 2. Colour versions of the amended versions were included in Vol 2 (referred to as the "Core Bundle"), at tab 10, pages 246 to 297. Unlike the original exhibit SP2, however, the flowcharts at Core Bundle, tab 10 were accompanied by pages from the FCIB bank records held by HMRC, from which the flowcharts had been derived. Those pages, which comprised transaction enquiry reports setting out the payments into and out of the FCIB accounts of the relevant companies (effectively copies of the bank statements for each trader's FCIB account), had not been exhibited to Ms Parikh's statement, nor had they been served as part of HMRC's evidence prior to being included in the trial bundle. Those transaction enquiry reports had not therefore been admitted into evidence prior to the hearing.

23. On the first day of the hearing before the FTT (9 August 2010), in his opening submissions, Mr Macnab, appearing for HMRC, took the tribunal to Vol 10 and the

exhibit SP2, where flowcharts appeared in black and white, and in some respects were indecipherable. He also referred them to the Core Bundle, and to tab 10, which comprised the colour flowcharts that appeared from page 246 in that bundle, as well as the supporting transaction enquiry reports for each of the flowcharts, representing the FCIB banking movements.

24. In the course of an exchange between Mr Macnab and Judge Bishopp, it was noted that the page at p 278 in the Core Bundle was a duplication of the page at p 246, dealing with deal 51, and not – as it should have been – a colour version of the flowchart dealing with deals 65 to 68. Mr Macnab then explains to the FTT that Ms Parikh had re-considered the figures and the documents and had concluded that a rather simpler set of transactions had taken place. Judge Bishopp at that stage decides that the matter of the new flowchart should be left until Ms Parikh gives evidence.

25. Officer Parikh gave evidence to the FTT on day 3 (11 August 2010). In examination in chief Mr Macnab took Ms Parikh to her exhibit SP2 and asked her if there were any changes to be made to the flowcharts. Ms Parikh having said there were, she was taken to the Core Bundle, and the colour flowcharts and transaction enquiry reports shown there. At the same time, reference was made to the replacement page 278, namely the colour flowchart in respect of deals 65 to 68 instead of the duplicate flowchart for deal 51; this was inserted into the bundle with the approval of Judge Bishopp, who explained to Ms Field that this was simply a mistake in the paperwork.

26. Ms Parikh's evidence was that amendments were required to the original flowchart in relation to deal 51. Ms Parikh explained that she had inserted on the new version the relevant FCIB account numbers, the reference numbers derived from the transaction enquiry reports and had also amended the dates inserted in the flowcharts from the invoice dates of the transactions to the payment dates.

27. The flowchart for deal 51 illustrated an alleged circularity of payments. That circle involved payments made by a company, Universal Traders (UK) Limited, to a Mr Joseph Kanadas, said to have been behind FX Drona Ltd, the alleged defaulting trader in relation to deal 51, and payments by Mr Kanadas to a company in the British Virgin Islands, Elvissa International Holdings. In the course of the discussion on the new flowcharts in the Core Bundle, Judge Bishopp raised the fact that (according to the revised flowchart) all the payments in the deal 51 chain took place on 30 March 2006, except for the payment by Mr Kanadas to Elvissa, which took place on 29 March 2006. The transaction enquiry reports which had been included in the bundle behind the deal 51 flowchart showed the payments referred to in the flowchart, but did not show any payment from Mr Kanadas to Elvissa on 30 March 2006 nor a receipt into Mr Kanadas' account on 30 March. Such a payment was shown as a receipt on the FCIB statement of Elvissa, but not as a payment on that date from an account of Mr Kanadas. Nor was there evidence of a receipt by Mr Kanadas from Universal on 30 March 2006. There was a missing page of Mr Kanadas' account.

28. What this meant, as Judge Bishopp remarked, and Mr Macnab conceded, was that the link between the payment by Universal to Mr Kanadas and the payment by Mr

Kanadas to Elvissa was not supported by documentary evidence, but was, in the words of the judge "supposition". The link was, at best, unclear.

29. Judge Bishopp took Miss Field through the documents to illustrate the position that had been arrived at. At that stage Ms Parikh was asked if she had a copy of the missing page of Mr Kanadas' statement; she replied that she would have to check. Mr Macnab then told the tribunal that he had a copy on a memory stick. At Miss Field's suggestion, it was agreed that a copy of the missing statement would be printed, and Judge Bishopp then directed that the question should be revisited after the lunch adjournment. He explained to Miss Field that HMRC had not produced a complete audit trail in this respect but that the FTT would have to look at the totality of the evidence before it. He assured Miss Field that the tribunal was not going to admit additional evidence without her having had the chance to see it first.

30. Examination in chief of Ms Parikh continued. Ms Parikh was asked to confirm amendments she had made to the flowcharts in respect of deals 62 and 63. In relation to deal 63, Ms Parikh explained that the change was required because she had originally been following the wrong transaction chain. Having received the breakdown of the payment information it had become possible to trace the money through the chains.

31. When the issue of deals 65 to 68 was reached, the revised flowchart was inserted at that stage into the Core Bundle, in place of the duplicate deal 51 flowchart. The new version of the chart for these deals (which were said to follow the same pattern) was simpler than the original flowchart that had been included at SP2. This was because further information obtained by HMRC had revealed the payment position as between Eyedial's own supplier, Highfield Distribution International (UK) Ltd ("Celex") and the company alleged by HMRC to be the contra-trader, Epinx Ltd.

32. In the course of Mr Macnab's questioning of Ms Parikh, it was revealed that the transaction enquiry reports supporting the revised flowchart for deals 65 to 68 did not include statements for 5 June 2006, in respect of which the flowchart asserted that payments had been made by Epinx's supplier, FAF International s.r.l, a French-registered company, to a Slovakian company (Zorba), and from Zorba to a company in Hong Kong (Global Financial Services).

33. At that juncture Judge Bishopp directed that HMRC should get their paperwork in order so that the questions of admission of evidence could be addressed. An early lunch adjournment was taken for that purpose.

34. On resumption of the hearing two witnesses who were then available were interposed, and the FTT then turned to consider the documents that Mr Macnab had arranged to be printed for insertion into the Core Bundle. According to HMRC's submissions, those documents fell into four categories:

> (1) Copies of Ms Parikh's amended flowchart for deals 65 to 68, together with the supporting FCIB documents with Ms Parikh's markings. These documents were new, in the sense that they were not already in the bundle

in the form in which they were presented. They were intended to replace the existing documents in the Core Bundle at tab 10, pages 278 to 297, and included some FCIB records not already in the bundle (although they duplicated the existing documents in large part).

(2) A copy of the missing page of Mr Kanadas' account, which had been printed from Mr Macnab's memory stick. The document was new in that it had not been included in SP 2 or in the Core Bundle.

(3) Colour copies of every relevant FCIB bank statement of every trader in Eyedial's chains covering the periods during which Eyedial's seven deals took place. Apart from the missing Kanadas page and the new pages in relation to deals 65 to 68 (as referred to above), these copies duplicated documents already in the bundle.

(4) A copy of Eyedial's full transaction enquiry report listing all transactions on Eyedial's FCIB account between 10 November 2005 and 5 September 2006. These were new documents that had not been included in the bundle.

35. In relation to deals 65 to 68, it was explained to the FTT that the transaction enquiry reports that had been inserted into the Core Bundle were those in support of the original flowchart for those deals which, as we have explained, had already been replaced by a revised flowchart showing different money flows involving Celex. The proposed new material was that which supported the revised flowchart.

36. At this stage, Miss Field raised with Judge Bishopp the issue that HMRC's case had been that Eyedial was linked to a chain, and that it appeared that HMRC had been unable to get the chain right. Having heard that objection, however, Judge Bishopp concluded that, because the new evidence did not relate to Eyedial's own transactions, Ms Parikh ought to be allowed to give accurate evidence, including by correcting something she had previously prepared. He said that it would be quite wrong to exclude that evidence because the tribunal would then have a false picture. The amended flowchart in respect of deals 65 to 68, and the supporting FCIB records, were admitted into evidence, and were inserted into the Core Bundle.

37. It is important, we think, not to lose sight of the starting point when considering the question of admission of evidence. The submissions of HMRC, which we have summarised above, start with the assumption that the only "new" evidence was that which was sought to replace or supplement what was already included in tab 10 of the Core Bundle. We do not accept that as the correct point from which to begin the analysis. The starting point in this case was that there were flowcharts exhibited to Ms Parikh's witness statement, but no transaction enquiry reports.

38. To the extent that Ms Parikh wished to update or clarify the flowcharts themselves, that was something that would be regarded as entirely properly permitted by the FTT as a matter of judicial discretion. The revised flowcharts were accordingly properly admitted. The issue of the transaction enquiry reports is, on the other hand, somewhat different. The starting point that appears to have been taken by the judge was that the transaction enquiry reports were simply correcting evidence

that was already before the FTT. In his explanation of the process to Miss Field, Judge Bishopp refers to the material as a "new version", and to the documents as being a "variation of the evidence". That was clearly an appropriate description of the flowchart in relation to deals 65 to 68, but it was not properly applied to the supporting transaction enquiry reports. The judge appears to have been under the misapprehension that all the material at tab 10 of the Core Bundle was evidence that was already admitted, and that the issue was solely one of updating. This also is apparent from the later remark of Judge Bishopp when he referred to the exhibit to Ms Parikh's statement as matching the transaction enquiry reports in respect of deals 65 to 68; that was an error, as the transaction enquiry reports had not been so exhibited. It is also clear, from further remarks made by the judge, that Judge Bishopp himself was mindful of the difference between evidence that corrected something which was already before the tribunal and supplementary evidence. Had the judge appreciated the true position of the transaction enquiry reports, we have no doubt that he would not have admitted them.

39. As the judge adopted the wrong starting point in this regard, the conclusion that the replacement transaction enquiry reports in relation to deals 65 to 68 should be admitted was flawed, and in our view it should be set aside. The result, in relation to those deals, is that the evidence properly before the FTT was confined to Ms Parikh's evidence and the new colour flowchart.

40. The FTT then moved on to consider the other material proposed to be inserted, namely the missing Kanadas page and the full FCIB transaction report for Eyedial. Miss Field objected to the admission of the Eyedial statements. They were not admitted. However, Judge Bishopp correctly advised Miss Field that, although those statements were not to be admitted as part of HMRC's evidence, Mr Macnab would be able to cross-examine Miss Field with regard to Eyedial's banking transactions. The missing Kanadas page was also not admitted. The purpose of this being sought to be introduced was to demonstrate something more than supposition in relation to the payment by Mr Kanadas to Elvissa. The application was refused because the evidence sought to be admitted was quite different from that originally served, and it would have been prejudicial to Eyedial for it to be admitted at such a late stage.

41. In the same way we have already described, the FTT's starting point in relation to the missing Kanadas page appears to have been wrong. It was looking only at the correction of a flaw in the supporting transaction enquiry report evidence in relation to deal 51, and did not consider the fact that the transaction enquiry reports themselves had not been part of Ms Parikh's witness statement, and were thus not admitted into evidence. There was no application to admit the transaction enquiry reports in respect of deals 51, 62 and 63, and in our view that material (in its original or revised form) was not properly before the FTT. Whilst we accept that the transaction enquiry reports were referred to by Mr Macnab in his opening and in the oral evidence of Ms Parikh, we do not accept that those materials can effectively be regarded as admitted into evidence because Miss Field failed to object at that stage. Miss Field was a self-represented appellant faced with voluminous evidence; any failure on her part to raise the issue cannot be a substitute for a proper application to

the FTT, and the exercise of judicial discretion to admit, or refuse to admit, that evidence.

42. The FTT was mindful not to have regard to additional evidence that it had declined to admit: the FTT itself described the position in [7] of its decision, where it stated that it had taken care to pay heed only to those parts of Ms Parikh's evidence which were properly before the tribunal. However, that statement can be regarded as affecting only those matters that the FTT itself regarded as not having been admitted. In view of our finding with regard to the FCIB materials, it will be necessary for us to reconsider the evidence without any reference to the transaction enquiry reports.

43. In this connection it is appropriate for us to record that it is also clear from the FTT's decision that the evidence of Ms Parikh was not considered by the FTT to be material to its findings. The FTT described such evidence as relevant in different cases to the question whether there had been fraud in the relevant chains, but found in this case (at [8]) that the evidence of Ms Parikh added little to the "already overwhelming evidence" of fraud.

44. In assessing for ourselves therefore the extent to which the FTT could reasonably have made its findings, we shall proceed on the basis that none of the supporting transaction enquiry reports were properly before the FTT. At the same time, we shall also refer, when doing so, to the submissions on the part of Miss Field that the FCIB evidence in relation to those deals did not support HMRC's case, and in fact supports the case of Eyedial.

Call logs

45. As part of her submission that material was introduced into the trial bundle without her having been given prior notice of it, Miss Field referred us to certain records of enquiries made by Miss Field and Eyedial to HMRC. These were referred to as Contact Centre Enquiries, or "call logs".

46. The issue of whether the call logs had been admitted into evidence was addressed in the course of Mr Armstrong's evidence. Those documents had been included in HMRC's list of documents served on Eyedial on 23 May 2007. Miss Field asserted that the call logs had not been received by her (she had been represented by solicitors at the time of service), but that she had received them only as part of the trial bundle. There was, however, no question but that the call logs had been properly served as part of HMRC's evidence.

47. Mr Armstrong gave evidence on one particular issue relating to the call logs in cross-examination by Miss Field. He had raised a concern, in a letter to Hassan Khan, then acting for Eyedial, dated 12 April 2007, about a particular call made by Eyedial to verify a company called Eurotronics International Aps. The date of the check recorded by Eyedial was 24 May 2006, whereas the system had recorded the call later, on 26 July 2006. It was put to Mr Armstrong that if the system was down a call would not be logged immediately, but would be uploaded later. Mr Armstrong was unable to assist with the workings of the National Advice Centre.

48. From the transcript we can see that the view adopted by Judge Bishopp was that it was for the FTT to consider the evidence in relation to calls that it had, including evidence of Miss Field that the calls were made, and the evidence of Mr Armstrong that he could not clarify the position regarding the logging of calls.

5 49. In the event, the FTT made no finding regarding the calls that were made. It did not make a finding that Eyedial did not verify VAT registration numbers, and that did not form part of the reasoning of the FTT in concluding that Eyedial should have known of the connection between its transactions and fraud in the relevant chains. In our view, even if the FTT had made a positive finding that Eyedial had verified the 10 VAT registration numbers, that could not have affected its conclusion as to whether Eyedial should have known of the connection to fraud.

Challenge to issue of fraudulent evasion of VAT (points a and c)

50. We approach these two points from the permission to appeal, the first of which (point a) is concerned with the tax loss, and the second (point c) with the existence of 15 fraud, as a single issue, as they raise essentially the same question as to what Miss Field, on behalf of Eyedial, challenged on the one hand, and on the other effectively conceded.

51. The following passages of the FTT's decision set out the FTT's view of the matter, which Eyedial now seeks to dispute. At [6] the FTT first dealt with the 20 question whether there had been any challenge to HMRC's case on loss of tax, and whether such a loss was attributable to fraudulent evasion of VAT :

> "6. Miss Field did not attempt to challenge the Commissioners' case that there had in fact been a loss of VAT attributable to fraud in the three chains which led back to defaulters, or in the related chains where 25 Eyedial's purchases were from a contra-trader. Her cross-examination of the HMRC officers who attended to give oral evidence about the transactions was limited to satisfying herself that there remained an outstanding VAT debt, which in all cases the officer concerned confirmed to be so. There was, moreover, no evidence to the contrary 30 and we accept as a fact that there was outstanding tax in each of the three chains which led back to a defaulter, and in the four related chains to which Eyedial was linked via a contra-trader. As the transactions which make up the chains, the defaults and the fraudulent nature of the defaults were all undisputed there is nothing to be gained 35 by our setting out the detail of the chains, though we shall have some observations to make about them later."

52. After having described the approach adopted to the evidence of Ms Parikh, and the admission of further evidence in that respect (which we referred to earlier), the FTT then said (at [8] to [9]):

40 > " 8. However, although evidence of the kind of Miss Parikh gave might be of importance, even critical, in some cases, in this it really added little to the already overwhelming evidence that there was fraud in every one of the relevant chains, a fact which Miss Field had

> effectively conceded by the conclusion of the hearing. The Commissioners' evidence established a now familiar pattern of traders selling huge quantities of goods, collecting the output tax due on those sales from their customers, and then disappearing without accounting to the Commissioners for that output tax. In some cases the evidence showed that the missing trader had not in fact itself received the tax, but had arranged for the price of the goods to be paid to a third party, usually its own, overseas, supplier, an arrangement which made it impossible for the trader to discharge its liability. In others the enormous size of the debt built up by the defaulting trader in a very short period is impossible to reconcile with legitimate trade, and the only reasonable inference is that the trader set out to defraud.
>
> 9. We accept that it is always difficult for a trader in Eyedial's position to produce evidence which undermines the Commissioners' analysis but, here, the evidence available to us, even disregarding the additional evidence which was produced in relation to the pattern of payments in some cases, established beyond any reasonable room for doubt that certain of the traders in each chain had entered into the transactions for no other purpose than to commit fraud. No plausible alternative explanation was offered, nor is any apparent."

53. It was Eyedial's assertion that the FTT had been wrong to conclude that it had made no challenge to HMRC's case on tax loss and fraudulent evasion of VAT, and that the issue of fraud had been "effectively conceded" that led to those issues being included as points to be determined by this appeal. In fact Eyedial's submissions went somewhat wider, focusing also on the requirement that HMRC show that Eyedial's transactions were connected with the alleged frauds. In that respect too the FTT had found (at [10]) that Eyedial had made no challenge.

54. We do not consider it would be right to confine our consideration of the issue of challenge to the specific points referred to in the permission to appeal. It is a question that affects both the issue of whether there was fraudulent evasion of VAT and whether Eyedial's transactions were connected to that fraud. In the circumstances of this case there is no rational distinction between the two.

55. In order to assist us in answering these questions, each of the parties referred us to relevant passages of the FTT transcript where Miss Field had cross-examined the witnesses for HMRC who had given statements on the question of tax loss and fraud in each of the relevant chains of transactions. It may be helpful at the outset if we identify those witnesses by reference to the alleged defaulters concerning whom they provided evidence:

Witness	**Deal number**	**Alleged defaulter or contra-trader**
Terence Mendes	Deal 51	FX Drona Ltd (defaulter)
Stephen Robinson	Deal 51	FX Drona Ltd (defaulter)

Kulvinder Kumar	Deals 62 and 63	Prompt Info Ltd (defaulter)
Ian Clifford White	Deals 65 to 68	Epinx Ltd (contra-trader)
Andrew Siddle	Deals 65 to 68	Eutex Ltd (defaulter)
Stephen Doyle	Deals 65 to 68	1st 4 Report Ltd (defaulter)

56. What can be seen from the transcripts is that, in each case, there was no extensive questioning of these witnesses by Miss Field, and accordingly no material challenge by Eyedial at that time to the evidence contained in the witness statements made by
5 each of them, and the exhibits to those witness statements.

Mr Mendes

57. In giving his evidence, Mr Mendes confirmed his witness statement, subject to a few minor corrections. He identified from the exhibits to his statement the source of the VAT debt of £35,199,516 assessed on FX Drona, and the way in which the
10 amount of VAT of £64,802.50 on the supply by FX Drona to its own customer, Universal, in Deal 51 was incorporated into the assessment. In her cross-examination, Miss Field asked Mr Mendes about certain dealings she had had with him in 2006. She asserted that Mr Mendes had refused to speak to her on an occasion, and had used foul language. This was disputed by Mr Mendes. It was, in any event, in relation to
15 an incident unrelated to the appeal; namely, a dispute over a failed Redhill verification check by a company on Eyedial itself.

58. Miss Field then asked Mr Mendes if Eyedial had ever had any dealings directly with FX Drona, to which Mr Mendes replied that he was not aware of any. The questioning then moved on to the status of the enquiries into FX Drona since the date
20 of Mr Mendes' witness statement (November 2008). Mr Mendes confirmed that the enquiries had gone no further; the VAT debt of FX Drona had increased, and the company was not VAT-registered. Mr Mendes also confirmed, in response to questions from Judge Bishopp, that he did not believe that FX Drona had ever validated anyone through the Redhill VAT office.

25 *Mr Robinson*

59. Mr Robinson was not called for cross-examination, and his evidence was accordingly not challenged. His statement dealt with a visit made by HMRC officers on 31 March 2006 to establish the existence of FX Drona, to confirm certain transactions identified as having been carried out through a freight forwarder and to
30 establish whether FX Drona was, or was likely to become, a missing or defaulting trader.

Ms Kumar

60. Ms Kumar in evidence confirmed her witness statement as at the date it was made. There was, however, some updating material, which the FTT allowed to be introduced in examination in chief. It appeared that Ms Kumar had made a further witness statement to cover the new material, but that this had not been served on Eyedial. The updating evidence was to record that further assessments had been raised against Prompt Info and to correct an error where certain figures had been transposed.

61. Ms Kumar was then taken by Mr Macnab to the exhibits to her statement in order that she could identify the assessment that related to the Prompt Info transaction in Deal 62 and 63. The assessment so identified was in the sum of £12,496,035. This contrasted with a figure of £12,353,035 that had been included in the evidence given by Mr Armstrong (the officer with responsibility for Eyedial). Miss Field argued before us that this figure had therefore been changed. We do not agree. All that happened was that the evidence was found by the FTT to justify the figure put forward by Ms Kumar. The precise figure would not in any event have been material.

62. Ms Kumar was then taken to the supporting schedule to the assessment, which listed the under-declarations included within the global total. Included in the list was an amount of £297,465. That was the sum of the VAT liabilities said by HMRC to have arisen on Prompt Info's supplies in deal 62 (£165,165) and deal 63 (£132,300).

63. In completing his examination in chief of Ms Kumar, Mr Macnab told the FTT that there was more documentation that related to the assessment. That documentation had not been produced, as it was not thought by HMRC to be worth burdening the tribunal or Miss Field. Miss Field in her submissions to us was strongly critical of the absence of the documentation, arguing that HMRC had not proved its case in respect of Prompt Info, and consequently deals 62 and 63. We shall consider that submission when we come to the examination of the evidence of the deal chains.

64. In cross-examination of Ms Kumar, Miss Field sought first to place on the record that she had had no dealings with Prompt Info, and that nothing in Ms Kumar's statement suggested otherwise. She then asked for the status of the enquiry, and why, if Prompt Info had gone missing with so much unpaid VAT, they had not been arrested. Judge Bishopp then explained to Miss Field that the company itself could not be arrested, but that the directors might be if they could be found; but that this was not something for the FTT. Ms Kumar confirmed that the current status of Prompt Info was that Prompt Info was in liquidation, it had been cancelled as a missing trader and that she was not aware that any monies had been recovered by HMRC from the company.

65. We should at this point deal with a submission made by Miss Field in her closing submissions, to the effect that Ms Kumar had confirmed in her evidence that Prompt Info had been "cancelled as a missing trader". Miss Field appears to have construed this as HMRC no longer considering Prompt Info as a missing trader. This is an unfortunate misapprehension on the part of Miss Field. The contrary is the correct

understanding of Ms Kumar's evidence: Prompt Info's VAT registration was cancelled *because* it was a missing trader, and remained as such.

Mr White

66. Mr White gave evidence, confirming the two witness statements he had made. However, he also clarified that where he had referred in his first statement to supplies having been made by Epinx to a company called Celex UK Ltd, the reference there to Celex should have been to Highfield Distribution International UK Ltd trading as Celex Export. Mr White's second statement was made in November 2008. He was therefore asked by Mr Macnab to give an update on subsequent events in relation to Epinx since that time. Mr White confirmed that enquiries into Epinx were virtually complete, and that a decision letter had been issued in relation to 69 broker deals in periods 03/06 and 06/06 to deny input tax on those deals. Epinx had changed its name to Lever Fair Trades Ltd, and was in liquidation. The principal director of that company had been disqualified from holding directorships for 12 years.

67. In her cross-examination of Mr White, Miss Field focused on the passage in Mr White's statement dealing with evidence that was said to show that the business and pattern of trading of Epinx Ltd was inconsistent with normal commercial practices and indicated that the company's trading was artificially contrived. In brief, Mr White's evidence pointed to a number of features to support that proposition:

> (1) All the deals where Epinx had acquired goods from the EU (outside the UK) that had been verified had been traced to brokers who had exported the goods, usually on the same day.
>
> (2) None of the goods had been released to the UK retail market or been traced to the manufacturer or to an authorised distributor.
>
> (3) All deals where Epinx had acted as a broker had been traced to a defaulting trader.
>
> (4) Epinx's turnover had increased at a phenomenal rate. In the 15 months to 30 June 2006 turnover exceeded £316 million, virtually all of which could be attributed to the new business activity of wholesale of mobile phones and computer components. This turnover was described as incredible for the first year of trading of a company with little capital, and no significant financial backing or experience in the market.
>
> (5) Epinx and all its customers had accounts with FCIB.
>
> (6) The director of Epinx withdrew a significant sum of working capital from the company just prior to the FCIB account being frozen.
>
> (7) The only advertising by Epinx was on International Phone Traders (IPT) and (ICB) websites, where the only potential buyers were other wholesalers.
>
> (8) Epinx traded without written contracts.

(9) Epinx had not insured any of the goods. It was said that in the context of a consignment value often in excess of £2 million this was an extraordinary risk to take.

(10) Of the 315 deals completed by Epinx between January and June 2006, Epinx made a profit in every one. It made a profit on all of its 77 broker deals, but its margins were low, the highest being 1.06% and only more than 1% in 3 out of the 77. This was said to be barely enough to cover the cost of transportation, and suggested the artificial fixing of prices.

(11) There had, in HMRC's view, been inadequate inspection of goods in transit.

(12) Suspicions had been raised about the use of a freight forwarder in Belgium, as well as an Italian company, said to be fictitious, with which Epinx had regularly traded.

(13) A large number of the deal chains involving Epinx showed a remarkable degree of consistency, with the same traders appearing in precisely the same order.

(14) In certain deals (for which documents were exhibited to Mr White's statement) circularity of goods had been proved.

68. In cross-examination of Mr White, Miss Field questioned him on the assertion that the failure to insure was an indicator of fraud, and asked whether that was generally applicable, or only in relation to MTIC fraud. Mr White's response was that it was merely an indicator in the particular circumstances. On the significance of there being no loss, it was put to Mr White that it was unlikely that a trader would buy goods to sell at a loss. Mr White replied that the making of a profit on every deal was either lucky or the result of manipulation. He accepted, however, that a trader would check the price he would receive on a sale before himself buying the goods from his own supplier.

69. Miss Field also referred Mr White to his statement regarding the low mark-ups achieved by Epinx, and sought an explanation. Mr White's reply was that it seemed to him (and to HMRC) unlikely that those profit margins would have been achieved in all broker deals as the prices were fluctuating on a day-to-day basis. Miss Field then went to a further section of Mr White's statement where he put forward evidence of the knowledge or means of knowledge of Epinx in relation to MTIC fraud. That section included a critique of Epinx's commercial checks on suppliers and customers (due diligence). Miss Field asked Mr White to describe the standard of due diligence expected by HMRC. Mr White's reply focused on independent checks, site visits and VAT registration confirmation. He said that guidelines were given to companies when they were visited, but could not recall the content of the guidelines.

Andrew Siddle

70. Mr Siddle confirmed his witness statement. That statement referred to Eutex Ltd, the alleged missing trader in the dirty chain said to be linked to Eyedial's transactions

in a clean chain with the contra-trader, Epinx. Mr Siddle's statement describes the fact that there was a genuine Eutex Ltd, a company that remained VAT-registered. The evidence was to the effect that the VAT identity of Eutex had been "hijacked" by a person that had been engaged in transactions in mobile phones and computer chips. As a consequence, HMRC had set up a dummy VAT registration for "A taxable person purporting to be Eutex Limited". That enabled the purported sales undertaken by the hijack to be scheduled so that a tax loss could be identified. On this basis assessments were raised.

71. In examination in chief, Mr Siddle was asked to explain a schedule of assessments included in his witness statement. Mr Siddle corrected an error in the table, to remove an element of double-counting, with the result that the total was reduced from some £178 million to about £125 million. The FTT was also referred to the supporting exhibits, without at that stage the witness being taken to them.

72. Miss Field asked Mr Siddle if Eyedial had ever had any dealings with Eutex, to which the answer, to Mr Siddle's knowledge, was no. Miss Field then asked about the current status of the enquiries into Eutex. Judge Bishopp intervened to suggest that Mr Siddle should answer in respect of both the genuine Eutex, and the hijack version. The response from Mr Siddle was that the genuine Eutex was still registered for VAT; the person purporting to be Eutex was missing and unlikely to be traced.

Stephen Doyle

73. Mr Doyle confirmed his witness statement, which related to the alleged defaulter, 1st 4 Report Ltd. The statement described background details of 1st 4 Report, and its own alleged involvement in MTIC fraud, before turning to an alleged hijack of 1st 4 Report's VAT registration number (possibly using the name, in the plural, 1st 4 Reports). Although HMRC apparently at the relevant time regarded it as unlikely that the VAT registration of a trader itself suspected of involvement in MTIC fraud would have been hijacked in this way, they nevertheless opened a dummy registration in order that assessments could be issued in relation to the transactions carried out by what was thought to be a hijacker. An assessment was issued.

74. In response to a question from Miss Field, and with assistance from Judge Bishopp, Mr Doyle confirmed that, as far as he had been aware, there had been no direct dealings between Eyedial and 1st 4 Report, whether genuine or hijack. Miss Field also asked about the current status of enquiries. For the genuine 1st 4 Report it was confirmed that the company had been denied repayment of VAT considered to be tainted with fraud. For the hijacker, if there had indeed been a hijack, there had been an assessment for the tax lost. Pressed on the point by Judge Bishopp, Mr Doyle confirmed that HMRC remained suspicious that the legitimate 1st 4 Report and the hijacker were in fact one and the same, but that, since the genuine company had denied involvement, the procedure was to raise the assessment against the person purporting to use 1st 4 Report's registration.

Discussion

75. Mr Mandalia submitted that the FTT was not required in its decision to set out in detail all of the evidence before it and all of the competing arguments. With that we can concur. What the FTT must do, however, is address the contentious issues between the parties and give sufficient reasons for its determination that the parties can understand the basis upon which the decision has been reached on every material issue, so that a party aggrieved at a particular decision can determine whether it has any grounds for mounting an appeal.

76. The question we are concerned with at this point is whether the FTT was correct to say, as it did in the passages we have already recited, that there was no challenge to HMRC's case that, firstly, there had been fraudulent evasion of VAT in the relevant chains, and secondly that Eyedial's transactions were connected to those frauds. We also have to consider if the FTT was right to say that the existence of fraud in the chains had been effectively conceded by Miss Field, and whether it was right to say, at [33] that:

> "As Miss Field cross-examined the witnesses only as to the continuing existence of the VAT loss, and did not argue that the VAT losses were attributable to any other cause or that her own transactions were not connected to them (in other words, she did not seek to argue that the goods in which she dealt had not been handled by the other traders identified by the Commissioners in establishing the chains) we do not propose to deal with the evidence relating to the transactions which preceded Eyedial's own purchases, but to confine ourselves instead to Eyedial's own transactions, in each case of a purchase matched by a sale of exactly the same quantity of goods."

77. Turning to the reference made by the FTT to the effective concession it considered had been made by Miss Field by the conclusion of the hearing, we have reviewed the transcript, in particular that part of it that records the final passage of the hearing. It is apparent that, following Miss Field's evidence, Judge Bishopp was concerned on two fronts. First, he was anxious that, having given evidence over three days, Miss Field should not at that stage be expected to give the tribunal her closing submissions; instead he directed that written submissions should be made. Secondly, the judge expressed his concern that, in giving her evidence, it had appeared to him that Miss Field may not have understood what the FTT had to decide.

78. Judge Bishopp then proceeded to suggest to Miss Field how she might best equip herself to make her submissions. He encouraged her to read the judgment of Moses LJ in *Mobilx*; and he clarified that the question was not whether she or Eyedial was a fraudster. The judge directed Miss Field's attention in particular to [59] and [60] of *Mobilx*, which deal with the question whether a trader "should have known" from the circumstances surrounding his transaction that they were connected to fraudulent evasion. He told Miss Field that the real argument of HMRC, at least as the judge saw it, was that Miss Field should have known of the connection to fraud.

79. Then, referring once again to [59] at *Mobilx*, Judge Bishopp said:

> "That tells you what you've got to look at. The evidence that your transactions were, in fact, connected with fraud … there's no point in beating about the bush on this. It's overwhelming. You haven't challenged it and, as far as I'm concerned, you were right not to challenge it because you wouldn't have got anywhere. It is absolutely overwhelming that these transactions were connected with fraud. No one is saying that you knew that. No one is saying that you were a participant in the sense that you set it all up. Effectively, what they're saying is that you got swept up into it and you wouldn't have been swept up into it if you had taken more care. That is what it comes down to."

Miss Field replied at the time: "Right. Thank you."

80. We do not consider that this was any basis for a conclusion that Miss Field had effectively conceded that there was fraud in the chains. The basis therefore for the conclusion reached by the FTT in that respect appears to have been the absence of challenge by Miss Field to the evidence of the HMRC officers, which we have summarised above, and not to any separate concession on the part of Miss Field. We have regard in that connection to the written closing statement prepared by Miss Field on behalf of Eyedial, foreshadowed in the exchanges between Judge Bishopp and Miss Field at the end of the hearing. The submissions are very much directed to the questions suggested by Judge Bishopp; indeed, Miss Field quotes the judge's comments regarding the case put by HMRC on the "should have known" issue before making submissions largely on the issue of due diligence. There is, however, no concession that HMRC had proved the existence of fraud.

81. What this issue comes down to therefore is the significance of the fact that Miss Field did not challenge the evidence of the officers concerning the missing traders and the contra-trader. In one respect, there was a challenge. As we have described, the evidence of Mr White concerning the fraudulent nature of the activities of Epinx Ltd (the alleged contra-trader in deals 65 to 68) was, to an extent, challenged by Miss Field, who disputed certain of the indicators of fraud suggested by Mr White in that connection. But we accept, in other respects, that Miss Field's cross-examination of the witnesses was largely restricted to the question whether Eyedial had had any direct dealings with the companies in question and the then current status of HMRC's enquiries into them. Miss Field suggested to us that her questions to the officers relating to the outstanding VAT debts were a form of challenge in that the fact that HMRC had not taken action to recover the huge amounts of VAT apparently at stake indicated that it was not believable that these amounts were in fact due. This suggestion was not explicit in her questioning and was not made explicit subsequently, but we accept that such an inference may have been her intention when asking the question.

82. In different circumstances we might have been prepared to accede to Mr Mandalia's submission that the FTT was entitled to note that Miss Field had not attempted to challenge HMRC's case that there had been a loss of tax in all the relevant chains, including in the related chains in the contra-trading cases. But, in these circumstances, we do not consider that a failure on the part of a self-represented

party, such as Miss Field and Eyedial, to challenge the witnesses on evidence that, on her own case, Miss Field could not be expected to have any knowledge, can amount to an absence of challenge to HMRC's case in this respect.

83. There is in our view an important distinction to be drawn between a challenge to the evidence, and a challenge to the conclusion to be drawn from that evidence. Miss Field was, effectively, self-represented. She made her case on the aspects of which she had direct knowledge, namely the way in which she had, according to her arguments, taken care to avoid becoming involved in fraud. Her written submissions cannot be taken as any form of concession, and have to be considered in the light of the very strong indication from Judge Bishopp that she should concentrate her efforts in arguing that HMRC were wrong to say that she should have known of the connection of Eyedial's own transactions with fraud. In these circumstances, we consider that the First-tier Tribunal should be slow to conclude that any point has been conceded purely by reason of a lack of any, or any effective, evidential challenge. This is particularly the case where, as in an appeal of this nature, the burden is on HMRC to prove the various elements that make up the test for determining whether the objective conditions for the right to deduct input tax have not been met.

84. We conclude therefore that the FTT made an error in determining that Eyedial had not challenged, or had effectively conceded, the issues of the existence of fraudulent evasion of VAT in the deal chains, and the connection in each case of Eyedial's transactions with that fraud.

Sufficiency of evidence as to fraudulent evasion of VAT and connection (points b, d, f and g)

85. It follows from our discussion above that, as a general rule, where evidence is unchallenged, it remains necessary for the First-tier Tribunal to make clear reasoned findings as to whether or not the evidence is sufficient to lead to the conclusion for which it has been adduced. In this case, Eyedial submitted that it did not. Miss Field's arguments in this connection were wide-ranging, and were directed not only at the question of loss of tax (as described in point b. of Warren J's grant of permission to appeal) but also to questions of the connection of Eyedial's transactions with the alleged fraud.

86. We do not think it would be right to adopt too proscriptive approach to the permission to appeal. Although the tests for establishing a failure on the part of a taxpayer to meet the objective criteria for deduction of input tax have been expressed separately, that is essentially for convenience. There is in reality only one test, involving knowledge or means of knowledge of fraudulent evasion of VAT to which a trader's transaction is connected. It would be wrong, therefore, in a case such as this, to seek to confine argument to one only of those, such as loss of tax.

87. Although it regarded the points as effectively conceded, or at least undisputed, the FTT did make certain findings. Thus, at [6], it accepted as a fact that there was outstanding tax in each of the chains (that is, deals 51, 62 and 63) which led back to a

defaulter, and in the contra-trader chains (deals 65 to 68). It found, at [8], that there was "overwhelming evidence" of fraud in the chains, and described the pattern of traders selling huge quantities of goods, collecting the output tax due on those sales from their customers and then disappearing without accounting to HMRC for the tax that, it found, HMRC's evidence had established. It went on to refer to evidence of third party payments that enabled the defaulter itself not to receive the tax so that it could not discharge its liability to HMRC, and the enormous debt built up in some cases that, the FTT found, was impossible to reconcile with legitimate trade. At [9] the FTT found that the evidence established beyond any reasonable room for doubt that certain of the traders in each chain had entered into the transactions for no other purpose than to commit fraud. There was, the FTT decided, no plausible alternative explanation.

88. These are strong findings by the FTT, which HMRC submit that the FTT was entitled to make. Mr Mandalia argued that the characteristics exhibited by each of the four defaulting traders that had been identified follows a common pattern:

> (1) The missing trader was incorporated and registered for VAT shortly before 2006 and both the missing trader and, where relevant, the "hijack" company specified an activity on its VAT 1 application other than the wholesaling of CPUs, phones and other electrical goods.
>
> (2) The projected turnover of the missing trader on its VAT 1 form was significantly less than the evidence of its trading subsequently demonstrates.
>
> (3) The level of trade increases dramatically in the weeks before the activities are discovered to figures that are out of proportion to the apparent resources and expertise of the trader.
>
> (4) The traders are invariably able to source their products at a cheaper price than the broker.
>
> (5) The principal place of business of the missing trader is a residential address or short-term serviced accommodation capable of being vacated at short notice with no significant financial commitment from the trader.
>
> (6) When HMRC are alerted to the fact of wholesale deals in electrical goods, it is usually as a result of enquiries with freight forwarders or other traders rather than by any declaration on the part of the trader itself.
>
> (7) Upon investigation by HMRC the officers of the missing trader fail to produce the business records when asked and/or disappear without filing returns and/or paying the VAT due on their sales.
>
> (8) When paperwork is discovered relating to deals by those companies it is incomplete and haphazard.
>
> (9) Invariably once the activity is discovered the defaulting traders fail to cooperate with HMRC's requests and enquiries, they fail to account for VAT due, are assessed and deregistered, but take no action to appeal such steps.

Fraudulent evasion of VAT

89. We shall look at the evidence of connection of Eyedial's transactions with the alleged fraud later, but in order to provide the context for our own assessment of the evidence of fraud in each of the chains identified by HMRC, we propose to consider separately the evidence pertaining to fraudulent evasion of VAT in each chain. This involves consideration both of the issue of loss of tax, and whether such loss was the result of fraudulent evasion.

Deal 51

90. In deal 51 Eyedial purchased 1150 Nokia 9500 phones from its own supplier, AR Communications & Electronics Ltd ("ARC") for a price of £323.00 per unit. It was invoiced by ARC on 28 March 2006. On the same day Eyedial invoiced its own customer, DGB Sarl (France), on a sale of the same number and model of phone at a unit price of £336.00. The chain identified before Eyedial's own transactions showed that on the same invoice date, the same numbers and model of phone were sold by FX Drona to Universal Traders UK Ltd at a unit price of £322.00, by Universal to A E Resources Ltd at a unit price of £322.25, and by A E Resources to ARC at a unit price of £322.50.

91. It is convenient at this point to refer to an argument of Miss Field that ranged across the identification of all the deal chains. It was that HMRC had failed to establish that the transactions alleged to have taken place in a chain before the purchase and sale by Eyedial were in fact part of the same chain. That submission was based on the fact that the evidence from HMRC relied upon invoices, whereas, on Miss Field's submission, Eyedial's deals were done on the dates of payment. Thus, for deal 51, the dates of the invoice for FX Drona was 28 March 2006, and the payment date for Eyedial's purchase was 30 March 2006. This, according to Miss Field, meant that the allegation that all the deals took place on the same day was nothing more than supposition.

92. We do not accept this submission. All the invoice dates for the transactions in the same quantity of phones were on the same date, namely 28 March 2006. The fact that payments were made on a different date does not mean that the deals were not done on the same day; the invoice date is relevant for the timing of the deal. The FTT was entitled to conclude from the invoices that the deal chain had been established by HMRC.

93. Evidence in relation to the alleged defaulting trader, FX Drona Ltd, was given by Mr Mendes and Mr Robinson. That evidence, as we have described, was not challenged to any material extent by Miss Field. The following is a summary of the salient features:

(1) FX Drona was incorporated on 5 December 2005. It was registered for VAT on 2 February 2006, its VAT application (VAT 1) having stated that the company's intention was to make supplies of graphic animations and multimedia development services. The annual value of those intended

supplies was said to be £85,000, and the value of intended acquisitions from the EC was stated as nil.

(2) Following a change of ownership of FX Drona, the company made sales of mobile phones and CPUs to the value of more than £191,493,039 in 11 working days. No evidence of the supplies was ever produced by FX Drona to HMRC.

(3) On 31 March 2006, following two visits by HMRC officers, including Mr Robinson, to the premises of FX Drona, during which only evasive responses had been given to the officers' questions, HMRC served FX Drona with a letter under VAT regulation 25 to render a VAT return within 24 hours. No VAT return was made in response to this notice. As a result, FX Drona was de-registered on 6 April 2006. Subsequent correspondence from HMRC was returned marked "Moved away. Whereabouts unknown."

(4) Ledger entries produced by Mr Mendes showed that assessments had been raised against FX Drona in the amount of £35,199,516.85 in relation to transactions identified by HMRC. There had been no challenge to those assessments, and FX Drona is now in liquidation.

(5) The relevant supply of FX Drona for deal 51 is that to Universal. The value of that supply (inclusive of VAT) was £435,102.50, and the VAT was £64,802.50. That supply, and the financial details of it, appeared on the invoice from FX Drona to Universal produced to the FTT. The evidence of Mr Mendes was that this VAT amount relating to that supply by FX Drona was incorporated into the assessment issued on 2 November 2006 for £16,987,207.85.

94. Miss Field makes a general submission in relation to the issue of tax loss, in that she argues that there is no evidence of a tax loss in any of the chains. She says that the tribunal needs to find evidence of a tax loss and not a mere concession or acceptance (which we take to be a reference to an assessment not being challenged by the alleged defaulter), and that mere assessments created by HMRC are not enough if not supported by factual evidence.

95. In relation to deal 51 in particular, Miss Field says that the FTT should not have relied on the evidence of Mr Mendes. She bases this submission on the fact that, in discussing one of the exhibits to his witness statement, namely the ledger details for 30 July 2008 where it is recorded "TAX – O/A ACCEPTED … £1,345,125", Mr Mendes was unable to tell the tribunal what the letter O represented, Judge Bishopp having to intervene to note that O/A meant "Officer's Assessment". Miss Field argues that this demonstrates that the witness statements were created for the officers and had not been thoroughly checked or understood by them.

96. In our judgment, the evidence before the FTT on the question of tax loss and that it was occasioned by fraudulent evasion of VAT, was such as to support the findings of the FTT in this respect. We do not accept Miss Field's dismissive characterisation of the assessments raised by HMRC. The unchallenged evidence of Mr Mendes, supported by internal HMRC documentation produced as exhibits, was that the supply

by FX Drona to Universal, for which the invoice demonstrated that VAT had been charged, was included in a relevant assessment, which was unpaid. There was clear evidence of a loss of tax. In this connection, we do not accept that the FTT should have doubted Mr Mendes' evidence on account of his failure to identify the meaning of the initials O/A. The weight to be attached to evidence given to it is a matter for the FTT, and it is, we are afraid, somewhat fanciful for Miss Field to suggest that evidence should be treated as unreliable by reason of such a matter.

97. Furthermore, there was, in our view, abundant evidence that the tax loss was occasioned by fraud. The huge turnover in sales of mobile phones and CPUs generated despite the different intended trading activity declared to HMRC by the previous owners, the evasiveness of the owners of the business when visited by HMRC, the failure to make VAT returns or to pay over any VAT on transactions identified by HMRC (including the supply to Universal) all point towards the fraudulent evasion of VAT. There was, in our judgment, clearly sufficient evidence on which the FTT could make such a finding.

Deals 62 and 63

98. As deals 62 and 63 both trace back to the same alleged defaulter, Prompt Info Ltd, they can be addressed together for the purpose of considering the evidence of fraudulent evasion of VAT.

Deal 62

99. In deal 62, Eyedial purchased 2200 Samsung i300 phones from Mobiletalk.co.uk Ltd at a unit price of £430.00. The date on what was headed a "proforma invoice" was 22 May 2006. A further invoice, for the same numbers of phones and in the same amounts was issued by Mobiletalk to Eyedial on 25 May 2006, although on that invoice the shipping date was 22 May 2006. Eyedial's purchase order is dated 22 May 2006. Eyedial sold the same quantity of the Samsung i300 phones to DGB SARL (France) at a unit price of £443.00. Eyedial's invoice is dated 22 May 2006, and its release note and ship on hold document is also dated 22 May 2006.

100. The same quantity of those same phones had been traced by HMRC back to Prompt Info. The identified chain starts with Prompt Info in the UK selling 2200 Samsung i300 phones to Deepend Trading Ltd at a unit price of £429.00; the invoice date is 22 May 2005. Deepend Trading then sold the same quantity of those phones to Exhibit Enterprises Ltd at a price per unit of £429.25. Exhibit Enterprises in turn sold 2,200 Samsung i300 phones to Mobiletalk, at a unit price of £430.00.

Deal 63

101. The invoice dates for deal 63 were also 22 May 2006, and the chains were traced back by HMRC to the same alleged defaulter, Prompt Info. But the chain was a little different in that, although Eyedial's own supplier, Mobiletalk.co.uk, was the same as in deal 62, in deal 63 the intervening traders between Prompt Info and Mobiletalk were not the same.

102. Eyedial acquired 1500 Nokia 8800 black phones from Mobiletalk at a unit price of £505.00. Mobiletalk issued an invoice on 22 May 2006. On the same day Eyedial sold (and released) the same quantity of the same phones to UTRB SARL (France) at a unit price of £520.00. Eyedial issued an invoice to URTB on 22 May 2006.

103. Prompt Info Ltd again appears at the start of the chain. It sold 1500 Nokia 8800 black to The Wireless Warehouse at a unit price of £504.00, and with an invoice date of 22 May 2006. On the same day, Wireless invoiced MT Phoenix Ltd for the same quantity and the same model at a price per unit of £504.25. MT Phoenix also invoiced that same quantity on the same date to Mobiletalk, at a unit price of £504.50.

104. The evidence, given by Ms Kumar, also included release notes relating to Prompt Info's acquisition and sale of Nokia 8800 phones. There was a release note from Hardware Traders Ltd Deutschland in favour of Prompt Info in respect of 3000 units, and a release note in respect of 1550 units each of which was dated 19 May 2006. The evidence also included a further release note, this time dated 22 May 2006, from Mezinarodni Velkoobchod s.r.o. On the sale side, there was a release note for 1550 Nokia 8800 black from Prompt Info in favour of [The] Wireless Warehouse dated 19 May 2006. There was no release note specifically for 1500 of those phones on 22 May 2006.

105. In each case these release notes showed Total Logistic Solutions as the freight forwarder. By contrast, the freight forwarder used in Eyedial's own transactions in the Nokia 8800 black phones was AFI Logistics (UK) Ltd. Miss Field submitted in this connection, and more generally in relation to the other deal chains, that this did not prove the connection between Eyedial and Prompt Info. Whilst we accept that the evidence of the Prompt Info release notes does not assist HMRC's case with regard to connection, the evidence of Ms Kumar was directed at a different point. It was, as we describe more fully in the next section, concerned with the involvement of Prompt Info generally in the fraudulent evasion of VAT. The evidence of the allocation and release notes had been obtained by HMRC from the freight forwarder, and was directed at showing the basis on which HMRC had raised an assessment. The connection of Prompt Info to deals 62 and 63 was provided by the evidence of Mr Armstrong, through the Prompt Info invoices for the relevant quantity of the relevant phones. The absence of evidence of release notes does not detract from the invoice evidence; nor does the apparent difference in the freight forwarders used make the FTT's finding of connection unreasonable..

Prompt Info

106. As we have just mentioned, the evidence on the fraudulent evasion of VAT by Prompt Info was given by Ms Kumar. Her evidence was substantially unchallenged by Miss Field. The material parts of that evidence can be summarised as follows:

(1) The information given by Ms Kumar regarding Prompt Info was derived from that trader's file with HMRC.

(2) Prompt Info was incorporated on 12 July 2004. It was first registered for VAT on 1 July 2005. Its declared taxable turnover was estimated at

£65,000 and its main business activity was declared to be software development and consultancy.

(3) Prompt Info applied on 4 August 2005 to be approved for the "Flat Rate scheme" and this was granted on 5 August 2005.

5 (4) In line with normal practice, a New Business Contact Questionnaire was sent to Prompt Info on 2 December 2005. The company did not respond.

(5) Prompt Info failed to furnish completed VAT returns for the periods 07/05 and 10/05. A demand notice for immediate payment of £247 was sent to Prompt Info's registered office, and was returned to HMRC as undelivered mail.

(6) On 23 May 2006, HMRC's Redhill Freight Team uplifted copies of allocation and release notes dated 17 May 2006 to 22 May 2006 from Total Logistic Solutions, a freight forwarder. These indicated that Prompt Info had acquired large quantities of mobile phones from traders in Germany (Hardware Traders Ltd) and the Czech Republic (Mezinarodni Velkoobchod s.r.o.).and had sold, or at least released, them to UK traders.

(7) On 24 May 2006 a pro forma nil VAT return was prepared for period 01/06 as the return had not been submitted by Prompt Info.

(8) HMRC wrote to Prompt Info informing it of an intention to de-register the company. An assessment in the sum of £3,392,594 was issued on 26 May 2006 based on allocation and release notes obtained from the freight forwarder, establishing defaults commencing on 17 May 2006. On the same day, a person claiming to represent Prompt Info telephoned HMRC to say that he had received the notice of intention to de-register, and that he did not want the company de-registered as it was still trading from the stated principal place of business. A letter dated 26 May 2006 requesting that the VAT number be reinstated was received from a person claiming to be a director of Prompt Info.

(9) The decision to de-register was upheld.

(10) Between 24 August 2006 and 19 June 2007 HMRC made unsuccessful attempts to trace and contact Prompt Info, and the individuals who had claimed to represent it. No contact was made, and on 12 September 2007 a compulsory winding up order was made against Prompt Info. As at 20 November 2007, Prompt Info owed £21,796,234 to HMRC in respect of 17 assessments of undeclared and unpaid VAT, 15 of which related to MTIC trading. Further assessments were issued in 2008. None of the assessments were challenged.

(11) As we have described earlier, when reviewing the examination in chief of Ms Kumar, she confirmed in her evidence that the assessment issued on 12 August 2008 was in the sum of £12,498,035, and included the VAT of £165,165 charged by Prompt Info on its supply to Deepend Trading on 22 May 2006.

107. As we have found already, the fact that the VAT liability of Prompt Info was sought to be collected by assessment does not mean that the tax loss has not been proved. In our judgment, the evidence of Ms Kumar itself was sufficient to enable the FTT to find that there was a tax loss in relation to the sale by Prompt Info to Deepend Trading on 22 May 2006. VAT of £165,165 was charged by Prompt Info on its invoice dated 22 May 2006 to Deepend Trading. That VAT, according to the evidence has not been paid, despite having been assessed on Prompt Info.

108. The evidence is also sufficient to enable the FTT to conclude that the failure of Prompt Info to account for the VAT was due to fraudulent evasion. No VAT payments were made by the company despite its having entered into a significant number of substantial transactions, and having made supplies of goods. Its actual business did not match the business it had declared to HMRC at the time of its VAT registration, and was incompatible with the Flat Rate Scheme. There was no meaningful engagement by the company with HMRC; the only contacts appear to have been made when de-registration was proposed. In our view, the FTT was entitled to find that there was no other reason for the trading activities of Prompt Info than fraud.

Deals 65 to 68

109. These fall to be taken together, as all four deals involved purchases by Eyedial from Highfield Distribution International (UK) Ltd (trading as Celex Export), and sales by Eyedial to Eurotronics International ApS (Denmark).

110. In addition, it was alleged by HMRC that the deals all had the following common traders:

(1) FAF International s.r.l., a French-registered company, which acted as the EU supplier in all these chains. FAF International had permanent and mailing addresses in Milan and was beneficially owned by one Tommi Heikinpoika Neuvonen, a Finnish national, apparently also resident in Marbella. Evidence was given that the Italian authorities had concluded that FAF International was a fictitious company.

(2) Epinx Ltd, alleged to be the contra-trader, which acted as the UK acquirer in all the chains.

(3) Highfield Distribution International (trading as Celex Export), which acted as a UK buffer in all chains.

(4) Eyedial, which acted as the UK broker in all chains.

(5) Eurotronics International ApS, which was the EU purchaser in all cases.

111. HMRC's case was that, although all the chains in respect of the goods traded by Eyedial were "clean", in that there was no VAT loss in those chains themselves, all the chains traced back to fraud in other chains, through the contra-trader, Epinx.

Deal 65

112. Eyedial purchased 3995 Nokia 6680 phones from Celex Export at a unit price of £150. These sales were invoiced by Celex Export to Eyedial in two tranches; one invoice on 22 May 2006 was for 2000 phones, and another on 23 May 2006 was for 1995. Eyedial's purchase order, for the full quantity of 3995 phones, was dated 24 May 2006, and the supplier declaration was signed by Celex Export on 25 May 2006. Eurotronics made a purchase order with Eyedial on 19 May 2006. Eyedial sold 3995 Nokia 6680 phones to Eurotronics with an invoice date of 24 May 2006. Those phones were released by Eyedial to Eurotronics on 7 June 2006.

113. In this "clean" chain, Celex Export itself purchased 3995 Nokia 6680 phones in the same two tranches as the phones had been sold to Eyedial, from Epinx Ltd. The documentation included an invoice from Epinx (addressed to Celex UK, but at the identical address as for Celex Export) in respect of 2000 phones, dated 24 May 2006, at a unit price of £146.00, and an allocation note issued by Epinx (also in favour of Celex UK) for 1,995, also dated 24 May 2006. A purchase order from Epinx to FAF International s.r.l dated 17 May 2006 is for 3995 Nokia 6680 phones at a unit price of £145.00, and an order confirmation from FAF International is dated 17 May 2006.

Deal 66

114. The transactions in deal 66 followed the same pattern as in deal 65. The phones in question were 1000 Nokia 6111 phones. FAF International sold that quantity to Epinx; an order confirmation at a unit price of £138.00 is dated 17 May 2006. Epinx invoiced the sale to Celex UK (at the same address as for Celex Export) on 24 May 2006 at a unit price of £139.50, and on the same date Celex Export issued a sales invoice for the same quantity and model of phone to Eyedial. Also on 24 May 2006, Eyedial invoiced Eurotronics for 1000 Nokia 6111 phones at a unit price of £146, following a purchase order by Eurotronics dated 19 May 2006. The phones were released to Eurotronics on 7 June 2006.

MSG Freight Limited

115. In his witness statement, Mr Armstrong had referred to the fact that in deals 65 and 66 the freight forwarder was MSG Freight Limited, and had sought to draw certain conclusions, including as to whether the relevant goods had entered the UK, from the job files obtained from MSG Freight in that respect. Those job files were not exhibited, and were not produced in evidence to the FTT. Their absence, and the need for them to be exhibited if reliance was to be placed on them, was noted by Judge Bishopp during Mr Armstrong's evidence. In the event they were not in the evidence before the FTT, and there is nothing in the FTT's decision to suggest that this evidence was relied upon by the FTT; indeed, the FTT made the point, at [32], that it had proceeded on the assumption that the goods did indeed exist. The evidence from the MSG Freight job files would not, therefore, have been material to the FTT's decision.

Deal 67

116. The same pattern is evident in deal 67. In that deal the goods traded were 2000 Nokia 6280 phones. The documentation shows an order confirmation from FAF International to Epinx dated 15 May 2006, including a confirmation of Epinx's order for that quantity of Nokia 6280 phones at a unit price of £180.50. Epinx's invoice dated 24 May 2006 shows the sale of that quantity to Celex UK (at the address referred to above) at a unit price of £182.50. On the same date, Celex Export invoiced the same quantity of the Nokia phones to Eyedial at a unit price of £186.00. Eyedial invoiced Eurotronics for that quantity on 25 May 2006, at a unit price of £190.50 in response to a purchase order from Eurotronics dated 16 May 2006. The documentation includes two releases of the number of phones to Eurotronics: one dated 20 May 2006, and the other dated 7 June 2006. Payment was made on 7 June 2006.

Deal 68

117. Deal 68 also exhibits the same pattern. There is an order confirmation dated 15 May 2006 (the same as for deal 67) from FAF International to Epinx in respect of 1800 Nokia 8800 phones at a unit price of £351.50. On 24 May 2006 Epinx invoiced that quantity of the same phones to Celex UK at a unit price of £352.00. On the same date Celex Export invoiced Eyedial in respect of the same number of the same phones at a unit price of £356.00. Eurotronics made a purchase order with Eyedial for 1800 Nokia 8800 phones on 16 May 2006 at a unit price of £368.50, and Eyedial invoiced Eurotronics for those phones, at that price, on 25 May 2006. As with deal 67, there are two release notes, one on 20 May 2006, and the other on 7 June 2006, the date on which Eurotronics made payment to Eyedial.

Celex UK/Celex Export

118. Miss Field sought to argue that HMRC's case on deals 65 to 68 had not been made out because no distinction had been drawn between Celex UK and Celex Export. Miss Field maintained that these were two separate entities; she claimed to have done business with both.

119. In our view, the FTT was entitled, on the evidence, to accept that the chains described by HMRC were unaffected by the fact that the sales by Epinx were recorded as being to Celex UK, whereas the purchases by Eyedial were from Celex Export. The position might have been different had there been evidence before the FTT that Celex Export was a company wholly separate and independent of Celex Export. But there was no such evidence; on the contrary, as we have described, those two names were associated with the same address, described in both Epinx's invoices and Eyedial's purchase orders as Celex House. Nor does the documentation indicate anything other than that the names Celex UK and Celex Export were anything other than trade names of Highfield Distribution UK Ltd; in the supplier declaration on Eyedial's purchase orders (those that were completed by its supplier) the supplier simply describes itself as "Celex". The FTT was entitled to conclude that there was no break in the chain between Eyedial and Epinx.

Epinx

120. We have referred earlier to the evidence of Mr White in relation to the alleged contra-trader, Epinx, and the extent to which Miss Field sought to challenge that evidence in cross-examination. The position of the contra-trader is important because, as has recently been noted by the Court of Appeal in *Atlantic Electronics Ltd v Revenue and Customs Commissioners* [2013] EWCA Civ 651 (per Ryder LJ at [14], citing the Chancellor in *Blue Sphere Global Ltd v Revenue and Customs Commissioners* in the High Court [2009] STC 2239, at [55]), knowing involvement of the contra-trader has to be established if, as here in relation to Eyedial, it is asserted that a broker in a chain connected to the contra-trader knew or should have known of the connection of its transaction to fraud.

121. Mr White's unchallenged evidence was that in May 2006 Epinx had completed 16 sales to Celex UK. In five of those transactions (including deals 65 to 68) the phones were subsequently supplied (by Celex Export) to Eyedial. Those deals were among a total of 29 alleged "contra deals" (where Epinx bought goods from a supplier in another EC member state, and sold to a UK trader) in May 2006, with a value of more than £14.1 million.

122. In the same month Epinx completed a total of 17 broker deals (where Epinx exported phones acquired from a UK chain) with a value in excess of £17.1 million. Of those 17 broker deals, 14 had been traced back to a company called Eutex Ltd (or a person using the hijacked identity of Eutex), and two to 1st 4 Report Ltd. These two companies are the alleged defaulters in the "dirty" chains.

123. Mr White's evidence included information regarding similar patterns from January to June 2006. The evidence illustrated how the "contra" deals had been offset against the broker deals. Epinx had submitted quarterly VAT returns for periods ending 31 March 2006 (period 03/06) and 30 June 2006 (period 06/06). In period 03/06 the evidence was of a clear offsetting between the two types of deals resulting in a small payment of VAT on the return submitted. In 06/06 (the period covering the May 2006 transactions) the officer's evidence candidly stated that there was not the same clear offsetting in each month, but that the overall tax totals for the period 06/06 return were very similar. The result was to offset the "contra deals" against broker deals over the whole period, leaving Epinx with a small repayment claim.

124. In periods 03/06 and 06/06, Epinx completed 108 acquisition deals. On verification of 96 of those deals by HMRC, all 96 deal chains led to UK brokers, including Eyedial; all goods were supplied by UK brokers to customers in other EC member states. The value of those "contra deals" was £78,935,344.50.

125. In the same periods, Epinx completed 77 broker deals, with a value of more than £82 million. Of those, 70 had been traced back to missing traders, resulting in tax losses of £12,943,621.20.

126. The evidence of Mr White records that it had been considered disproportionate for evidence to be produced of all the broker deals for the relevant periods. Instead evidence was given in relation to a sample of the tax loss chains in support of

HMRC's decision to deny the input tax claimed by Eyedial. Although she had not raised this as an issue before the FTT, Miss Field submitted that, in the absence of full evidence of all the tax loss paperwork, HMRC must be taken not to have proved its case in this respect.

127. We disagree. In our view the FTT was entitled to conclude that there had been losses on the example deals and was entitled to accept Mr White's evidence that losses arose on the others. Furthermore, it is of the nature of contra-trading that there is no necessary direct connection between any particular "clean" chain and any particular "dirty" chain. The whole essence of contra-trading is to conceal the connection of the broker transaction with the fraudulent evasion of VAT by offsetting (in the contra-trader) input VAT due on purchases within a number of "dirty" chains against output VAT on supplies into a number of "clean" chains. It is that offset, and the knowing participation of the contra-trader in achieving such an offset, that provides the necessary connection between the broker transaction in the clean chain and the fraudulent evasion of VAT in the dirty chain. That does not require evidence of all of the chains for which the offset has been made; what it requires is a demonstration of the offset of the tax losses in the dirty chains against the output tax associated with the supply into the clean chains, so as to show the required offset in relation to the transactions in question.

128. We ourselves need refer only to one such deal chain in respect of which evidence was given by Mr White. In this deal (referred to as Epinx deal 58185), the alleged defaulter was Eutex (or rather, the person who had hijacked the VAT registration of Eutex). The deal sheets produced to the FTT showed that the goods in question (computer components – 12,285 SL7Z9 Intel processors) were bought and sold by three buffer traders, Dialhouse Electrics Ltd, Yodem Ltd and Sabretone Electrics Ltd. The goods were supplied by Sabretone Electrics Ltd to Epinx, who in turn supplied them to FAF International srl. The goods were shipped to Boston Freight in Belgium from Ontime Logistics Ltd in the UK. The tax loss on the deal is said to have been £176,289.75.

129. Mr White's evidence was to the effect that the deal had exhibited third party payments. Dialhouse Electrics Ltd had not itself received full payment from Yodem Ltd for the goods, as it received only commission. That evidence was confirmed by reference to a visit report of an HMRC assurance visit to Dialhouse on 20 July 2006: Dialhouse itself confirmed that all its supplies were from Eutex, and its only customer was Yodem. Furthermore, although Dialhouse had been invoiced for the full purchase price and had re-invoiced Yodem for the sale, plus VAT, they claimed not to have been paid the full amount, and not to have made payment to Eutex. Mr White's evidence was that the director of Dialhouse had said that the bulk of the payments had been made by Yodem to an "unknown third party". Before us, Miss Field submitted that such speculation could not be evidence of third party payments. But this was not in our view mere speculation; the Dialhouse evidence was sufficient to enable the FTT to accept that there had been third party payments.

130. In relation to this deal (Epinx deal 58185), Mr White's evidence also referred to a report on the activities of Boston Freight in Belgium compiled by the Belgian tax

authorities. When that company was visited by the tax authorities it had been confirmed that there were no storage facilities at the principal place of business. The conclusion reached was that some of the UK traders using Boston Freight were involved in VAT "carousel" fraud.

131. Mr White's evidence provides details of two further Epinx deals, referred to as Epinx deals 58187 and 58196. Similar patterns emerge. The total amount of the tax losses said to have been associated with these two "dirty" chains is £327,514.91, which exceeds the input tax denied to Eyedial on deals 65 to 68 (£306,958.75). As Mr White's witness statement records, the consequence of Epinx's contra deals was to reduce the potential repayment due to Epinx on its own export out of the "dirty" chains. By means of the offset in Epinx, the right to a repayment of VAT which had been lost due to the default had been effectively transferred to broker traders, such as Eyedial, who had acquired goods directly or indirectly from the contra-trader and exported them.

132. We have referred earlier to the evidence of Mr White in support of the submission that Epinx's business and pattern of trading were inconsistent with normal commercial practices and were artificially contrived, and to the limited challenge made by Miss Field to that evidence in cross-examination of Mr White. We shall not repeat that summary.

133. Before setting out our conclusions on the evidence concerning Epinx, we turn first to the evidence regarding the alleged defaulters in the "dirty" chains associated with Epinx.

Eutex

134. Evidence was given by both Mr White and Mr Siddle in relation to Eutex. We have referred earlier to certain of Mr Siddle's evidence, and to the limited challenge to it by Miss Field in cross-examination. The material evidence in relation to Eutex can be summarised as follows:

(1) The true Eutex was incorporated on 10 February 2000 as a company registered in Scotland. It was registered for VAT from 1 May 2000.

(2) As a result of the 20 July 2006 visit of HMRC to Dialhouse, information was obtained that a company called Eutex was making supplies of goods. The VAT registration number used did not, however, correspond to the correct VAT registration number of Eutex.

(3) A visit to the true Eutex led to the conclusion that Eutex's trading details had been hijacked by a person or persons unknown. That was said to have been a deliberate act to defraud the Revenue by the person purporting to be Eutex. No VAT liability for the sales by that person has ever been accounted for.

(4) On 26 March 2007 a dummy VAT registration was set up by Officer Siddle for the purpose of determining the tax loss attributable to the hijack trader and to raise an assessment. Assessments were issued on what was

said to be the only reasonable assumption that the hijack trader was the UK acquirer of goods from the EU; this is on the basis that there can be no legitimate reason to steal another person's identity. On this basis it was said to be reasonable to assume that the whole of the VAT charged should have been accounted for, with no deduction for input tax. Mr Siddle's evidence also sought to make the point that, even if the hijack person were to have acquired the goods from another UK trader, it was extremely unlikely that the person who acquired the goods from the EU had ever accounted for the VAT due.

1st 4 Report

135. We have also referred earlier to the evidence of Mr Doyle in relation to 1st 4 Report and to Miss Field's limited challenge in cross-examination in that respect.

136. As we have described, in the case of 1st 4 Report there was some doubt on the part of HMRC whether this was a hijack case or whether the genuine 1st 4 Report was a defaulting trader. Despite those doubts, HMRC had opened a dummy VAT registration for a person assumed to have hijacked the trading identity of 1st 4 Report.

137. Using that dummy registration, the following assessments were made on the person purporting to be 1st 4 Report:

(1) A notice of assessment dated 27 September 2007 in respect of supplies by the hijack person to a company called DBP Trading Ltd in the period March to June 2006, in the sum of £10,939,033.70.

(2) A notice of assessment dated 9 June 2008 in respect of VAT period 05/06 (1 March 2006 – 31 May 2006), in the sum of £1,089,417.85.

(3) A notice of assessment dated 1 July 2008 in respect of further supplies to DBP Trading in the month of April 2006.

138. No VAT has been accounted for by the trader purporting to be 1st 4 Report. There had been no contact with HMRC at the relevant time from either the genuine 1st 4 Report or the person purporting to be 1st 4 Report.

Discussion: deals 65 to 68 tax loss and fraud

139. In our judgment the FTT was entitled on the evidence to find that there were tax losses of Eutex and/or 1st 4 Reports that represented input tax claimed by Epinx to offset its output tax on its supplies into a chain of transactions culminating with the export sale by Eyedial, and that these losses were occasioned by fraudulent evasion of VAT. Eutex was a hijacked identity, in respect of which no VAT had been paid on transactions identified by HMRC. The FTT was entitled to find that there was a tax loss, and that there was no other reasonable explanation but that this was occasioned by the fraud of the person purporting to be Eutex. The same can be said for the person purporting to be 1st 4 Reports. Even if it had been the genuine 1st 4 Reports that had been the defaulter in this regard, the same conclusion would be drawn; in such a case the assertions on the part of 1st 4 Reports that it was not the relevant trader

(and thus not itself liable to the VAT) would have been evidence on which the FTT would have been entitled to find fraud.

140. Miss Field argued that unless HMRC were able to point to the identity of the fraudster they could not be taken to have discharged the burden of proving that there was a fraudulent evasion of VAT. We do not accept that submission. It would be contrary to the principle enunciated in *Kittel* to impose such a requirement. It is well-established that it is not necessary that the trader whose input tax is sought to be denied should know of the identity of a missing trader or, as the case may be, a contra-trader (see, for example, *Megtian Ltd (in administration) v Revenue and Customs Commissioners* [2010] STC 840, per Briggs J at [37] – [38]; and *POWA (Jersey) Limited v Revenue and Customs Commissioners* [2012] STC 1476, per Roth J at [52]). The identity of the participants in the fraud is not the relevant factor; it is the existence of the fraud itself.

141. In the same way, what needs to be shown is that there has been fraudulent evasion of VAT. That this can include a fraud involving the hijacking of a trader's VAT registration appears as early as in the Opinion of the Advocate-General (Poiares Maduro) in *Optigen Ltd v Customs and Excise Commissioners* [2006] STC 419 (Opinion, para 8). This was in turn cited with approval by Advocate-General Colomer in *Kittel* (Opinion, para 35) where he said that "in every case the bottom line is that an amount received in respect of VAT is not declared". Whilst it may be possible to identify both the fraud and the identity of the perpetrator of the fraud, the latter is not a necessary ingredient. It is axiomatic that the very nature of the fraud may make such an identification impossible. The paradigm example, perhaps, is the case of a hijacked VAT identity, where those responsible for the hijack will have taken care to conceal their own identity behind the hijack. That does not preclude a finding of fraud; indeed, it is likely to be an element of the factual matrix that goes to establishing the presence of fraud.

142. The FTT was also entitled to find that Epinx was a contra-trader knowingly involved in the offset of input tax associated with fraudulent evasion of VAT against output tax on its sales to Celex UK. The evidence was that the vast majority of Epinx's acquisition transactions in the period January to June 2006 had been traced back to missing traders, and that in May 2006 only one out of 17 had not been so traced. Taking the evidence of the patterns of trade of Epinx as a whole (including the effective netting of the VAT on the dirty chains against that on the clean ones), the FTT was fully justified, in our view, in finding that there was fraudulent evasion of VAT, and that Epinx was a knowing participant in that fraud.

143. On the basis of our own consideration of the evidence, and ignoring all the transaction enquiry reports, the finding of the FTT at [9]:

> "… even disregarding the additional evidence which was produced in relation to the pattern of payments in some cases, established beyond any reasonable room for doubt that certain of the traders had entered into the transactions for no other purpose than to commit fraud. No plausible alternative explanation was offered, nor is any apparent"

was one that the FTT was fully entitled to make, and as such it cannot be upset on this appeal.

FCIB evidence (points d and f)

144. Having regard to our earlier findings, the documentary FCIB evidence, consisting of transaction enquiry reports, contained in tab 10 of the Core Bundle before the FTT was not properly admitted by the FTT as part of Ms Parikh's evidence. Nonetheless, in common with the FTT, we do not consider that such evidence was necessary in order for the FTT to reach its conclusions; it was not necessary for its findings of tax loss, its findings of fraud, or for the finding of connection. Its exclusion cannot therefore affect the FTT's findings.

145. Our conclusion in relation to the extent of the evidence properly admitted is, on the other hand, relevant to consider in relation to two of the points at issue from the permission to appeal, namely points d and f. Those are, to remind ourselves, firstly, for Eyedial to demonstrate that there was no documentary evidence of payments to defaulters, and secondly to enable Eyedial to argue that there was no, or no sufficient, evidence to establish that the missing trader had not in fact itself received the tax but had arranged for the price of goods to be paid to a third party.

146. At first sight these possible submissions by Eyedial appear contradictory. That at point f. derives from what the FTT said at [8]: "in some cases the evidence showed that the missing trader had not in fact received the tax, but had arranged for the price of the goods to be paid to a third party". This is understandable, because such third party payments may indicate a fraudulent intention on the part of the missing trader, who will not only want to go missing, but may seek to ensure that in any event there is no money received that could go to pay the tax. Before the FTT, HMRC had, in relation to deals 51, 62 and 63 (the direct chains) relied on the existence of payments to third parties as indications (amongst others) that the defaulting trader was fraudulent. As we have described, the evidence in this respect ought to have been confined to the flow charts that Ms Parikh had prepared from the underlying material, and should not have included the underlying material itself.

147. More problematic is point d. That appears to have arisen from what the FTT said at [9] concerning patterns of payments. But HMRC's case did not specifically rely on the existence of payments to defaulters. In any event, we do not consider that, even if it were shown that there was no evidence of payments to defaulters, that could in any way affect the conclusions reached by the FTT. The FTT was entitled to conclude that non-payment of the tax was due to fraud, and not due to any shortage of funds on the part of the defaulting traders. Evidence that payments were not made to defaulters is more likely to indicate fraud. Moreover, as we shall describe when looking at the issue of connection, the evidence of payments was not necessary for the FTT to reach the conclusion that in each of the seven deals in question, Eyedial's transactions were connected to fraud. Point d cannot therefore assist Eyedial.

148. As regards third party payments (point f), Eyedial's submission is that there is no documentary evidence to show the existence of third party payments. Miss Field

says that the statements of HMRC's witnesses simply contained bland assertions that such third party payments took place, and that there were no documents, or trail of documents to prove the assertion. In making this submission, Miss Field has referred to the evidence of Mr White as to third party payments in the case of Dialhouse Electrics to which we referred earlier when looking at Epinx. We reject that particular submission for the reasons we have already given.

149. The evidence of Ms Parikh included the charts she had prepared, with revised charts supplanting those originally exhibited to her statement as SP2. In relation to deal 51, where the defaulting trader was FX Drona, both the original chart and the new one showed a payment £435,102.50 from FX Drona's customer, Universal, to Mr Kanadas; that payment matched the amount invoiced by FX Drona to Universal. We have found that the FCIB material supporting payment out of the FCIB account of Universal to Mr Kanadas was not admitted; and, following the refusal of the FTT to admit further evidence in this connection, there was no evidence of the relative credit entry into the account of Mr Kanadas. Nonetheless, the FTT was entitled to rely on the flowcharts produced by Ms Parikh, and her evidence as to the provenance of those charts.

150. Although the evidence was thus arguably deficient in relation to such payments to and by Mr Kanadas, and thus in relation to circularity, there was, even taking no account of the FCIB material, evidence on which the FTT could conclude that, instead of FX Drona receiving the amount due to it on its sale to Universal, that payment had been diverted to Mr Kanadas. The FTT would have been entitled, in the absence of the transaction enquiry reports themselves, to have relied, if it had chosen to do so, on the evidence of Ms Parikh as to third party payments from the investigation she had carried out and the materials upon which she had relied, namely, according to her witness statement, data that had been obtained from the fiscal authorities in the Netherlands.

151. The same conclusion can be drawn from the evidence in relation to each of deals 62 and 63. In deal 62, there was evidence, in the form of Ms Parikh's witness statement and the flowchart, of payment from Deepend Trading to a third party, and not to Prompt Info. In deal 63, the evidence of Ms Parikh and the flowchart she produced was of payment from The Wireless Warehouse to the same third party, and not to Prompt Info.

152. Furthermore, the absence of evidence as to circularity would not, in our judgment, provide any basis on which the decision of the FTT could be impugned. Proof of circularity would be an element, but not an essential element, of a finding that the transactions were contrived and conducted with a fraudulent purpose. It could also, depending on the circumstances, be a factor to be taken into account by a tribunal in determining the state of a trader's actual knowledge of the fraud. In this case the FTT made no finding of actual knowledge. It acknowledged, at [7] of its decision that Ms Parikh's evidence failed in respect of some of the chains, and explained (at [9]) that its decision on the issue of fraud in the chains would have been reached even taking no account of the additional evidence as to the patterns of payments (see [9]). That was a conclusion that, on the evidence we have reviewed,

was one that the FTT was entitled to reach. Our own conclusion, disregarding the transaction enquiry reports as a whole, is the same.

153. For these reasons, although we agree with Miss Field that to the extent the FCIB materials were not properly admitted, there was an absence of direct banking evidence of the third party payment in those deal chains, the FTT was entitled, even absent such evidence, to accept the evidence of Ms Parikh in relation to those payments. Accordingly, the FTT was entitled to conclude, as it did at [8], that there was evidence of third party payments as one of the indicators that the transactions of the defaulting traders were carried out for the purpose of the fraudulent evasion of VAT. There was, in our judgment, no error of law in the conclusion reached in this respect by the FTT.

Connection

154. In her closing submissions, Miss Field argued, consistently with the submissions she had made before the FTT, that it had been established on the evidence that there was no connection between Eyedial and the defaulting traders or the contra-traders, because there was no evidence that Eyedial had ever dealt with those traders. That displays a misapprehension on the part of Miss Field, namely that the relevant connection is a direct trading relationship between Eyedial and the other traders. That is not what is meant by "connection" for this purpose.

155. There is clear authority, in *Mobilx* and also, in this Tribunal, in *POWA (Jersey)*, that the fact that the trader claiming credit for input tax did not deal directly with a fraudulent trader but was more remote in the chain does not preclude his being denied repayment under the rationale of *Kittel*. We respectfully agree with the analysis of Roth J (*POWA (Jersey)*, at [34]), that the connection test is applied to the *transaction*, and not to the individual trader, and that the position of the individual trader is addressed by reference to that trader's knowledge or means of knowledge. Accordingly, the fact that a trader does not himself deal directly with a fraudulent trader does not preclude the denial of an input tax deduction if it is shown that the trader knew or should have known that there was fraudulent evasion of VAT somewhere in the chain.

156. We have described the various chains of transactions identified by HMRC as leading up to the supply made by Eyedial in the deals in question in Eyedial's appeal. We have examined the evidence of those chains, which includes invoices, purchase orders and allocation instructions to freight forwarders. The identifying features of those transactions are as follows:

> (1) The transactions in each deal chain involving Eyedial were invoiced on the same day (deals 51, 62 and 63), virtually the same day (deal 65, where one of the invoices from Celex Export to Eyedial was dated 23 May 2006, and all other invoices were dated 24 May 2006) or on the same day tracing back to Epinx, but with a different invoice date as between FAF International and Epinx (deals 66 to 68; the tracing exercise is material only as far back as Epinx, the contra-trader).

(2) There was complete identity of types and quantities of phones bought and sold by the traders in the chains.

(3) There is a modest increase in the price charged on each successive transaction, with a more substantial increase on the export sale by Eyedial. This is particularly notable in deals 51, 62 and 63; although there is the same pattern of price increases in deals 65 to 68, the amounts of the increases, and the difference between the relative increases are less marked in those cases.

157. For those chains (deals 51, 62 and 63) which, as we have concluded the FTT rightly decided, traced directly back to defaulting traders, and thus to fraudulent evasion of VAT, this evidence was in our view on its own sufficient to enable the FTT to conclude that Eyedial's own supplies were connected to that fraud. It was not necessary for the FTT to place any reliance in this respect on any of the FCIB evidence. We do not accept Miss Field's submission that because there was no evidence of payment having been made to FX Drona (deal 51) and Prompt Info (deals 62 and 63), the FTT ought to have concluded that those companies were not part of those deal chains. On the contrary, the evidence shows that those companies did make sales of the relevant phones that were part of the chains of transactions; the fact that, notwithstanding those transactions, those companies did not receive payments, but payments were according to the evidence of Ms Parikh (and ignoring the transaction enquiry reports) directed elsewhere, may properly be taken instead to support HMRC's case that FX Drona and Prompt Info were fraudulent traders.

158. We reach the same conclusion in respect of the "clean" chains of transactions (deals 65 to 68) leading from Eyedial directly back to Epinx. It is not necessary for the transaction enquiry reports to be relied upon in order to be satisfied that the FTT had sufficient evidence of the transactions in question to conclude that those transactions involved the same goods, bought and sold successively, and so were connected.

159. A different tracing exercise applies to the question of connection to fraud in a "dirty" chain by means of contra-trading. There, as we have explained, the connection arises as a result of the direct chain leading from the broker to the contra-trader, and then the contra-trader's offset of the output tax arising in the "clean" chain by input tax incurred in transactions in one or more different chains, with different goods, but leading back to one or more defaulting and fraudulent traders. As we have said, the nature of contra-trading, which is designed to conceal the connection of the broker's transactions with fraud, is that there is no neat correlation between the transactions giving rise to output tax in the contra-trader, and those giving rise to the offsetting input tax.

160. This point was raised by Miss Field when she referred to the fact that Mr White's evidence (which was confined to the contra-trading deals) dealt with the netting or matching of input tax claims against output tax and used a sample of the tax loss chains. She argued that if the FTT had analysed the evidence, rather than, as she submitted, simply accepting it at face value, it could not have come to the conclusion

that it did. In particular, argued Miss Field, there were no invoices, delivery notes or shipping notes to support any supposed fraudulent chain at the relevant time.

161. We do not accept Miss Field's submissions in this respect. It is not necessary for the tribunal to verify every transaction of the contra-trader, and every "dirty" chain involving the contra-trader in the relevant period. The FTT was entitled to conclude that Eyedial's transactions in deals 65 to 68 were connected with fraudulent evasion of VAT by reason of a combination of the following:

> (1) The evidence of fraud in relation to Eutex and 1st 4 Report that we have considered earlier.
>
> (2) The evidence of the knowing involvement in fraud of Epinx, the contra-trader, which we have already discussed, and the netting of its periodic VAT liability to a nominal amount.
>
> (3) The evidence of Mr White as to the tracing of transactions of Epinx to defaulting traders in the period January – June 2006, and that in all the deal chains where Epinx had acted as a broker trader the deal chain had been traced back to a defaulting trader.
>
> (4) The evidence of Mr White as to the tracing of 16 out of 17 deals involving Epinx to Celex UK, and that in five of those deals (including deals 65 to 68) the goods were sold by Celex Export to Eyedial. (Mr White's evidence refers only to Celex UK, but as we have discussed, the fact that Celex UK is the name of the acquirer in each case from Epinx and Celex Export is Eyedial's supplier does not bring the FTT's conclusion as to the integrity of these chains into doubt.)
>
> (5) The sample transactions, each of which was evidenced by supporting documentation, including invoices, purchase orders, payment transfer documents, inspection reports, release notes, and CMR international consignment notes. Those sample transactions, in each case leading back to fraudulent evasion of VAT by the person purporting to be Eutex, gave rise to tax losses exceeding the amount of the input tax arising in Eyedial on deals 65 to 68.

162. In our judgment, the FTT was entitled, on the basis of this evidence (which was not substantially challenged by Miss Field before the FTT), to conclude that it was more likely than not that the output tax arising on Epinx's sale to Celex UK in the "clean" chain had been set off against input tax in Epinx in the relevant period that could be traced back to fraudulent evasion of VAT, and that, having regard to the knowing involvement of Epinx in the fraud, the transactions of Eyedial in deals 65 to 68 were connected to the fraudulent evasion of VAT.

163. Miss Field made two further submissions with respect to the FCIB evidence presented by Ms Parikh. The first turned on the fact that the original money flows diagrams (flowcharts) exhibited to Ms Parikh's evidence referred to the invoice dates, and not to the payment dates. This was rectified in the revised flow charts included (and admitted by the FTT) at tab 10 of the Core Bundle before the FTT. Miss Field submitted in this respect that the use of the invoice date, by Mr Armstrong in his

evidence, was in error, and that the actual transaction only took place upon delivery. There was in addition a connected argument, namely that if payment had bypassed a member of the alleged chain then that person was not shown to have been a member of the chain and thus not connected.

5 164. We do not accept that submission or the connected argument. We discussed earlier, with specific reference to deal 51, our rejection of Miss Field's submission regarding the proof of the various transactions in the deal chains generally. The tracing of the deal chains through invoice dates is clearly part of the factual matrix on which a tribunal is entitled to base its decision as to connection with fraud. Invoices 10 on the same, or proximate, dates for the same model and quantity of the goods in question, at equivalent prices, are relevant facts in any enquiry of this nature. Indeed, such evidence is far more likely to be material to the tribunal's determination of the deal chains than payment dates or dates of delivery, which of their nature may lack any congruity with the making of the deal itself. Invoices are evidence of the deals 15 having been made, in the sense of a contractual commitment having been entered into. Furthermore, where (as was the case in all of the deals under review) the invoice precedes delivery and payment, the time of supply for VAT purposes is the date of issue of the invoice (see s 6(4) of the Value Added Tax Act 1994). We therefore reject the submission made by Miss Field that the chains of transactions could not be 20 regarded as "back to back" because payments were made some time later than the invoices. In our judgment, the FTT was entitled to conclude, by reference to the invoice evidence, that the goods dealt in by Eyedial in each of the deals in question did trace through to the fraud that had been established, and the connected argument fails for the same reason.

25 165. The second submission of Miss Field on the FCIB evidence was that it was possible to construct, through the FCIB records of the accounts of traders, any number of different possible chains, and that accordingly HMRC's case was based on nothing more than an assumed construct. We accept that, had the transaction enquiry reports properly been before the FTT, the banking evidence showed a number of payments 30 made between the same traders, but that fact cannot get Eyedial anywhere in this appeal. The exercise undertaken by Ms Parikh was not the starting point in tracing the deal chains. The linkage between transactions is not primarily evidenced by the payments; it is evidenced, as we have discussed, through invoices and other documentary material. So, for example, Miss Field took us to the FCIB transaction 35 enquiry reports in relation to deal 51 (which although not admitted were said by Miss Field to support Eyedial's case). That showed a payment on 30 March 2006 from ARC to A E Resources in the sum of £435,778.13, which is the amount invoiced on 28 March 2006 by A E Resources to ARC for the 1150 Nokia 9500 phones. The fact that, as Miss Field pointed out, there was a payment from ARC to A E Resources of 40 £609,825 on the same day, does not take anything away from the evidence of the former payment. Nor do any of the other similar examples raised by Miss Field. The exercise in identifying the payment chains, which, as we have described, showed certain third party payments and evidence to some extent of circularity, derived quite properly from the tracing exercise that had already been undertaken. It was not an 45 exercise in random matching of payments; it sought to confirm payments between parties whose transactions were evidenced already through the documentary evidence,

and in some case to show that, although invoices required payments in certain directions, payments had in fact been made in other directions. We therefore reject Miss Field's arguments in this connection.

166. A recurring theme running through Miss Field's submissions to us was that the inadequacies in, or the failure to admit banking evidence, should lead to the conclusion that the FTT's decision was wrong. We have rejected that submission in relation to the issue of fraudulent evasion of tax, and we also reject it on the question of connection. For the reasons we have given, banking evidence is not a necessary element in deciding that a trader's transactions are connected with fraudulent evasion of VAT. The transaction enquiry reports were either not admitted, or not properly admitted, by the FTT. But disregarding all of that evidence, we find that, on the evidence that we regard as having been properly before the FTT, which we have reviewed extensively, we are ourselves satisfied that Eyedial's transactions in each of the deals in question were so connected. The FTT's conclusion in that regard cannot be impugned.

Whether Eyedial challenged certain notes of meetings and a telephone conversation (point h)

167. Point h of the permission to appeal allowed Eyedial to seek to demonstrate that certain notes, namely those referred to in [27], [28] and [29] of the FTT's decision, had been challenged by Eyedial at the hearing before the FTT.

168. Those paragraphs of the FTT's decision are set out below:

> "[27] In January 2006, there were several telephone conversations between Miss Field and Mr Armstrong, who paid a further visit to Eyedial on 13 January. The same topics were discussed and, according to Mr Armstrong's record, Miss Field again volunteered at the meeting that she was aware that there were fraudulent chains but that she did not wish to become caught up in them. Mr Armstrong's response, according to his record—and we consider it to be an accurate one—was to repeat what he had already said, that Eyedial would inevitably be caught up in such chains if it carried on trading in large quantities of mobile phones. Later that month Miss Field asked again for permission to make monthly returns, a request which was refused by a letter of 24 January 2006, in which Mr Armstrong also told Miss Field that of the 12 transactions which featured in Eyedial's 11/05 return, 11 had been traced, all to defaulting traders.
>
> [28] A few days later Mr Armstrong sent Eyedial a formal warning letter, advising it that it was at risk of being considered by the Commissioners to be jointly and severally liable with others in its chains of transactions. Miss Field's response was to advise Mr Armstrong that she had immediately ceased trading with her current suppliers, and was looking for others. According to Mr Armstrong's notes, which again Miss Field did not challenge, she extolled the quality of her due diligence, and asked Mr Armstrong for his own opinion. He declined to give it, but did tell her that she should continue

to make the checks she was undertaking. However, a few days later he wrote to her, again pointing out that merely making the enquiries was not enough; true due diligence, he wrote, was the analysis of the information received. A few days later, in a telephone conversation in which Miss Field complained to Mr Armstrong that, when checking with HMRC's Redhill office, to ensure that Eyedial was a registered trader, an intending purchaser had been told (she understood) that Eyedial was a defaulter; her complaint was not so much that it had apparently been described, wrongly, as a defaulter, but that it had not in fact been involved in any defaulting chains. Mr Armstrong reminded her that, as he had told her in his letter of 24 January 2006, the Commissioners had discovered that it had been involved in several such chains.

[29] The next visit took place on 20 February 2006, shortly before the start of the period with which we are concerned. On this occasion, too, Mr Hunton was present; Mr Armstrong was accompanied by another officer, a Mr Martin. Mr Armstrong's note was again not challenged. It shows that Miss Field said she knew that there were pre-arranged chains of transactions, but that she was not involved in them and that Mr Armstrong was picking on her by not allowing Eyedial to make monthly returns. Again, Eyedial's due diligence was discussed, in the manner which we have already related. As had become his habit, Mr Armstrong wrote following the meeting, again pointing out that due diligence consisted in the analysis of the information obtained from the other traders with which Eyedial was proposing to deal. On 5 May 2006 Miss Field wrote to Mr Armstrong. Her letter contains the following passage, on which the Commissioners rely:

> 'Defaulters: we note your comments concerning the possibility that we may have unknowingly been involved in transactions where there have been defaulters, and you state this may have an impact on the application [for monthly returns]. We understood that following the recent EC ruling, that we can not be held responsible for defaulters within a transaction chain of whom we are unaware. Therefore how can this be taken into consideration in relation to our application for monthly VAT returns?' "

169. The relevant meetings and conversations were the following:

(a) 13 January 2006. Visit by Mr Armstrong to Eyedial. Mr Armstrong was accompanied by Malcolm Orr of HMRC. Those attending for Eyedial were Miss Field and Miss Deborah Stapley.

(b) 1 February 2006. Following a letter of 30 January 2006, in which Mr Armstrong advised Miss Field that of 12 transactions in period 11/05 that had been examined, 11 had commenced with defaulting traders, Miss Field telephoned Mr Armstrong.

(c) 10 March 2006. It was accepted that the reference in [29] of the FTT's decision to a meeting on 20 February 2006 must have been in error. The March 2006 meeting was again at

Eyedial's office, and it was attended by Mr Armstrong and Mr B Martin of HMRC and by Miss Field and Dale Hunton, Eyedial's accountant, who gave evidence for Eyedial at the FTT hearing.

5 (d) 16 June 2006. This meeting was not specifically referred to by the FTT, but it is relevant to be noted, as Miss Field did challenge Mr Armstrong in this respect in cross-examination. It was a further meeting at Eyedial's office, this time with Mr Armstrong and Helen Grunwell of HMRC and Miss Field and 10 Mr Hunton.

Discrepancies between the typed notes and the handwritten notes

170. Mr Armstrong gave his evidence on the second day of the hearing, 10 August 2006. He was asked by Mr Macnab about typed-up visit reports. Immediately, and before Mr Armstrong had given any oral evidence in that regard, Miss Field 15 intervened to say that the typed-up notes did not match the handwritten notes, and that she did not want Mr Armstrong to perjure himself. She told the FTT at that time that she had identified 144 differences in a document to be produced to the tribunal. The same point was put to Mr Armstrong in cross-examination. It was put to Mr Armstrong that some of the discrepancies amounted to falsehoods.

20 171. In his evidence, Mr Armstrong confirmed that the handwritten notes were taken by other officers, and that those officers had typed up the formal version from those notes.

172. Miss Field asked Mr Armstrong about the notes of the meeting on 13 January 2006. Two discrepancies had been identified between the handwritten meeting notes 25 and the typed-up version. The first was that the typed-up version had recorded that Miss Field had "reiterated that she had nothing to hide. She knew there were dodgy people in the trade", whereas the handwritten notes had noted her as saying: "You know that some people go into this and deal with dodgy people, but I've got nothing to hide. If you say don't do a deal, we'll not. We don't want to go to jail." The 30 second was that in the typed-up version Mr Armstrong is recorded as having said that she [Miss Field] would not go to jail. In the handwritten notes this appears as "You'll not go to jail unless you're the person behind it".

173. Miss Field argued that when she referred to "dodgy people" at this meeting she was not referring to her own knowledge, but to that of Mr Armstrong, the reference to 35 "you" in "You know …" being to Mr Armstrong. Adopting the most generous approach to what was said, we cannot accept that the only interpretation of this was that it was Mr Armstrong only, and not Miss Field, who knew of the presence of "dodgy people" in the industry. The natural reading of Miss Field's words is that both she and Mr Armstrong were aware of that fact. Miss Field's reference to "dodgy 40 people" was her own; it had not been preceded by anything to that effect said by Mr Armstrong. The notetaker cannot be criticised for the record that was made in the typed-up version.

174. Accordingly we find that these are unexceptionable differences between notes written down during a meeting and the later transcribed version. Furthermore, the reference to Miss Field's knowledge in the typed-up version was not taken by the FTT as an admission of knowledge of any of the frauds with which Eyedial's transactions were connected. Nor was that the basis on which the FTT found that Miss Field knew that there was fraud within the wholesale mobile phones trade. It is clear that the existence of such fraud had been explained to Miss Field on numerous occasions, and that she had been urged to do everything she could to protect herself from becoming involved in "dodgy chains".

175. From her cross-examination of Mr Armstrong in respect of these meeting notes the point that Miss Field was seeking to make becomes apparent. Her point was that she believed that Mr Armstrong was telling her that she was doing nothing wrong in her trading. However, in forming that view it is evident that Miss Field was confusing what Mr Armstrong was saying with regard to criminal, or illegal, activity, for which conviction and a prison sentence might be applicable, with the very different issue as to whether there could be loss of a right to recovery of input tax for an otherwise innocent trader, or possible joint and several liability.

176. As Mr Mandalia pointed out, and we accept, taking both the handwritten notes and the typed-up notes of the meeting on 13 January 2006, it is clear that the notes record that Miss Field did say at the meeting that she was aware of fraud in the wholesaling of mobile phones (hence her reference to "dodgy people"), but that she did not want to get caught up with them. Mr Armstrong is recorded as saying that Miss Field would inevitably get caught up in dodgy chains, and that she should do as much as she could to protect herself. That, essentially, is what the FTT found at [27], having concluded, having heard the evidence of both Mr Armstrong and Miss Field, that the note of the meeting was an accurate one. The discrepancies identified in respect of the meeting notes are not material and cannot upset that finding of the FTT.

177. There was no note before the FTT of the telephone call between Miss Field and Mr Armstrong on 1 February 2006. The evidence in relation to that call was contained in Mr Armstrong's witness statement, in which he said:

> "On 1 February 2006, Ms Field phoned me she had received my Joint & Several warning letter. She told me that she had ceased trading with all the people that she had traded with in the past and was sourcing new suppliers now she was exporting. She asked if she was safe if she carried on doing the checks she was doing. I told her that the due diligence she did was the only thing that would protect her from me taking any action and she should keep it up and not become complacent and let it slip. She said that Veracis had been in and told her that they thought her due diligence was very good, what did I think? I told her I wouldn't comment on that, just reiterated my previous point. She said the paperwork was being drawn up with her investor and they would send me a copy. She asked me to send her the check list for exports discussed at the last meeting. I told her I would."

178. Before the FTT there was no challenge by Miss Field to this evidence. Miss Field proffered an explanation to us: namely that she had been under the impression

that, as the relevant phone logs had not been admitted into evidence, she did not have to cross-examine Mr Armstrong in that respect. If that was what Miss Field thought, then she was clearly mistaken. But as we shall describe, Miss Field was given a clear direction by Judge Bishopp to the effect that she would have to challenge Mr Armstrong on any part of his evidence that she did not accept as correct. In any event, Miss Field did not suggest before us that the evidence of Mr Armstrong in this respect was incorrect.

179. On 7 February 2006, Mr Armstrong wrote to Miss Field having examined certain checklists that Miss Field had faxed to him regarding exports. He referred to the specified need for inspection reports and IMEI numbers, and commented, in effect, that merely obtaining that material would not fulfil the purpose of the checklists. He commented that the most important aspect of the due diligence checks was: "what to do with them?" He then went on to consider the steps Eyedial might take once the information had been obtained.

180. On the basis of this evidence, it is not difficult to understand the conclusions drawn in this respect in [28] of the FTT decision. The reference to Mr Armstrong's notes may have been a mistake – the FTT should have referred to Mr Armstrong's evidence – but that does not in any way detract from the findings of the FTT.

181. Miss Field asked Mr Armstrong about discrepancies she alleged there were between the handwritten and typed-up notes of the meeting of 10 March 2006. Miss Field put it to Mr Armstrong that the handwritten notes had recorded the following (we have amended this according to our own reading of the handwritten notes):

> "DA: I ask all my traders to do same – some pay attention some don't. I'm pleased Veracis think your records are good. What I've told you to do is to protect yourself from problems in trade. I will look at them, point out any problems, things change, due diligence may need to change to meet it. You need to ensure your due diligence [areas] are meaningful. You will get a feel for people, like you say Clover and Josh, some people don't care, don't do due diligence."

182. Miss Field argued before the FTT (and indeed the materials produced to us contained the same assertion) that this element of the handwritten notes had not been reflected at all in the typed-up notes of the meeting on 10 March 2006. In fact they had, as was demonstrated by Mr Armstrong in the course of his cross-examination. The typed-up minutes recorded the following:

> "DA reiterated that he highlights problems for all his allocated traders and makes recommendations as to what due diligence checks may be appropriate. He pointed out that the fraud changes and that traders must constantly review their due diligence measures to ensure they remained meaningful."

183. It is evident that this was intended to reflect what had been recorded in the handwritten notes. There is in our view no distortion of the position as originally set out in the handwritten notes, and nothing material in the differences between the two that can affect this appeal.

184. We have referred to this particular difference because it is representative of the points put by Miss Field to Mr Armstrong, and argued by Miss Field before us. Indeed, it is probably the high water mark of Miss Field's submissions in that respect. We have examined all the differences between the two sets of notes that Miss Field had identified. As Mr Mandalia submitted to us, Miss Field's challenges were not to the substance of any of the information set out into the notes, but to the way in which the handwritten notes had been translated into the typed notes. The distinction was pointed out by Judge Bishopp to Miss Field during her cross-examination of Mr Armstrong; she was advised to put to Mr Armstrong anything she wished to argue was an error in the notes, and then to give her own evidence in that respect. However, no such questions were put to Mr Armstrong.

185. In these circumstances, we consider that it was perfectly understandable for the FTT to find, at [29], that there was no challenge to the notes. The two sets of notes, both typed and handwritten, were considered together by the FTT, and the references it makes to the notes, or to the record of a meeting, must be taken to include all the notes, both handwritten and typed, and not just the typed version. There was no challenge on the basis that anything recorded in the combined sets of notes was wrong, in the sense that what was recorded as having been said had not been said.

186. Nor, in our judgment, could the differences identified by Miss Field have had any effect on the FTT's determination. The FTT had before it not only the two sets of notes, with all the comments of Miss Field on the differences clearly highlighted, and the evidence of both Mr Armstrong and of Miss Field herself, but the correspondence from Mr Armstrong which invariably followed the meetings and which made clear, as the FTT itself observed (at [45]), that there was more to due diligence that simply making enquiries and collecting the answers; it was necessary for Miss Field to look critically at Eyedial's business and at the transactions it was intending to undertake, and it was not for Mr Armstrong to run a trader's business.

187. It is not necessary for us to summarise the correspondence that the FTT relied upon in this respect. However, Miss Field did raise one particular issue on the letter sent by Mr Armstrong in response to Miss Field's request that Eyedial be put on monthly VAT returns (the benefit being, for an export trader, that repayment of VAT would be made monthly rather than quarterly). In that letter Mr Armstrong raises some questions, but also takes the opportunity to stress to Miss Field that Eyedial was operating in a very high risk trade sector, one tainted by MTIC fraud. It referred to the risk of a trader such as Eyedial incurring joint and several liability, and the fact that Eyedial's only protection in that respect would be its due diligence. The letter makes the following point, which the FTT referred to at [45]:

> "… checklists in themselves and the documents that you gather are not in themselves due diligence. Due diligence is the cognisance that you take of the information that you have gathered and how you act upon it. As I have said to you before, it must not be treated as a tick box exercise, examine it critically for potential problems and act upon any found."

188. In her closing submissions to us, Miss Field submitted that the correspondence referred to had been superseded by "other documents in which Officer Armstrong retracts his comments". She referred to her closing statement to the FTT, dated 17 September 2010 and to her own evidence that, whereas in the letter of 30 March 2006 Mr Armstrong had warned of defaulters having been found in Eyedial's deal chains for the 02/06 period, she had had a telephone conversation shortly afterwards with Mr Armstrong in which he had told Miss Field that "he was not now looking at [Eyedial's] deals for this return of the 02/06 [period] and that the companies were ok to trade with".

189. In the closing statement of 17 September 2010, Miss Field also referred to a letter from Mr Armstrong to Hassan Khan (Eyedial's solicitors at the time) dated 21 November 2006 in which Mr Armstrong, replying to a judicial review pre-action protocol letter dated 9 November 2006, sated that Eyedial was incorrect in its understanding that the repayment of VAT for period 02/06 was made because Mr Armstrong was content with the due diligence procedures that were being undertaken; Mr Armstrong said that the return in question was not selected for extended verification, no due diligence documentation had been checked and minimal other checks had been undertaken. The statement by Mr Armstrong concerning the checking of Eyedial's due diligence was in turn disputed by Hassan Khan in their reply of 13 December 2006.

190. None of this can assist Eyedial on this appeal. The evidence in question was all before the FTT, and the FTT was clearly directed to it by Miss Field's closing statement. There is nothing in this correspondence that can cast any doubt on the conclusions reached by the FTT as to the nature and extent of Mr Armstrong's advice and assistance to Miss Field, and the reliance placed by Miss Field on Mr Armstrong, nor on the decision of the FTT that Miss Field, and through her Eyedial, should have known of the connection to fraud. The question before the FTT was whether there was any reasonable explanation of the transactions other than connection to fraud, not whether Miss Field had been given assurance that all was well. In reaching its conclusion the FTT was entitled and indeed bound to have regard to matters beyond any view that Mr Armstrong may or may not have expressed.

"Off the record" discussions

191. We remind ourselves that this was not a ground of appeal allowed by Warren J. However, for completeness, and in view of the submissions we received, we believe it is right to set out our analysis and conclusions in this respect.

192. In his evidence in chief, Mr Armstrong was asked by Mr Macnab to consider what Miss Field had said in her witness statement about Mr Armstrong coming "off the record" in order to give Miss Field a steer in relation to potential trading partners for Eyedial. Mr Armstrong told the FTT that there were no such discussions. Pressed on this point later by Miss Field, Mr Armstrong reiterated that he did not come off the record *in relation to any discussion of Eyedial's case*; whilst it was clear that not everything said during a meeting would have been recorded in the notes, which were

not a verbatim transcript, the notes themselves recorded all matters relevant to the visit.

193. The issue of "off the record" discussions was referred to in the evidence of Mr Dale Hunton, who, through his firm Hunton & Co, was Eyedial's accountant at the relevant time. In Mr Hunton's first witness statement he refers to meetings he attended with Miss Field and Mr Armstrong. Although there was some confusion about a February 2006 meeting, it was clarified by Mr Hunton in his oral evidence that he in fact attended the meetings with Mr Armstrong in March and June 2006 to which we have referred above; the February 2006 meeting had been between Mr Hunton and Miss Field. That statement describes the discussions at the meetings from Mr Hunton's own recollection (he did not take his own notes), and makes no reference to "off the record" discussions.

194. Mr Hunton's second statement clarifies a number of points arising out of his first, and refers, in general terms, to Mr Armstrong's habit of speaking off the record, which, Mr Hunton says, became more worrying when he was asking for specific banking information. Mr Hunton also comments in this respect that most of the information Mr Armstrong was asking for had already been supplied by Eyedial as part of its due diligence material.

195. In Mr Hunton's examination in chief, Miss Field asked him about off the record discussions. In relation to the meeting on 10 March 2006, Mr Hunton's evidence was that Mr Armstrong asked that notes not be taken of certain discussions concerning due diligence that was said to have commenced to be undertaken by FCIB, due diligence checklists in general and Eyedial's spreadsheets showing an analysis of the FCIB bank account and the transactions recorded in that respect. Mr Hunton also said that Mr Armstrong asked that details of bank accounts of other traders should be omitted from the notes.

196. In relation to the meeting of 16 June 2006, Mr Hunton's evidence was that information provided by Mr Armstrong to Eyedial concerning certain traders was not recorded in the notes. Mr Armstrong informed Miss Field that certain traders were under investigation and were going to be de-registered. However, Mr Hunton's evidence was also that Mr Armstrong had made the point that he could not tell Eyedial with whom it should, or should not, trade.

197. The evidence given by Mr Hunton in relation to "off the record" discussions contrasted with the evidence of Mr Armstrong. But these points had not been put to Mr Armstrong in cross-examination, and he had not therefore had an opportunity of dealing with them. There was therefore some discussion as to whether Mr Armstrong ought to be recalled to give further evidence. In the event he was not recalled.

198. In cross-examination by Mr Macnab, Mr Hunton confirmed that Mr Armstrong had on occasion asked the person taking notes to stop doing so, because the matters in question were not relevant to the meeting. He said that the matters in question were not pertinent to Eyedial, and were quite often related to other traders and what other

traders did. Mr Hunton had not been concerned at the time about the fact that notes were not taken of those matters.

199. Mr Macnab put to Mr Hunton that the only time this had arisen was at the meeting on 16 June 2006 when Mr Armstrong had instructed that no note be taken of something Miss Field had said about a trader called Global Master. Mr Hunton's response was that this related to five companies that had subsequently been referred to in a complaint made against Mr Armstrong. At the time, however, Mr Hunton said that he had not been concerned about the failure to take notes.

200. Despite this not being an admitted ground of appeal, we have considered this issue at some length because, along with the matter of the preparation of notes and letters by Mr Armstrong, it formed the basis of a submission by Miss Field that Mr Armstrong's evidence as a whole should have been regarded as tainted and called into question, thus casting doubt not only on the evidence of Mr Armstrong but that of all the other officers who had based their evidence on instructions and requests made to them by Mr Armstrong. We do not accept that submission. Having considered all of the relevant evidence, we share the evident view adopted by the FTT (which heard all of the evidence and which considered Miss Field's written submissions in that respect) that these matters were of peripheral relevance, and did not call into question Mr Armstrong's evidence. None of the matters alleged to have been discussed "off the record" could have altered the conclusions reached by the FTT as to the guidance given by Mr Armstrong to Miss Field or her reliance upon it.

201. Nor is Mr Armstrong's credibility reasonably placed into question: it is evident that not everything discussed at the meetings would have been relevant to Eyedial, and there may have been good reason for discussions in relation to third parties not to have been minuted. There is no material inconsistency in this respect between the evidence of Mr Hunton and that of Mr Armstrong, who was candid in saying that not all matters would have been recorded in the notes, and limited his statement that there had been no off the record discussion to matters pertaining to Eyedial's own case. The FTT itself was best placed to evaluate the evidence of all the witnesses. It was entitled to accept the evidence of Mr Armstrong. Although Miss Field argued that, in one respect, Mr Armstrong had been hesitant in reply, that can have no bearing on this appeal; not only was the FTT best placed to observe the demeanour of the witnesses, but the it was entitled to have regard to the context of the alleged hesitation as showing that Mr Armstrong was merely considering the note discrepancy put to him by Miss Field, before responding fully that the meeting note was not intended to be a verbatim transcript. There is therefore nothing of substance in Miss Field's submission in that respect.

Conclusion

202. From all the evidence before the FTT, and taking account of all the submissions made by Miss Field in this respect, we are satisfied that the FTT was entitled to conclude, at [46]:

“[Miss Field] clearly placed a great deal of reliance on Mr Armstrong, and it may well be that what he said did have the effect of reassuring her. But if so, we are sure that any such reassurance was inadvertent, and due in large part to Miss Field’s greater receptivity (as we could see for ourselves as the hearing proceeded) to what she wanted to hear than to what she did not. We find it impossible to believe that an HMRC officer of Mr Armstrong’s experience, engaged as he was on what the Commissioners were loudly proclaiming—as Mr Armstrong’s own letters show—to be their highest priority (of preventing MTIC fraud), would wittingly encourage any trader to engage in the wholesaling of mobile phones within the “grey” market at all, let alone set out to convey the impression that the trader would be safe from action by HMRC if he or she undertook certain suggested steps. The difficulty facing Eyedial is that Miss Field was, we have concluded, too willing to believe that Mr Armstrong was “on her side” than to pay attention to what he said to her about the risks of the trade and the warning signs she should heed.”

Risks of wholesale trade in mobile phones and policy on joint and several liability (point i)

203. The question here is whether Eyedial has demonstrated that it was disputed at the hearing before the FTT that at a meeting on 24 March 2005 Mr Armstrong explained the risks of the wholesale trade in mobile phones and HMRC’s policy in relation to imposing joint and several liability. This arises from [22] of the FTT’s decision at which it was said that this had been undisputed.

204. A note of a meeting on 24 March 2005 was exhibited to the evidence of both Mr Armstrong and Officer Yvette Hay who with Mr Armstrong had conducted a visit to Mr Hunton’s house on that date to meet Miss Field and Mr Hunton. The note records that Miss Field had asked about joint and several liability. Mr Armstrong replied that he would deal with that later. Subsequently, the note records Mr Armstrong advising Miss Field as to due diligence checks, the need to avoid involvement in third party payments and the fact that non-economic activity and joint and several liability had a high profile.

205. Miss Field did not cross-examine Mr Armstrong on this note. But she did challenge Ms Hay. In her evidence Ms Hay said that she was the notetaker for the meeting. Challenged on what had been said concerning Miss Field’s father’s company, Ms Hay said that, if there was no reference in the notes, she would be unable to remember. She expanded on this by saying that the note was not a verbatim transcript. Miss Field then stated that “there’s bits missing”, before turning to a question on part of Ms Hay’s witness statement dealing with a telephone conversation in April 2005 regarding missing bank statements.

206. The only reference to joint and several liability in the cross-examination of Ms Hay is in relation to the evidence of Ms Hay in her witness statement concerning a visit to Eyedial on 15 July 2004, described as a business education visit. Ms Hay’s evidence was that she had explained MTIC fraud to Miss Field and had used her only copy of VAT Notice 726: Joint and Several Liability in order to do so. Having

promised to send copies of Notices 726 and 700/52 to Miss Field in the post, Ms Hay did so from the Middlesbrough VAT office. Miss Field put it to Ms Hay that what was in fact said was that not much advice could be given, but that a book had been handed to Miss Field with the instruction, simply, to "read it". Ms Hay agreed that it was a substantial book.

207. No further questions were raised with Ms Hay on the issue of joint and several liability. The matter of Notice 726 was, on the other hand, addressed by Mr Macnab in his cross-examination of Miss Field. In her evidence Miss Field said that the notice had not been discussed; it had been given to her at the 15 July 2004 meeting, but had been put in a file and not referred to. Miss Field's evidence was that she had wanted to go through the notice with Ms Hay, but Ms Hay would not discuss certain paragraphs in it. However, Miss Field also confirmed that she had discussed joint and several liability with Mr Armstrong, but not with reference to notice 726.

208. We conclude that there was no challenge to the accuracy (as opposed to the completeness) of the record of the meeting of 24 March 2005. There was accordingly no challenge to the evidence that the risks of wholesale trading in mobile phones and HMRC's policy in relation to joint and several liability were discussed at that meeting. There is no reference to notice 726 in those meeting notes; the FTT was entitled to find, having regard to Miss Field's own evidence, that she accepted there were discussions of joint and several liability with Mr Armstrong albeit that those were not by reference to that notice.

209. We should add, having regard to submissions made by Miss Field, that we do not accept that there was any evidence before the FTT of the notes of the meeting on 24 March 2005 having been "tampered with" by any HMRC officer. The FTT were fully entitled, on the basis of all the evidence it heard in this regard, to reach the conclusions that it reached at [22] of its decision.

The scope of insurance (point j)

210. Having found that no sensible trader would have carried on business internationally, as Eyedial had done, without proper contractual protection, the FTT made the following finding with regard to the insurance of the phones sold by Eyedial (at [54]):

> "Similar comments may be made about insurance. These were valuable consignments, worth, as we have said, hundreds of thousands of pounds. Miss Field told us she understood that they were insured by the freight forwarders, not only while they were at their premises but while they were in transit. There is no evidence whatever that she verified that belief. In addition, even if the goods were insured for their own value, there was no evidence that Eyedial was insured for any consequential losses that it might sustain."

211. This gives rise to the next point at issue. Miss Field submits that there was evidence before the FTT to establish that she had verified her belief that the consignments of mobile phones were insured by the freight forwarders in transit. In

support of that submission she referred us to a number of documents that were contained within Eyedial's bundles before the FTT. We have examined those documents and make the following findings in respect of each, in so far as they are relevant to the insurance question (and were not simply duplicates):

5 Deals 51, 62 and 63

(1) Agreement (undated) with AFI Logistics, Insurance Division, for the payment of a deposit of £1,000 by Eyedial for the opening of an account for marine insurance cover.

(2) Application, relating to deal 51, for single shipment insurance with
10 AFI Logistics, with shipment on 28 March 2006.

(3) Certificate of insurance dated 28 March 2006 from AFI Logistics in relation to deal 51. The location is specified as UK – France, and the freight type Road Export.

(4) Insurance invoice dated 28 March 2006 in relation to deal 51.

15 (5) Single shipment insurance application to AFI Logistics relating to deal 62, with shipment on 22 May 2006.

(6) Certificate of insurance dated 22 May 2006 from AFI Logistics in relation to deal 62. The location is specified as UK – France, and the freight type is Road Export.

20 (7) Insurance invoice dated 22 May 2006 in relation to deal 62.

(8) Single shipment insurance application to AFI Logistics relating to deal 63, with shipment on 22 May 2006.

(9) Certificate of insurance dated 22 May 2006 from AFI Logistics relating to deal 63. The location is specified as UK – France, and the
25 freight type is Road Export.

(10) Insurance invoice dated 22 May 2006 in relation to deal 63.

Deals 65 to 68

(11) Invoice dated 1 June 2006 from MSG Freight Ltd to Eyedial in relation to deal 65. The invoice covers handling, security and
30 warehousing, freight to the Netherlands (although the port of discharge is specified as Calais), documentation and inspection. There is no reference to insurance.

(12) Identical invoice dated 25 May 2006 in relation to deal 66.

(13) Invoice dated 29 May 2006 from Advance Solutions (freight
35 forwarders) to Eyedial in relation to deal 67. The invoice is for storage and handling charges. There is no reference to insurance.

Non-insurance related documentation

The remaining documents to which Miss Field referred us as showing insurance in relation to deals 65 to 68 did not relate to insurance at all. For
40 completeness, those documents were:

(14) Letter from Hassan Khan to HMRC dated 17 April 2007 concerning Eyedial's due diligence documentation.

(15) Letter from HMRC to Hassan Khan dated 12 January 2007.

5 (16) Letter from Hassan Khan to HMRC dated 22 April 2007 requesting allocation of a new VAT officer to Eyedial in place of Mr Armstrong.

212. The position of HMRC in opening before the FTT was that there was some documentary evidence that the goods in deals 51, 62 and 63 had been insured, but no documentary evidence indicating that the insurance premiums had been paid. In relation to deals 65 to 68, the submission was that there was no evidence 10 (documentary or otherwise) that the goods had been insured.

213. It was also submitted by HMRC before the FTT that, as one of the characteristics of fraud, there was no satisfactory evidence that the goods were insured, and no evidence at all in relation to deals 65 to 68.

214. Mr Mandalia referred us to a number of passages from the transcript of the FTT 15 hearing where the question of risk had been canvassed with Miss Field in cross-examination. But questions concerning contractual protection and due diligence on freight forwarders would not have assisted the FTT's consideration of the insurance question. What is relevant, however, is the brief questioning of Miss Field, on 19 August 2010, in relation to the payment of the insurance invoice in relation to deal 51 20 (document (4) above). Miss Field was asked from which account the invoice was paid; she was unable to recall, as she did not have the various account statements (from a number of banks) in front of her. Judge Bishopp intervened to say that there did not appear to be any suggestion that the documents were not genuine, and Mr Macnab agreed that further questioning as to whether the invoices had been paid was 25 not going to lead anywhere.

215. In the light of that evidence, although the FTT was clearly entitled to make the finding as to lack of verification that it did at [54] in relation to deals 65 to 68, we do not think the same can be said for deals 51, 62 and 63. In relation to those deals, there was no challenge from HMRC to the genuineness of the insurance documentation, nor 30 in the end to the issue of the payment of the insurance premiums. The insurance documents for deals 51, 62 and 63 appear on the face of them to provide cover for loss in transit. Our conclusion is that the FTT did not take that evidence properly into account when making its finding, and that consequently the finding in this respect that it did make could not reasonably have been arrived at.

35 216. On the other hand, we do not consider that the FTT can be criticised for its finding, also at [54], that there was no evidence that the goods were insured for consequential loss. The insurance documentation does not appear, on its face, to cover such loss.

217. Notwithstanding this error by the FTT, we are satisfied that it could not affect 40 the decision that Eyedial should have known of the fraud in the relevant chains. Failure to insure is apt to indicate a confidence in the deal chain that might suggest that a trader knew of the fraud, and consequently was indifferent to the risk of loss. It

is less material to the question of constructive knowledge which requires consideration of the observable features of the transactions, and whether the trader should have considered that there was no reasonable explanation for them other than that they were connected to fraud. The fact that there was evidence that Eyedial did insure certain of the goods it exported against loss in transit cannot affect the conclusion arrived at by the FTT on all the evidence that Eyedial should have known of the connection of Eyedial's relevant transactions with fraud.

Sufficiency of evidence to establish that Eyedial knew or should have known of the fraudulent nature of any of the seven deal chains (point k)

218. The permission to appeal granted by Warren J finally permitted Eyedial to argue, by reason of all or any of the items we have discussed, that the evidence was insufficient to establish that Eyedial knew or ought to have known of the fraudulent nature of any of the seven chains of transactions identified by the FTT.

219. Expressed in that way, we consider that the scope for argument by Eyedial would be rather too limited. The relevant question, as we have described, is concerned with knowledge or means of knowledge of the connection of Eyedial's transactions to fraud. That is what the FTT was determining, and it is that which Eyedial must demonstrate is a finding that cannot be supported by the evidence.

220. We dealt first with the question of what evidence was properly before the FTT. We concluded that the revised flowcharts were admitted, but that the transaction enquiry reports (essentially the supporting FCIB evidence) had either not been admitted (deals 51, 62 and 63) or that the FTT made an error in admitting it (deals 65 to 68). We have accordingly made our own findings by reference to the evidence excluding that FCIB material.

221. On that basis, we have dealt with the question of sufficiency of evidence in the course of our discussion of each of the other separate points (points a to j) for which permission to appeal was granted. Thus, although we consider that the FTT was wrong to conclude that Eyedial had not disputed whether there was fraudulent evasion of VAT and whether Eyedial's transactions were connected to that fraud, for the reasons we have given we have found that there was sufficient evidence for the FTT to have made its findings in those respects.

222. The FTT dealt with the question whether Eyedial knew or should have known of the connection to fraud at [43] to [58] of their decision. At [43], and again at [58], the FTT asked itself the question, derived from *Mobilx*, which is relevant to the issue of constructive, as opposed to actual, knowledge, namely whether a trader should have known of the connection: the question being whether Eyedial, through Miss Field, ought to have known that there was no reasonable explanation for the transactions, apart from connection to fraud. The FTT appears to have dismissed at an early stage the possibility of Eyedial being regarded as having actual knowledge; it stated, at [46], that it was satisfied that Miss Field did not set out, even indirectly, with the intention of profiting from fraud, and at [58] it concluded, in light of its findings on constructive knowledge, that it was not necessary for it to make a finding on

HMRC's argument that the transactions had been orchestrated. The FTT's finding, therefore, was solely that Eyedial should have known of the connection to fraudulent evasion of VAT.

223. The FTT's decision in that respect was based on its analysis of a number of factors. In its discussion of the facts, at [20] to [33], it referred to the evidence it had received as to the visits made by HMRC to Eyedial, and the correspondence, It then, at [34] to [42] considered the features of Eyedial's own transactions. In its discussion of the question of constructive knowledge it started, at [45] – [46], by examining the reliance said to have been placed by Miss Field on Mr Armstrong. The submissions made by Miss Field in respect of the meeting notes (point h) and the information imparted by Mr Armstrong as to the risks associated with the trade (point i) have been considered earlier, and we have concluded that there is no basis for a challenge to the FTT's decision on either account.

224. We have found in particular that the FTT was entitled to conclude (at [46]) that Miss Field was too willing to believe that Mr Armstrong was "on her side" than to pay attention to what he had said about the risks of the trade, and the warning signs. The FTT went on to find, at [47], that the warning signs were all too obvious and that any prudent company director would have realised that this was a market in which an honest trader should not be involved and that the individual transactions could not rationally be explained otherwise than by an underlying fraudulent purpose. The FTT was therefore entitled to conclude that there was no reasonable explanation for the transactions otherwise than that they were connected with fraud.

225. The FTT then went on to explain what it meant by "warning signs". We need not describe these in detail, as they are set out in the FTT's decision at [48] – [57]. The areas covered were in essence (a) the nature of the goods traded, (b) the absence of any added value on the part of Eyedial, (c) the failure to evaluate information obtained through due diligence, (d) the attitude of Eyedial and Eyedial's suppliers to contractual risk, (e) the ability of Eyedial to undertake substantial transactions with little capital and other resources, (f) the nature of Eyedial's transactions, (g) insurance, and (h) inspection of goods.

226. Of these, the only area of challenge before us was that of insurance (point j). Although we have found some substance to Eyedial's submissions in relation to the insurances for deals 51, 62 and 63, we have concluded, for the reasons given earlier, that this error cannot affect the finding of the FTT that Eyedial should have known of the connection to fraud.

227. Whilst we have concluded that the FTT made errors, firstly in admitting evidence on a flawed understanding of the position, secondly in concluding that the issues of tax loss, fraudulent evasion of VAT and connection to fraud had not been challenged or had effectively been conceded, and finally in certain of its findings in respect of insurance, our own assessment of the evidence, taking into account the considerable submissions both from Miss Field and HMRC, has led us to the conclusion that the evidence properly before the FTT was sufficient to establish that, as was found by the FTT, Eyedial should have known of the connection of its relevant

transactions to the fraudulent evasion of VAT. That finding, in our view, was one that the FTT was fully entitled to make on the evidence that we consider was properly before it, and no error of law can be discerned in the conclusion reached by the FTT.

Decision

228. For the reasons we have given, we dismiss this appeal.

ROGER BERNER
CHARLES HELLIER

UPPER TRIBUNAL JUDGES

RELEASE DATE: 05 September 2013