TC02687

Appeal number: LON/2007/1481

VAT –input tax reclaim – MTIC fraud – contra-traders – whether trader knew or should have known that its purchases were connected with VAT fraud – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ASYLUM DISTRIBUTIONS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE MISS JILL C GORT
DR MICHAEL JAMES

Sitting in public in London between 19 November and 13 December 2012

No appearance by or on behalf of the Appellants

Mr Christopher Foulkes and Mr Jamie Sharmer of Counsel, instructed by the Solicitor to HM Revenue and Customs for the Respondents

DECISION

1. This is an appeal against three decisions of the Commissioners of HM Revenue & Customs ("the Commissioners") contained in letters dated 13 August 2007, 19 June 2008 and 4 August 2008 denying input tax in a total sum of £5,792,536.73 in respect of 22 deals relating to computer peripherals, satellite navigation systems and various other electronic and other items carried out by the Appellant in the Value Added Tax periods between 03/06 and 08/06. The grounds for each of the decisions were that the input tax incurred by the Appellant, Asylum Distributions Ltd "(Asylum") in every instance was done so in transactions connected with the fraudulent evasion of VAT and that Asylum knew, or should have known of that fact.

2. By its three Notices of Appeal dated respectively 17 August 2007, 14 June 2008 and 17 August 2008, Asylum's grounds of appeal in essence were that it did not have the knowledge, or means of knowledge that a) VAT fraud existed in its supply chains, or b) its transactions formed part of an overall scheme to defraud the Revenue. It was, therefore, entitled to a deduction for input tax by virtue of Article 17 of the Sixth Directive.

3. Up until the start of the hearing of the appeal, Asylum had been represented by Mr Liban Ahmed of Controlled Tax Management ("CTM"), and there had been an agreed timetable between the parties prior to the opening. However no opening submissions were received by the Commissioners on behalf of Asylum in accordance with that agreed timetable, the Commissioners only received Asylum's opening submissions on the first day of the hearing of the appeal(19 November 2012), although those submissions were dated 7 November 2012. Also on the opening day the Court was notified of the proposed non-attendance either by or on behalf of Asylum, however Mr Ahmed agreed to be a contact point between the Commissioners and Mr Marcello Auletta, the director of Asylum, in the event of the need to clarify any specific matters which might arise. We will refer below to the outcome of any such communications where relevant.

4. Following a joint application on 10 September 2010 by Asylum and IT Wholesale Ltd ("ITW"), (a company of which Mr Marcello Auletta was company secretary and whose brother, Mr Elio Auletta, was director, and which had also appealed against a denial of input tax) for the two appeals to be heard together, on 3 November 2010 it had been directed inter alia that evidence be cross admissible between the appeals of Asylum and ITW. However, on 29 November 2011 ITW had been dissolved and it had decided that, whilst it did not accept that it was not entitled to the input tax in the sum of £4,386,179.89 that it had been denied by the Commissioners in respect of VAT periods 04/06 and 05/06, the subject of its appeal, it could not afford to continue with the appeal. In the circumstance we decided that it was nonetheless appropriate to consider the evidence available which concerned ITW in so far as it was relevant to the appeal of Asylum.

5. Also on the morning of first day of the hearing of the appeal an email was received on behalf of Asylum from Mr Ahmed stating:

> "Please be advised that we have been informed by the Appellant that he doesn't feel that he can attend such a daunting hearing without representation and he does not have the funds to pay for any more litigation. We have supplied opening submissions on the Appellant's instructions, and he wished that the trial goes ahead, but without his attendance. He relies on the opening submissions."

There was no explanation given as to the reason for Mr Elio Auletta's non-appearance, although as a witness in Asylum's appeal his attendance had been required. In the circumstances the Tribunal directed in accordance with Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 that, the parties having being notified of the hearing, it was in the interests of justice for the hearing to proceed in the absence of Asylum or its representative.

6. Although following its dissolution, there was no longer an appeal by ITW before the Tribunal, nonetheless, the direction of 3 November 2010 as to cross-admissibility of evidence remained extant. Initially, Mr Foulkes on behalf of the Commissioners objected to the admission into evidence of Asylum's witness statements in the light of the proposed non-attendance of its witnesses for cross-examination. The Tribunal directed that the Commissioners inform Asylum's representatives of the proposed objection, in order to ascertain whether this affected Asylum's intention that its director not attend for the duration of the hearing and specifically for cross examination. By an email dated 19 November 2012, Mr Ahmed responded as follows:

> "1. The Director will not be attending on any given day. We appreciate that this raises certain problems for the Appellant and these have been fully explained to Mr Auletta.
>
> 2. The issue of the pleaded case and inadmissibility of evidence is withdrawn, given we will not be there to properly argue our point and given the lateness of the issue. …"

In the circumstances, given that Asylum had been advised of the possible consequences of failing to make its witnesses available for cross-examination, and in the light of the Respondents' subsequent withdrawal of their objection to the admissibility of the witness statements, we decided under Rule 15 of the Procedure Rules to admit both witness statements in evidence. It will, nonetheless, be a matter for us as to the weight to be attributed to the evidence contained in those witness statement given the failure of the witnesses to attend for cross examination.

7. The appeal is in respect of Missing Trader Intra Community ("MTIC") VAT fraud which also involved contra-trading (see para 9 below for an explanation of MTIC fraud)

The principal issues to be decided:

i) Whether the Commissioners had provided evidence of the fraudulent evasion of VAT in respect of any or all of the transactions.

ii) Whether there is a connection with any or all of Asylum's transactions to fraud.

iii) Whether Asylum knew of this connection

iv) Whether Asylum should have known of this connection there being no other reasonable explanation.

Other issues were raised in Mr Ahmed's skeleton argument which we deal with towards the end of the Decision.

8. The following matters were agreed between the parties:

In his skeleton argument Mr Ahmed on behalf of Asylum conceded the following:

i) The Commissioners have identified the correct supply chains in both the Appellant's chains and those of all the contra traders.

ii) The witness statements that provide factual evidence regarding the actions and trading patterns of the contra traders are not disputed. Therefore, no contra trader witnesses are required to give oral evidence. It is the opinion of these Officers that is challenged through submissions.

iii) A fraudulent tax loss has occurred at the start of all the contra traders supply chains. Therefore no defaulting trader witnesses are required to give oral evidence.

9. Mr Ahmed's skeleton argument continues at paragraph 6 that Asylum continued to contest: "… that a tax loss, let alone a fraudulent tax loss, has been proved in any of its supply chains." Following the non appearance by the Mr Ahmed at the hearing, the Tribunal directed the Commissioners to contact Mr Ahmed to clarify the apparent conflict between (iii) above and paragraph 6 of the skeleton argument. By an email sent on 23 November 2012 Mr Ahmed set out Asylum's position as follows:

> "1. There is a tax loss in all the dirty supply chains.
>
> 2. There is no tax loss in its own supply chains.
>
> 3. The contra traders did not act fraudulently and, therefore the Appellant is not connected to fraud.
>
> 4. The construction of the supply chains is correct in all the dirty and clean chains and, therefore, the goods purchased by the contra traders were later purchased by the Appellant."

The Legislation

10. Articles 167 and 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of VAT[1] provide:

> "167 – A right of deduction shall arise at the time the deductible tax becomes charged.

[1] Formerly Article 17(1) and (2) of Directive 77/388 – the Sixth directive of the harmonisation of the laws of the member states relating to turnover taxes – common system of value added tax: uniform basis of assessment.

168 – In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following form the VAT which he is liable to pay;

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person"

Sections 24, 25 and 26 of the VAT Act 1994 provides:

"24. – (1) Subject to the following provision of this section, "input tax", in relation to a taxable person, means the following tax, that is to say-

(a) VAT on the supply to him of any goods or services;

(b) VAT on the acquisition by him from another Member state of any goods; and

(c) VAT paid or payable to him on the importation of any goods from a place outside the Member States.

being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.

…

(6) Regulations may provide-

(a) for VAT on the supply of goods or services to a taxable person, VAT on the acquisition of goods by a taxable person from other member States and VAT paid or payable by a taxable person on the importation of goods from places outside the member States to be treated as his input tax only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases;

25 – (1) A taxable person shall-

(a) in respect of supplies made by him, and

(b) in respect of the acquisition by him from other member States of any goods,

Account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations may make different provision for different circumstances.

(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

> 26. - (1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.

Regulation 29 of the VAT Regulations provides:

> 29.-(1) Subject to paragraph (2) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable.
>
> (2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of-
>
> (a) A supply from another taxable person, hold the document which is required to be provided under regulation 13: …
>
> Provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold, instead of the document or invoice (as the case may require) specified in sub-paragraph (a)… above, such other documentary evidence of the charge to VAT as the Commissioners may direct.

The Law

11. This appeal concerns HMRC's right to refuse a claimed repayment of input tax if Asylum knew or should have known that its transactions(s) were connected with fraud.

12. The Court of Appeal considered the basis for, and application of, this test for the first time in the conjoined appeals of *Moblix Ltd (in Administration) v HMRC: HMRC v Blue Sphere Global Ltd; Calltel Telecome Ltd and another v HMRC* [2010] EWCA Civ 517. For ease of reference this case will hereafter be referred to as "*Mobilx & others"*. Before addressing this judgment, some of the background and context – to be found in the decisions and judgments of the European Court of Justice ("ECJ") and the lower national courts – is considered.

13. It is assumed to be common ground that if a taxable person has incurred input tax that is properly allowable, he is entitled to set it against his output tax liability and, if the input tax credit due to him exceeds the output tax liability, to receive a repayment.

14. It is also assumed that it is common ground that *Axel Kittel v Belgium: Belgium v Recolta Recycling SPRL* (C-439/04 and C-440/04) [2006] ECR 1-6161 provides a legal basis for denying a taxable person the right to deduct in certain defined circumstances.

15. In *Kittel,* the ECJ stated:

(1) where the tax authorities find that the right to deduct has been exercised fraudulently, they are permitted to claim repayment of the deducted sums retroactively (paragraph 55);

(2) 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 the fraudulent evasion of VAT, must be regarded as a participant in that fraud (paragraph 56);

(3) this is the case, irrespective of whether or not he profited by the resale of the goods;

(4) this is because in such a situation the taxable person aids the perpetrators of the fraud (paragraph 57).

The ECJ concluded:

> "… where it is ascertained, having regard to objective factors, that the supply is to a taxable person who knew or should have known that, by his purchase, he was participating in a transaction connection with fraudulent evasion of VAT, it is for the national court to refuse that taxable person entitlement to the right to deduct." (paragraph 61)

16. In the light of the above, the Commissioners have the right to refuse a claimed repayment of input tax if the taxable person knew or should have known that his transaction was connected with fraud.

17. The ECJ in *Kittel* (paragraph 51) refers to "traders who take every precaution which could reasonable be required of them to ensure that their transactions are not connected with fraud". Such traders can rely upon the legality of their transactions without the risk of loosing their right to deduct the input VAT.

18. The Tribunal in *Dragon Futures Limited v HMRC* [2006] UK VAT 19831 set out its own interpretation of the test at paragraph 74 and more concisely at paragraph 75:

> "Where an initial enquiry gives rise to information suggesting the need for further enquiry, the test is reapplied to assess the need for that further enquiry."

19. The following questions have been considered and approved (see e.g. *Blue Sphere Global Limited v HMRC* [2009] EWHC 1150 (Ch)) as the correct questions which must be considered by the Tribunal in an appeal of this sort:

(1) was there a tax loss?

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

(3) if there was a fraudulent evasion, where the Appellant's transactions which are the subject of this appeal connected with that evasion?

(4) if such a connection was established, did the Appellant know or should it have known that its transactions were connected with fraudulent evasion of VAT?

20. What is clear is that the relevant "knowledge" is not necessarily knowledge of the specific fraud or even the identity of a particular defaulter. Rather, it is a question of knowledge of the connection with fraud and what a trader can infer form matters he either knows or reasonably could know.

21. In *Livewire Telecom ltd: Olympia Technology Ltd* [2009] EWHC 15 (Ch), Lewison J also stated that the "means of knowledge" test involved considering what the ordinarily competent director would have know and done (paragraphs 123-126).

22. The instant case involves an allegation that some of the appellant's deals were connected with a fraudulent tax loss through the operation of a **"contra trader",** ie that the acquiring trader supplying the Appellant's deal chains was deliberately off-setting its output tax in those chains against input tax reclaimed in chains in which it acted as a broker (exporting) trader, those latter chains involving a defaulting trader or other connection to a fraudulent default. The purpose of this is to shift the some or all of the payment claim from the contra trader to the Appellant, whose transactions on their face are not directly connected with a fraudulent default. This is intended to reduce the chance of the repayment claim(s) being denied.

23. In *Livewire Telecom Ltd: Olympia Technology Ltd,* Lewison J considered the means of knowledge test in such cases:

> "102. In my judgment in a case of alleged contra trading, where the taxable person claiming repayment of input tax is not himself a dishonest co-conspirator, there are two potential frauds:
>
> i) the dishonest failure to account for VAT by the defaulter or missing trader in the dirty chain; and
>
> ii) the dishonest cover up of that fraud by the contra trader.
>
> 103. Thus it must be established that the taxable person knew or should have known by a connection between his own transaction and at least one of those frauds. I do not consider that it is necessary that he knew or should have known of a connection between his own transaction and both of these frauds. If he knows or should have known that the contra-trader is engaging in fraudulent conduct and deals with him, he takes the risk of participating in a fraud, the precise details of which he does not and cannot know. As Millett J put it in *Agip (Africa) Limited v Jackson* [1990] CH 265, 295 (in the context of dishonest assistance in a breach of trust):
>
> In my judgment, however, it is no answer for a man charged with having knowingly assisted in a fraudulent and dishonest scheme to say that he thought that it was 'only' a breach of exchange control of 'only' a case of tax evasion. It is not necessary that he should have been aware of the precise nature of the fraud or even of the identity of its victim. A man who consciously assists others by making arrangements which he knows are calculated to conceal what is happening from a

third party, takes the risk that they are part of a fraud practised on that party."

104. This conclusion is, I think, consistent with what Burton J said in *Just Fabulous* (§ 24): "whether or not Evolution knew of the precise nature of the defaulter chain or of the goods purportedly dealt with in that chain or the identities of the participants in that chain, Evolution knew of the fraudulent aim of Blackstar in acquiring, through the off-set on the contra trading transaction, the opportunity to receive by such off-set, VAT which it would not be able to recover direct form the Revenue.

105. In other words, if the taxable person knew of the fraudulent purposes of the contra trader, whether he had knowledge of the dirty chain does not matter."

24. The test has been further considered in *Calltel Telecom Limited v HMRC* [2009] EWHC 1081 (Ch) and *Blue Sphere Global Limited v HMRC* [2009] EWHC 1150 (Ch). In *Calltel*, Floyd J again considered the application of the *Kittel* test to allegations of contra trading:

"79. The Tribunal relied on the judgment of Burton J in *R (Just Fabulous (UK) Limited and others v HMRC* [2007] EWHC 521 (Admin). In that case Burton J had to consider the position in relation to contra trading, a case where by definition the transaction in which the trader is involved is outside the fraudulent chain altogether. At [43] having referred to the passages in *Kittel* which I have cited above, Burton J recorded the Revenue's submission that:

> "the words which record these definitive statements are untrammelled by any reference to the need for establishing that the taxable person must be a member of a defaulter chain, or that he must be dealing in the same goods as had been the subject of a defaulter chain."

80. Burton J accepted those submissions without reservation at [50] to [53]. If the Revenue can justifiably refuse repayment of VAT, on the basis of the rest in *Kittel*, in the case of a contra trade, it seems to me that there is no obstacle to applying the same principle to successive members of the defaulter chain itself, provided always that the taxpayer in question satisfied the *Kittel* test. In the case of contra trading, the impugned transaction is necessarily one which can have no causative relationship with the importer's fraud. No causal connection of the kind suggested as being necessary by Mr Cordara is recognised by Burton J in *Just Fabulous* or by Lewison J in the course of his careful review of the authorities in *Livewire* and *Olympia.*

81. It will be recalled that the rationale in *Kittel* for refusing repayment where the purchaser knows that he was taking part in a transaction connected with fraudulent evasion of VAT was that he "aids the perpetrators of the fraud and becomes their accomplice". For my part I have no difficulty in seeing how the purchaser who is not in privity of contract with the importer aids the perpetrators of the fraud. He supplies liquidity into the supply chain, both rewarding the perpetrator of the fraud for the specific chain in question, and ensuring that the supply chains remain in place for future transaction. By being ready,

> despite knowledge of the evasion of VAT, to make purchases, the purchaser makes himself an accomplice in that evasion.
>
> 82. Accordingly, I must reject Calltel's and Opto's appeal on this basis."

25. In *Blue Sphere Global*, the chancellor also considered the application of the *Kittel* test, and particularly in relation to allegations involving contra trading. He considered separately the issues of **connection with fraud** and **knowledge**. In respect of connection with fraud, he said:

> "44. There is force in the argument of counsel for BSG but I do not accept it. The nature of any particular necessary connection depends on its context, for example electrical, familial, physical or logical. The relevant context in this case is the scheme for charging and recovering VAT in the member states of the EU. The process of off-setting inputs against outputs in a particular period and accounting for the difference to the relevant revenue authority can connect two or more transactions or chains of transaction in which there is one common party whether or not the commodity sold is the same. If there is a connection in that sense it matters not which transaction or chain came first. Such a connection is entirely consistent with the dicta in *Optigen* and *Kittel* because such connection does not alter the nature of the individual transactions. Nor does it offend against any principle of legal certainty, fiscal neutrality, proportionality or freedom of movement because, by itself, it has no effect.
>
> 45. Given that the clean and dirty chains can be regarded as connected with one another, by the same token the clean chain is connected with any fraudulent evasion of VAT in the dirty chain because, in a case of contra trading, the right to reclaim enjoyed by C (Infinity) in the dirty chain, which is the counterpart of the obligation of A to account for input tax paid by B is transformed to E (BSG) in the clean chain. Such a transfer is apt, for the reasons given by the Tribunal in *Olympia* (paragraph 4 quoted in paragraph 4 above), to conceal the fraud committed by A in the dirty chain in its failure to account for the input tax received from B".

(A = defaulting trade in dirty chain
B = first line buffer in dirty chain
C = contra trader
E = broker in clean chain)

26. The Chancellor was in these passages dealing with the connection with the fraudulent default in the contra trader's broker chains. He also recognised the principles set out by Lewison J in *Livewire* that there are at least two potential frauds to which a connection may be established, the second being the fraud of contra trader in deliberately offsetting his input and output tax to cover the defaults in its broker chains, as will be seen below.

Hence the action of the contra trader in offsetting input tax against output tax in its broker and acquirer chains provides the connection of the appellant's broker deals in the latter chains to the fraudulent defaults in the former, without more. For these

purposes, the state of knowledge of the contra trader is irrelevant. Equally the type of goods in the broker chains is compared to those in the acquirer chains is irrelevant.

27. On the issue of the Appellant's knowledge, the Chancellor stated:

> "48. As Lewison J pointed out in *Livewire* (see paragraph 26 above), in alleged contra trading cases there are, at least, two potential frauds (1) the dishonest failure to account for VAT by the defaulter or missing trader (A) in the dirty chain, namely, AS Genstar and Wade Tech and (2) the dishonest cover up of that fraud by the contra trader (C), namely Infinity. In this case, the Tribunal rejected the contention of HMRC that Infinity had itself been fraudulent even though it must have known or have had reason to suspect that within its transaction chains there were missing, hijacked or otherwise defaulting traders, see paragraph 141. Accordingly for the purpose of applying the *Kittel* test the only relevant fraud is that of AS Genstar and Wade Tech."

28. In that case, however, there was no suggestion that the Appellant had actual knowledge of a connection with fraud, and the Tribunal had found that the alleged contra trader had only means of knowledge of the fraudulent defaults within its "dirty" (broker) chains. Having recognised Lewison J's identification of two potential frauds, therefore, the Chancellor went on to consider only the possibility of the Appellant's means of knowledge of those fraudulent defaults. He concluded that if the alleged contra trader was not part of a scheme such that it had actual knowledge of the fraud in its chains when that fraud happened, then the Appellant could not have known of the same. Therefore it could not be said that it ought to have known. He went on:

> "55. In my view it is an inescapable consequence of contra trading that for HMRC to refuse a reclaim by E it must be in a position to prove that C was party to a conspiracy also involving A. Although the fact that C is party to both the clean chain with E and dirty chain with A constitutes a sufficient evasion of VAT involved in the subsequent dirty chain. At the time he entered into the clean chain there was no such dirty chain of which he could have known, nor was the occurrence of such dirty chain inevitable in the sense of being pre-planned."

29. In *Livewire*, Lewison J left open the possibility of the *Kittel* test being satisfied in respect of the broker Appellant even where there was an innocent contra trader providing the connection with the fraudulent default, albeit that the circumstances would be very unusual, whereas in *Blue Sphere Global* the Chancellor has concluded that, in reality, the alleged contra trader must be deliberately offsetting its input and output tax in the knowledge of fraud in its dirty chain.

30. In *Megtian Limited (In Administration v HMRC* [2010] EWHC 18 (Ch), Briggs J considered a submission on behalf of the Appellant arising from Lewison J's identification of two potential frauds in a contra trading case:

> "33. Mr Patchett-Joyce's submission under Ground 3 was that, in light of Livewire, it was necessary in any case where a disallowance of input tax was to be made good as against the broker at the foot of the clean

chain in a contra trading case to demonstrate, and for the Tribunal on appeal to find, that the broker knew or ought to have known specifically of one or other in those two aspects of the underlying fraud. By contrast, Mr Patchett-Joyce submitted (correctly) that in the present case the Tribunal had addressed the question of what Megtian knew or ought to have known as a single question applicable both to the straight transactions and the contra trading transactions, without any such specific analysis in relation to the latter. Mr Patchett-Joyce was quick to point out that it was understandable that the Tribunal took this course, bearing in mind that *Livewire* was decided shortly after it released its Decision in the present case. Nonetheless it was, he submitted a fatal error of law, in relation to the contra trading transactions.

34. I disagree. I do not read Lewison J's analysis of the issue as to what must be shown that the broker knew or ought to have known in a contra trading case as amounting to a rigid prescription that, as a matter of law, such an analysis must be performed in every contra trading case, such that it will be defective unless it identifies one or other of the alternative frauds as being that which the broker knew or ought to have known.

35. In the first place, Lewison J was, as he made very clear, addressing the question what had to be demonstrated against an honest broker who was not a dishonest co-conspirator in the tax fraud. In the present case, the Tribunal's conclusion, after hearing oral evidence from the cross-examination of Mr Andreou, Megtian's shareholder and principal manager, was that Megtian knew that the transactions on which it based its claim were connected to fraud: see paragraph 112 of the Decision. Participation in a transaction which the broker knows is connected with tax fraud is a dishonest participation in that fraud: see below.

36. Secondly, Lewison J acknowledged that in many if not most cases of contra trading, the clean chain and the dirty chain were likely to be part of a single overall scheme to defraud the Revenue. As he put it, at paragraph 109:

> "Indeed, it seems to me that the whole concept of contra trading (which is HMRC's own coinage) necessarily assumes that to be so."

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

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

> made reasonable enquiries. In my judgment, sophisticated frauds in the real world are not invariably susceptible, as a matter of law, to being cared up into self-contained boxes even though, on the facts of particular cases, including *Livewire*, that may be an appropriate basis for analysis."

31. In *Mobilx & Others* the court of Appeal (Moses LJ giving judgment) dismissed a submission that the principles enunciated by the ECJ in *Kittel* cannot be applied as part of UK domestic law without specific legislation. It then went on to consider what it described as two essential questions:

> "… firstly, what the ECJ meant by "should have known" and secondly, as to the extent of the knowledge which it must be established that the taxpayer ought to have had: is it sufficient that the taxpayer know or should have known that it was more likely than not that his purchase was connected to fraud or must it be established that he know or should have known that the transactions in which he was involved were connected to fraud?" [Paragraph 4]

32. On the first question, the Court concluded,

> "52. If a taxpayer has the means at his disposal of knowing that by his purchase he is participating in a transaction connected with fraudulent evasion of VAT he loses his right to deduct, not as a penalty for negligence, but because the objective criteria for the scope of that right are not met. It profits nothing to contend that, in domestic law, complicity in fraud denotes a more culpable state of mind than carelessness, in the light of the principle in *Kittel.* A trader who fails to deploy means of knowledge available to him does not satisfy the objective criteria which must be met before his right to deduct arises."

33. In relation to the second question, the Court stated,

> "53. Perhaps of greater weight is the challenge based, in *Mobilx* and *BSG*, on HMRC's denial of the right to deduct on the grounds that the trader knew or should have known that it was more likely than not that transactions were connected to fraud … In short, does a trader lose his entitlement to deduct if he knew or should have known of a risk that his transaction was connected to fraudulent evasion of VAT? HMRC contends that the right to deduct may be denied if the trader merely knew or should have known that it was more likely than not that by his purchase he was participating in such a transaction.
>
> …
>
> "56. It must be remembered that the approach of the court in *Kittel* was to enlarge the category of participants. A trader who should have known that he was running the risk that by his purchase he might be taking part in a transaction connected with fraudulent evasion of VAT, cannot be regarded as a participant in that fraud. The highest it could be put is that he was running the risk that he might be a participant."

34. The Court held that the alternative view would infringe the principle of legal certainty. It concluded:

> "59. The test in *Kittel* is simple and should not be over-refined. It embraces not only those who know of the connection but those who "should have known". Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have know that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known that fact. He my properly be regarded as a participant of the reasons explained in *Kittel.*
>
> "60. The true principle to be derived from *Kittel* does not extend to circumstances in which a taxable person should have known that by his purchases it was more likely than not that his transaction was connected with fraudulent evasion. But a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion."
>
> (Emphasis added).

35. The Court also addressed the issue raised by traders in a number of previous cases: that the test cannot be satisfied when the fraudulent default may take place after the appellant's connected transaction:

> "61. …The extension of that principle to a taxable person who has the means of knowledge but chooses not to deploy it, similarly, does not infringe that principle. If he has the means of knowledge available and chooses not to deploy it he knows that if found out, he will not be entitled to deduct. If he chooses to ignore obvious inferences from the facts and circumstances in which he has been trading, he will not be entitled to deduct.
>
> 62. The principle of legal certainty provides no warrant for restricting the connection, which must be established, to a fraudulent evasion which immediately precedes a trader's purchase. If the circumstances of that purchase are such that a person knows or should know that his purchase is or will be connected with fraudulent evasion, it cannot matter a jot that that evasion precedes or follows that purchase. That trader's knowledge brings him within the category of participant. He is a participant whatever the stage at which the evasion occurs."
>
> (Emphasis added)

36. Later in its judgment the Court provided further guidance on the application of the *Kittel* test:

> "81. HMRC raised in writing the question as to where the burden of proof lies. It is plain that if HMRC wishes to assert that a trader's state of knowledge was such that his purchase is outwith the scope of the right to deduct it must prove that assertion. No sensible argument was advanced to the contrary.

"82. But that is far from saying that the surrounding circumstances cannot establish sufficient knowledge to treat the trader as a participant. As I indicated in relation to the BSG appeal, Tribunals should not unduly focus on the question whether a trader has acted with all due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is his transactions have been or will be connected to fraud. The danger in focussing on the question of due diligence is that it may deflect a Tribunal from asking the essential question posed in *Kittel*, namely, whether the trader should have known that by his purchase he was taking part in a transaction connected with fraudulent evasion of VAT. The circumstances may well establish that he was."

37. Moses LJ quoted with approval the dictum of Christopher Clarke J in *Red 12 v HMRC* [2009] EWHC 2563, to the effect that the Tribunal should examine all the circumstances, and consider a given transaction in the context of the other transactions conducted, and patterns that may exist, the quoted passage ending,

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

38. Moses LJ continued,

"84. Such circumstantial evidence, of a type which compels me to reach a more definite conclusion than that which was reached by the Tribunal in *Mobilx*, will often indicate that a trader has chosen to ignore the obvious explanation as to why he was presented with the opportunity to reap a large and predictable reward over a short space of time. In *Mobilx*, Floyd J concluded that it was not open to the Tribunal to reply upon such large regards because the issue had not been properly put to the witnesses. It is to be hoped that no such failure on the part of HMRC will occur in the future.

"85. In so saying, I am doing no more than echoing the warning given in HMRC's Public Notice 726 in relation to the introduction of joint and several liability … A trader who chooses to ignore circumstances which can only reasonably be explained by virtue of the connection between his transactions and fraudulent evasion of VAT, participates in that fraud and, by his own choice, deprives himself of the right to deduct input tax."

MTIC Fraud and contra-trading

39. Classic MTIC fraud is now too well known to require setting out in very great detail here, however in broad principle it operates as follows. When the VAT system is correctly operated, VAT charged by one VAT-registered trader to another VAT-registered trader should be accounted for as output tax. Then the VAT previously charged as output tax may subsequently be reclaimed by the purchaser as input tax.

This mechanism ensures that the tax is neutral in its effect upon VAT-registered traders regardless of how many transactions are involved. When a business' input tax claim exceeds its output tax, it will be entitled to make a claim for a repayment of VAT. However an MTIC fraud usually operates by a VAT registered trader importing goods which are subsequently sold on through a chain of so-called 'buffer' traders to an exporter, 'the broker', who claims the input tax from the Commissioners. The importer will have charged output tax on the sale of the goods, but will not pay it over to the Commissioners, and the importer subsequently goes missing ('the missing trader'). The Commissioners will have paid the broker his input tax, and the net effect is a deficit in the revenue collected through the VAT system.

40. Contra-trading, which is alleged to have taken place here in respect of Asylum's deals from April to August 2006 inclusive, is very well described by Dr Avery-Jones in his Decision in the case of *Livewire Telecom Ltd* [2008] 20538, where he stated as follows:

> "5. … in contra-trading there are, in its simplest theoretical form, two chains of transactions. First the "dirty chain", in which there is a missing trader, defaulting trader, or trader using a hijacked VAT number ("missing trader" for short), comprising A (the missing trader) who is the importer of goods into the UK, who sells them to B who sells them to C, who exports the goods, and is thus in a VAT reclaim position. (For simplicity we shall use the expression import and export for intra-Community trade, acknowledging that these are not the proper labels). Secondly, the "clean chain", in which there are no missing traders, comprising C, who is this time the importer, who sells to D, who sells to E, the exporter (the Appellant in this Appeal is in the position of E). The effect of the clean chain is that the net input tax position of C in the dirty chain is cancelled by output VAT in the clean chain. There is no benefit to C in this as C has paid the input tax to B, and therefore C could be a trader who happens to carry out both import and export transactions unconnected with any fraud, or C could be a trader who is controlled by a "puppet master" to enter into the cancelling transactions to disguise A's involvement in a fraud. The effect of the contra-trades is that C does not excite Customs' attention as it is not applying for a repayment; the non-payment of tax by A is less noticeable since without a return the Customs do not know how tax A owes. The input tax reclaimed that C had in the dirty chain has moved to E who is at the end of a clean chain. The only way for Customs to refuse repayment of E's input tax is to show that E knew or ought to have known of A's fraud in a completely different chain, and possibly of C's involvement. Since, as we have demonstrated in our example in paragraph 4 above, the only gain from A's fraud is the recovery of input tax by E, this must imply that E is a participant in the fraud and, unless he is the puppet master, is presumably sharing the tax recovered with someone else. …
>
> "6. The nature of contra-trading is easy to state in the above way but the problem in real life is that there is no logical connection between the clean and dirty chains. First, the VAT accounting periods for C and E will not coincide; E may be on a monthly accounting as it is a habitual exporter, but C may be on a three-monthly period, and C need only arrange that the net tax is nil during that three-month period by entering into transactions after E's transactions. Secondly, the goods dealt in may be different in the two chains. Thirdly, for a

particularly C there may be many different equivalents to and A and E, and for a particular E there may be many equivalent C, each with more than one equivalence to A. Fourthly C may not have deliberately entered into imports in the clean chain in order to cancel the input in the dirty chain; C may merely be an importer and an exporter with outputs in relation to the former happen roughly to cancel its inputs in relation to the latter. Fifthly, there may be many B's and D's in between the importer and exporters."

41. In this Appeal it is not disputed by Asylum that there is evidence of contra-trading with regard to the deals which took place between April and August 2006 and it is accepted on its behalf that there is a tax loss to the Revenue in the 'dirty' chains. There is no evidence of contra-trading in the eight deals which took place in March. It was accepted by Asylum that there was a tax loss in those 'straight' deal chains, other than in the deal carried on 20 March ("deal March 3") but knowledge of this on the part of the Asylum was denied.

In the present case there are both two- and three-tier contra-schemes, these schemes are described as follows by Judge Demack in his decision in *Regent Commodities Ltd* [2010] UK FTT 68 (TC):

"5. … in such schemes the first contra-trader ("Contra 1") operates in the same way as in a single contra-trading scheme. However, it uses an additional source of supply for the goods it sells to its EU customers. The additional source is the second contra-trader ("Contra 2") which also follows the normal single contra-trader pattern of trading in that a net input tax in a third chain is offset against the net output in tax in a fourth chain. Contra 1 takes the position of broker for Contra 2's UK suppliers. That results in Contra 2's repayment claim arising from the third chain "shifting up" the chains to Contra 1. However, because Contra 1 is not acting simply as a broker, the claim does not remain there. Contra 1 is itself offsetting the tax liabilities on different types of supply (input tax in the first and fourth chains against output tax in the second chain). Because of the relative values of the first and fourth chains against the second chain, the bulk of the repayment claim is further shifted to the broker sourcing goods from Contra 1. In such scheme the repayment claim made by the broker is linked partly to the tax loss at the defaulter in the first chain (Contra 1) and partly to the tax loss of the defaulter in third chain (Contra 2)."

The evidence

42. On behalf of the Commissioners we heard oral evidence from the two broker officers in the case, Mr Stephen Smith and Mr Piers Ginn, although their presence had not been required by Asylum. We also heard evidence from other officers in the case, namely Mr Terence Mendes, Mr Stewart Yule and Ms Karen Cummings. We heard from them although none of their evidence was disputed, because of the necessity for us to examine the Respondents' case very particularly given the absence of any representative being present on behalf of Asylum.

43. We read the following witness statements produced on behalf of the Respondents: Ms Katrina Wheatcroft Mr Mohamed Nazir; Ms Christine King; Ms Jennifer Davis; Mr Matthew Elms; Mr Stephen Patterson; Ms Susan Tressler; Ms Lisa

Jayne Orr; Mr Kevin Findlay; Mr Roderick Stone; Mr John Thorpe; Mr Eran Milner and Mr Michael Downer. Of the above, only Messrs Findlay, Milner and Downer are not employees of HMRC.

44. As referred to above, witness statements on behalf of Asylum had been submitted by Marcello Auletta and Mr Elio Auletta. Neither attended for cross examination, although their evidence was not agreed by the Commissioners.

45. In addition to the five bundles of witness statements which we received, there were also one hundred and eighteen binders of exhibits and two binders containing the submissions and the various schedules. Additionally there were two binders containing thirty three authorities and the legislation. We will not set out the names of those authorities other than those to which we refer in the course of this decision.

The Facts

46. From its incorporation on 22 April 2003 to date, the director of Asylum was Marcello Auletta. His brother Elio Auletta, was company secretary from its incorporation until 1 April 2006. A Mr Dipak Rao was company secretary from 1 April 2006 until he resigned on 1 October 2007. Initially Asylum traded from Global House in Epsom, ITW's place of business.

47. Asylum applied to be registered for VAT and was so as from 23 June 2003 when it commenced trading. On 10 July 2003 it requested that its VAT returns be changed from quarterly to monthly. It had originally stated that it would be trading as to 80% in clothing and perfumes and 20% in computer peripherals and had been registered to a trade class relevant to computer and computer peripherals wholesale. On 31 July 2003 in support of its application to change to monthly returns, Asylum stated that its business activity was the "purchase of clothing and fashion goods in the UK and then exporting", and due to the change in the nature of the business its trade class should be "wholesale of textiles". On 31 August 2004 the Commissioners approved Asylum's request to be placed on monthly returns and its change of trade class.

48. At the time of the disputed transactions Asylum traded from two addresses: 1. The Red House, in Kingswood, Surrey, and 2. The Global House, in Epsom, Surrey, from which it currently trades and which was also the address of ITW. It had moved from Global House to the Red House in June 2005, but moved back to Global House in April 2006 because it needed more space.

49. The background to ITW is also relevant to Asylum's appeal, as is that of a company called Red House International Ltd ("RHI"), which was the subject of an assessment to VAT by HMRC in the sum of £7,591,573, which it neither appealed, nor did it pay that sum to the Commissioners.

50. ITW was incorporated on 20 November 2000, when its director was Elio Auletta and Marcello Auletta was its company secretary. In its VAT registration application ITW had stated that it expected to trade in computer components but did not expect to be making supplies outside the UK. Its estimated turnover between 1 April 2001 and 31 March 2002 was £120,000. Its actual turnover in that period was

£5.8 million and it traded in mobile phones and was making wholesale supplies outside the United Kingdom.

51. RHI was incorporated on 20 April 2002 as a "wholesaler of electric household goods". On incorporation its director was Marcello Auletta and its company secretary was Elio Auletta. It applied on 16 February 2005 for a backdated VAT registration as it expected to be exporting electrical goods as from March 2005. Its estimated turnover in the following 12 months was £700,000; its actual turnover in this period was approximately £33.7 million. Marcello Auletta, although company secretary of ITW since late 2000, only became actively involved in its business in or about 2003-4, the evidence is conflicting as to the exact time when this occurred. In 2004 Marcello Auletta was working for ITW and also for another company, Cream Computers (UK) Ltd, of which Elio Auletta was the director and he was company secretary. Cream Computers was an internet retail distributer of computers and computer components. It was stated by Elio Auletta that Marcello Auletta joined ITW and started to learn the "industry" (the industry in question was stated as being the computer/IT industry in which Elio Auletta had 30 years' experience). When Marcello Auletta set up Asylum and RHI, Elio Auletta had allowed him to use ITW's client base, both buying from ITW's suppliers and selling to its customers, on the basis that Elio Auletta took 50% of Marcello Auletta's profit. (It is unclear whether this applied to gross or net profit and whether it applied both to Asylum and to RHI).

52. Asylum and all its suppliers, its customers and all the contra-traders used the First Curacao International Commercial Bank ("the FCIB") in the earlier deals. Asylum also had an account with Barclays Bank and from 23 June 2006 it used the International Commercial Bank ("the ICB") which is in Panama. The FCIB was closed down by the Dutch authorities in August 2006.

53. We will refer below to evidence of the funding of, the links between, and the trading patterns of, the three companies, where such evidence exists. It was never provided directly by or on behalf of any of the three companies.

54. As stated, this Appeal concerns 22 deals carried out between March and August 2006, there being eight deals in March, eight deals in April, one deal in May, one in June, three in July and one in August. Asylum had carried out two additional deals in March, but they are not the subject of decisions by the Commissioners nor subject to appeal. As none of the deals chains themselves are challenged by Asylum, we do not propose to set out each and every one in detail. Whilst it is accepted that there is a fraudulent default in the contra-trade deal chains, Asylum's connection with any fraudulent default in those or in the straight chains is challenged. The evidence provided by the various officers of the Commissioners is not challenged, but any opinion expressed by them is. The evidence relating to the various defaulters is not challenged. There is additional complexity in this case because the majority of the deals with which we are concerned relate to the supply by Asylum of not just one type of product, but in one case deal April 7,with as many as 17 different types of product. It is only in deals March 3, 5, 7, 8 and April 6 that there is only one product that is being sold by Asylum. It is a feature of this case that the variable quantities of different types of goods purchased by Asylum were sold on by Asylum in the same large quantities to its customer on each and every occasion.

55. We set out below detail of some of Asylum's deals and deal chains. Although other than in respect of deal March 3 Asylum has acknowledged that there is a fraudulent default, we have set out some of the particulars because of the nature of Asylum's trade and the recurrence of various of its trading partners and their connection with fraud.

Deal 1 ("deal March 1") and Deal 2 ("deal March 2")

56. Deal March 1 took place on 15 March 2006 (as per Asylum's invoice which is the date we will use for all the deals) and involved the sales of varying quantities and types of Garmin and Mio Satellite Navigation Systems ("Sat Navs"), and one lot of 500 Garmin GPS's. The quantities varied between 450 and 1,150 per lot but all could be traced back from the same supplier to Asylum, BIP UK Ltd ("BIP"), via the same two buffers to the alleged defaulter, Stella Communications Ltd ("Stella"), who is also the defaulter in deal March 2. The quantities for each lot did not vary as they passed from a defaulter down the chain via Asylum to its customer, a Portuguese company, Phone Deal World ("PDW") which was also Asylum's customer in deal March 2 and was the supplier in deals April 1-5 and April 7 and 8. The supplier, BIP, was also the contra-trader in Asylum's deal June 1, and in all three July deals. As in all Asylum's deals, the buffer traders and the supplier took a much lower mark-up than Asylum, and one which was largely consistent. (We set out below any relevant information in respect of this and the other deals when we come to evidence obtained by Mr Mendes from the FCIB documents.)

57. Deal March 2 took place on 17 March 2006 and involved various quantities of sat navs and speed camera detectors. Asylum's supplier was a company called JP Commodities Ltd ("JPC") who was also the contra-trader in deal August 1.

58. In deal March 1 the buffers were Electrical Store Ltd (who appears as a buffer trader in deals March 7 and March 8 as well), and Hass Packaging Ltd (who features as a customer of JSR Ltd who appears later as a contra-trader in various of Asylum's deals, the details of which we set out below). In deal March 2 the buffers are All Name Products Ltd ("APS") (also the buffer in deals March 7 and 8) and P & M Transport & Communications Ltd ("PMTC"), the supplier to Asylum in deals March 7 and 8 and also a second level contra-trader in Asylum's June deal.

59. An assessment against Stella for the period between 1 January 2006 and 31 March 2006 was raised by the Commissioners in the sum of £1,950,000 in respect of undeclared sales, that assessment, which includes sums in respect of deals March 1 and 2 was neither paid nor challenged. A later assessment in the sum of over £10,000,000 was also neither paid nor challenged by Stella. We find on the basis of the evidence provided to us that Stella was a defaulting trader and that its default was fraudulent.

60. In deal March 2 there were multiple supplies, 11 lots in total and the fact that Asylum was able to sell on in each case the exact number of the items it had purchased to the same customer, PDW, as in deal March 1, an outcome which would be extremely difficult to achieve in genuine business dealing, is indicative of the unreality and contrived nature of these deals.

Deal 3 ("Deal March 3")

61. This deal was contested by Asylum on the basis that there was no evidence of fraud in the deal nor evidence of any connection between Asylum and any alleged fraud.

62. Deal March 3 differs from all the others deals in that there is no deal chain on face of the documents, although, as with all Asylum's deals, there is no evidence of a manufacturer, an authorised distributer or an end user. On 20 March 2006, Asylum purchased a quantity of Haritaki Herbals directly from a company called Ketan t/a Arm Gibraltar ("Ketan"). He sold the goods to a company in Canada called Morning Dew. Ketan did not declare the output tax for this deal in its return for period 03/06, claiming falsely via its director, Mr Thakrar, that it had not traded at all in this period. The Commissioners raised an assessment in the sum of £224,406. This assessment was never appealed and when officers of the Commissioners visited the premises in August 2007, they discovered that the premises had been vacated without Ketan informing them, nor providing any forwarding address. We find that Ketan's default was fraudulent and on the basis of Asylum's direct connection with this missing trader that Asylum is not entitled to recover its input tax. We deal below with the issue of Asylum's knowledge.

63. There is evidence obtained from the FCIB of a prior connection between Ketan and JPC (see March deal 2 above), in the form of a reference on behalf of JPC by Ketan to the FCIB for a fee. It is also the case that Mr Thakrar had between April 2004 and 18 August 2008 been a director of a company called Cybocity plc which failed to pay an assessment of £295,562.30 to the Commissioners. Arising out of his actions with Cybocity plc on 22 September 2003, Mr Thakrar had been convicted of two counts of conspiracy to cheat the Revenue and was later sentenced to 15 months imprisonment. He was disqualified from being a director for seven years and ordered to £50,492.74 as part of a confiscation order. There is no evidence that Marcello Auletta specifically knew of this but on 5 December 2005 a company called "Arm Gibraltar Ltd" was incorporated with Marcello Auletta as its director and Elio Auletta as the company secretary. Elio Auletta resigned from that company on 1 June 2006 but Marcello Auletta remained a director until the company was dissolved on 22 January 2007. We deal further below at paragraph 126 with Marcello Auletta's connection with Ketan.

64. With regard to deals 4-8 in March, we do not propose to go into great detail save to say that deals March 4 and March 7 follow identical chains from an EU supplier, IQ Trading, to a company called Walk N Talk Ltd, (which, the unchallenged evidence shows, is a defaulting trader), and from thence through three buffers to a further buffer trader, Stardex (UK) Ltd ("Stardex") who supplied Tradex Corporation Ltd ("Tradex") who supplied Asylum. Both Stardex and Tradex had been introduced to Asylum by Elio Auletta. Asylum's customer in both deals March 4 and March 7 was High Level Trading GmbH ("High Level") a German company. In deal March 8 the deal chain is identical other than that the original supplier of the goods is not IQ Trading, but a company called AVM Euromoviles S.L. ("AVM")

65. In deals March 4, 7 and 8 the product sold was in each case Intel P4 SL7Z9 computer chips. In deals 5 and 6 no EU supplier has been identified. The chain goes

back to a company FX Drona Ltd ("FX"), which was registered for VAT on 2 February 2006 and deregistered by the Commissioners as a missing trader on 4 April 2006, later amended to 6 April 2006. FX only traded for a period of 2 months but in that time incurred a VAT debt of £35,199,516.85. This debt was raised on the basis of documentation from other traders which demonstrated that it had been buying mobile phones and CPUs from the EU and selling them on to UK-based customers. These transactions had not been declared by FX nor the VAT accounted for to the Commissioners. On 19 October 2006 an assessment was raised against FX in respect of its trade in deals March 5 and 6 and that assessment was in the sum of £1,259,222. The supplier to Asylum in deals March 5 and 6 was PMTC (see above) and Asylum's customer was a French company called M.S. Enterprise Ltd ("MSE") which appears elsewhere as a customer of BIP (see reference in deal March 1 above). Both deals 5 and 6 involved multiple lots of different products.

66. In relation to both Walk N Talk and FX we are satisfied that they are defaulting traders and that in respect of all the deals those defaults is fraudulent. This was a matter which had been acknowledged by Asylum other than in respect of deal March 3 and we have set out above our reasons for concluding that that too was a fraudulent default.

Deals April to August

67. All Asylum's transactions between the periods 04/06 and 08/06 are connected to defaulting traders via contra-traders. It was directed by the Tribunal on 13 December 2010 on the basis of an agreement between the parties that the Commissioners had identified tax losses at the start of all the contra-traders' broker deal chains where they assert that tax losses are present, and that all those tax losses are attributable to fraud. The Commissioners were not required to call any evidence at trial as to the fraud of the defaulting traders. Further the Commissioners have identified a factual connection between the transactions in all of the deal chains and were not required to call any evidence as to those connections, therefore all that the Commissioners are required to prove in respect of these deals are the connections of Asylum's deal chains to fraud, and also that Asylum knew or should have known of that connection.

68. In Asylum's first deal in April it carried out thirteen trades selling varying quantities and types of MP4 players, consoles and video cameras. As in the March deals, the mark-ups between the buffers were consistently low (in some cases as low as 0.20p per item) and consistent as between each buffer in each trade, whereas Asylum's mark-ups were consistently higher, in deal April 1 for example ranging from £2.46 to £11.67 in respect of the various products. The level of mark-up ranged from 0.2% to 7% in the case of the buffers, and averaged at 25% in Asylum's case. The exception is April deal 6 where the product sold was CPUs (Intel P4s) and one buffer, Stardex, who sold on to Asylum's supplier Tradex, obtained 1.21% and Asylum received 4.17%.

69. In April deals 1, 4, 7 and 8, the contra-trader was a company called JSR Ltd. In April deals 2, 3 and 5, it was The Authentic Indian Company Ltd ("AIC") and in April deal 6 it was A-Z Mobile Accessories Ltd ("A-Z"). The EU supplier to both JSR and AIC was a Spanish company, Fine Arts of India ("Fine Arts"), in all the April deals other than, again, deal 6 where the EU supplier was a French Company,

Kom Team Sarl. The deal chain in deal April 1 was as follows: Fine Arts – JSR – Hass Packaging – PMTC – JPC – Asylum – PDW. JSR was the contra-trader. In deal April 2 it was: Fine Arts – AIC Ltd – PMTC – Asylum – PDW. AIC was the contra-trader. In deal April 6 it was: Kom Teem SARL – A-Z – Stardex – Tradex – Asylum – Evolution SARL. Deal April 6 is further anomalous in that both Asylum and ITW purchased a quantity of CPUs on the same date, in Asylum's case from Tradex, but in ITW's case from Stardex, who was the supplier to Tradex in Asylum's deal chain. Stardex had purchased all the CPUs from A-Z (the contra-trader) and had sold them to Stardex who split the deal, selling part to Tradex and part to ITW.

70. In all Asylum's April deals other than deal 6, Asylum's customer was PDW (a Portuguese company which was also Asylum's customer in deals March 1 and 2). In deal April 6 Asylum's customer was Evolution SARL in France which also was a customer of Tradex. ITW's customer was a Spanish company Complimentos De Exportacion Multi Fucionales which also was a customer of Tradex. This raises the question as to why Tradex sold to Asylum or ITW when it had previously dealt with both their customers.

71. In its solitary deal in May, Asylum traded 21 different lots of cameras, purchasing from JPC (as in March 2 and in April deals 1 and 8) who had purchased from PMTC (Asylum's supplier in April deal 7). JPC itself had purchased the cameras in each of the twenty-one lots from PMTC who had been supplied by JSR, the contra-trader who had imported the goods from Fine Arts in Spain. Asylum sold the goods on to a Belgian company, Gredis. In its June deal, which took place on 23 June, Asylum bought two lots of a different type of camera from BIP, the EU supplier again being Fine Arts. Asylum sold these on, again in two lots, to a French company, MS Enterprises SARL ("MSE"). This was the same deal chain as in the second deal in July. In the first and third July deals the route to Asylum was the same as in the second July deal, but Asylum's customer in those two deals was a German company, SL Handels GMBH. In Asylum's August deal, the goods (four lots of iPods) came from a Danish company, EU Comp Aps which sold them on to JPC, thence to Asylum who sold them on to a Polish company, Imperia Spolka Z.O.O (EU Comp was JSR's customer in a large proportion of the deals in which it featured as the contra-trader.)

72. The contra trader in May was again JSR, and in its chains there were three defaulters, Intelligent Planning Ltd, ("IP"), NVA Communications Ltd ("NVA") and PF Williams Ltd ("PF Williams"), these were the same defaulters as in all JSR's deal chains in the period 06/06. The contra-trader in Asylum's June deal chain was BIP, which was Asylum's supplier in the deal, and there is undisputed evidence of BIP's acquisition chains being linked to fraudulent defaulters via two different contra-traders, AIC and JSR, again. The same three defaulters as in the May contra-trade deal chains also appear in both AIC's and JSR's chains, namely PF Williams, NVA and IP. This is a clear example of a double contra-fraud. In Asylum's three July deals there is again a link to fraudulent defaulters via the contra-trader who again is BIP. This link is via both AIC and JSR who connect BIP's acquisition chains to fraudulent defaulters, the same three defaulter in AIC's case as previously, but only PF Williams in JSR's case. This is again evidence of a double contra-fraud.

73. In Asylum's final deal, in August, the connection between that deal and a fraudulent default is the contra-trader JPC which was also Asylum's supplier. The

connection between JPC's acquisition chains and the fraudulent defaulters is via the contra-traders PMTC and JSR. In both cases the fraudulent defaulter was again PF Williams.

74. In the April to August deal chains it initially appears that each of Asylum's broker transactions is unconnected with a tax loss, but the evidence shows a connection between the acquiring traders in Asylum's broker deal chains who were acting as contra-traders. The first level contra-traders were deliberately disguising part of their input tax claims in respect of the transactions undertaken in deal chains which each commenced with either a fraudulent tax loss or with a second contra-trader, by offsetting them against an output tax liability in respect of the acquisition deals in which the goods it imported were exported by Asylum and other traders. Where there are second level contra-traders, the second acquiring traders were also acting as contra-traders, i.e. also deliberately disguising part of their input tax claims in respect of the broker transactions undertaken in deal chains which each commenced with a fraudulent tax loss, by offsetting them against an output tax liability in respect of their acquisition deals in which the goods they imported were exported by the first level contra traders and other traders. We accept the Commissioners' submission that the connection with a fraudulent tax loss is established by the contra-traders' offsetting processes alone, no matter what the state of mind of the contra-traders at the time. It follows that, although Asylum disputes a connection with fraud, that connection is established on the agreed facts in respect of all Asylum's disputed transaction chains except for deal March 3 which we have dealt with above. We attach as Appendix 1 evidence concerning the contra-traders.

The Notebook Evidence

75. We heard evidence from Officer Karen Cummins who was the liaison officer with other officers involved in a criminal investigation by the Commissioners into MTIC fraud in the course of which a series of notebooks and papers were discovered in August 2006 in two separate premises in North West England. These notebooks covered a time period between August 2005 and August 2006 and contained details of approximately 650 handwritten transaction chains. The Commissioners broke the notebooks and papers down into 14 bundles and gathered information relating to 200 businesses based in the United Kingdom, the European Union and third countries. The date of 2005 specifically appears on some of the entries, and the date of 2006 which we will refer to below in relation to two of Asylum's deals, was taken from a faxed entry from the PC Hotel, Lahore which was sent on 3 April 2006 from Lahore.

76. It is the Commissioners' case that the transaction chains relate to MTIC deals, and to the fraudulent evasion of Value Added Tax and that abbreviations 'ASY' and 'ASS' which appear relate to Asylum. These abbreviations appear in nine of the deals and two of the nine relate to deals which are the subject of this appeal which took place in March, the deals in question being March 4 and March 7. ITW is also named on four occasions in the notebooks and Officer Lisa Orr, a senior officer with the Commissioners, gave evidence in relation to those references which relate to the sale of CPU's on 20 March 2006, 17 February 2006, 10 March 2006, and 15 March 2006.

77. Officer Cummins gave detailed evidence, which we accept, as to the methodology which led to the Commissioners' conclusion that the entries in the note

books were related to specific deal chains with which Asylum was connected. We set out her evidence in detail at Appendix 2. That evidence shows circularity of trading with regard specifically to deals March 4 and March 7, the circle starting and ending with High Level Trading, Asylum's customer in deals March 4, March 7 and March 8. The notebooks also set out deal chains which we find relate to ITW's trading.

78. Although this was not submitted by or on behalf of Asylum, we have considered the possibility that the notebooks were written after the relevant deals were carried out and also that Asylum was an innocent dupe caught up in a fraudulent scheme, but we do not find this to have been the case. We find any suggestion that the notebooks are a record of past dealings highly improbable; whilst there might be sense in having a record of what has happened, there is far more need for a plan of what is to happen, given the number of parties and the large sums of money involved. We accept the Commissioners' submission that even if it is a record of what did happen, it is nonetheless evidence of fraud, given the payments to third parties not in the specific chains, and is evidence of circularity. Other aspects of Asylum's trading which we will return to below, make it inconceivable that Asylum was an innocent dupe in these chains, in particular the lack of evidence of any price negotiation in Asylum's deals, or of any returned goods or any unsold stock, and the fact that the goods were often released to Asylum by the seller without payment from Asylum. Furthermore if Asylum were to back out of one of the planned deals then one would expect to find a record of alternative companies in the position of broker, which there is not. We accept the Commissioners' submission that the notebooks demonstrate pre-planning of the transaction chains, and the operation of a "controlling mind" involving one or more individuals with knowledge of, and access to, all the parties named. This is inconsistent with legitimate, arms' length trading, where the identity of the participants and the details of their transactions would only be known by each party's immediate trading partner and is evidence that the trades were contrived and fraudulent. The evidence of circularity involving Asylum's customer, High Level Trading is significant, as is the existence of third party payments which is borne out in some cases by the FCIB evidence which we turn to below.

THE FCIB Evidence

79. Mr Terence Mendes provided three Witness Statements, one in respect of Asylum, one in respect of ITW and one relating to both companies. Mr Mendes had analysed Asylum's and ITW's bank accounts with the FCIB, which was where Asylum's suppliers and customers also banked, as well as the majority of the traders involved in Asylum's supply chains.

80. In October 2006, FCIB's banking licence was withdrawn by the Dutch authorities and administrators were appointed. The bank's Dutch computer server was seized by the Dutch authorities and the data it contained was later made available to the United Kingdom authorities. Mr Mendes analysed the data relating to Asylum and ITW obtained from this server and later, when given access to the bank's Paris server, he obtained more details in respect of Asylum's and ITW's transactions. The Dutch server contained evidence of documentation submitted by or on behalf of the account holders for the purpose of their applications to open accounts, stored in a system known as "Datastore". There were however no documents held in Datastore in respect of Asylum. The Paris server provided narrative entries (made by the

account holder) concerning the transactions, it also contained the timing of the transactions and the internet protocol ("IP") address of the computer from which instructions for payments had been made.

81. Mr Mendes traced the flow of payments beyond Asylum's immediate trading partners, continuing the process where possible to show each transaction and recipient/payer in the chain until the funds could not be traced with any element of certainty to another trader. He produced flow charts illustrating the deal chains and the corresponding payment flow, including the timing of the payments. We produce an example of two such flow charts as Appendices No 3 and 4 which relates to Asylum's deals April 4 and April 7 (see below).

82. The accuracy of Mr Mendes' money tracing exercise is not disputed by Asylum, but the Commissioners are put to proof of it, and Asylum also challenges the assertion that Mr Mendes' evidence demonstrates Asylum's knowledge of, or connection with, fraud. The tracing identified participation in the money chain of a number of companies not identified from the deal documents previously available to the Commissioners. In sixteen of the nineteen deals analysed it was possible to trace the payment flow sufficient to show that the money travelled in a circle of the participating account holders, including Asylum.

83. Mr Mendes also identified a flow of funds linked to the circular flow which was directly linked to Asylum's transaction chains. That linked flow itself in a number of instances followed a circle and on each occasion included a trader identified by the Commissioners as a defaulting trader (although a different defaulter from the one in Asylum's deal chains). Thus the money flow tracing revealed a linked dispatch transaction chain (a "dirty chain"), the link occurring at the level of the contra-trader in Asylum's "straight" deal chain. We accept the Commissioners' submission that this shows evidence of the contra-traders activities in using receipts from one acquisition transaction to fund another dispatch transaction which is itself linked to a fraudulent default and to Asylum.

84. We do not propose to set out the details of all the money chains identified by Mr Mendes. He compiled the charts by looking at the documentary evidence provided by both Officers Stephen Smith and Piers Ginn, at the deal sheets relating to Asylum's deal chains, and also the Commissioners' documents in relation to ITW, and the evidence provided by the Dutch authorities taken from both the Dutch server and the Paris server of the FCIB Bank. Mr Mendes also took into consideration Asylum's bank statements, from Barclays Bank and the ICB.

85. Mr Mendes set out the transaction chains in full detail in charts which show Asylum's invoice chain as well as the money chains; he has identified all the participating companies, the exact sums changing hands and the date, and where possible has included the IP Numbers and the precise timing of the payments. There were no IP Numbers included in respect of the March deals. Mr Mendes' method was to check the deal sheets for the value of the goods sold by Asylum and then trace where Asylum's customer obtained the money to pay Asylum. He would expect to see a £21,000 or so difference in the money flow to allow for profit. We found Mr Mendes to be a highly competent and credible witness.

86. In his witness statements Mr Mendes referred to specific aspects of the various charts and from the charts we take particular account of the following. In deals March 1 and 2, Asylum's funding came in part from a £300,000 deposit into his Barclays Account from an unknown depositor, and in part from an earlier VAT repayment from the Commissioners. In respect of deal March 3, which Asylum contests is connected with fraud, the money trail shows an initial payment from a company called Bronteum Ltd (Gibraltar) making a payment on 20 March to Celcom Trading BV (in Holland) and the funds go round in a circle via JPC, PMTC Timeline, All Name Products Ltd in varying amounts through a defaulter, Roble Com Ltd (a defaulter in another chain) through Fluid Trading APS (Denmark) and a company Flashman Trading Ltd (Canada) back to Bronteum who then on 5 April transfers funds to Morning Dew Trading Ltd (Canada) who is Asylum's customer in this deal and who pays Asylum in three amounts on 5 April. These funds are then used by Asylum to pay his supplier Ketan Thakrar t/a Arm Gibraltar. Asylum makes five separate payments to Ketan Thakrar between 5 April and 2 June, leaving a shortfall of £45,000 which Mr Mendes traced as being paid to the company subsequently. Between 5 April and 26 May 2006 Ketan Thakrar paid four amounts to a company called Liberty International Trading (USA) in the sum of £1,410,535, Liberty then paid Bronteum £1,410,000 in four amounts on 5 April 2006 and 26 May 2006.

87. The evidence from the FCIB documents in respect of deal March 4 marries with the notebook evidence referred to above. The money trail shows both MG Components and Walk and Talk being left out of the money trail, Optimal not having made the payment to MG Components, but passing the exact inclusive sum it has received on to IQ Trading (Denmark) who pays the sum on to High Level Trading, Asylum's customer in the deal. The VAT funding came from Asylum itself in this deal. In deals March 5 and 6 defaulting traders Phone City Ltd and S Electrical Store Ltd are identified in the money circles accounting for the VAT loss. Deal March 7 is again a deal which corresponds with the evidence from the notebook.

88. All the money flow charts from April 1 onwards show the circular flow of money with an identifiable defaulter passing money identified as VAT loss on via the money chain. In the all the April deals except deal 6 Asylum itself funded the VAT payments from repayments it had received from the Commissioners. In April deal 6 Red House International (Marcello Aulletta's other company) injected the funds to Asylum. Morning Dew Trading Ltd, Asylum's customer in March deal 3, appears in the money circle in April deal 1 for no apparent reason. JSR Ltd, the importer in this deal is also the defaulting contra-trader.

89. In deal April 3 there is a clear VAT loss chain linked to the dirty chain, with 3D Animations Ltd as the defaulter. In April deal 6 the Bankmaster Plus Account showed that Asylum's customer Evolution Sarl had received funds from Bruins Consortium Ltd (Malta) who had received funds from SNV Worldwide Ltd. That company had had a loan payment from Liban Trust Communications (Lebanon) a company who had loaned money to ITW. The contra-trader is connected to a VAT loss transaction by a second contra-trader, A-Z Mobile Accessories Ltd, who paid money to Urban Enterprises (UK) Ltd, who paid the defaulter S. Electrical Store Ltd who paid SNV World Wide who in turn paid money back to the Liban Trust. This deal shows clearly SNV as the beginning and the end of a circle of payments. The importer in Asylum's "straight" deal chain is A-Z Mobile who acts as a broker in the

VAT loss transaction chain and also in the dirty chain. In this deal the money chain started in time with Stardex paying its supplier A-Z. There were seven transfers in the VAT loss chain all of which took place within 42 minutes at the same time as the nine transfers in the contra-chain were proceeding. Mr Mendes identified a third party payment in the money chain.

90. A feature of the money flow charts is that the majority of the transactions show multiple payments being made in respect of a single invoice. This occurs frequently both in respect of the payments made to Asylum by its customer and in respect of payments made by Asylum to its supplier. These multiple payments occur over a short space of time. In respect of Asylum's deal April 7, (see Appendix 4) for example ten part payments were made to PMTC by Asylum in respect of a single invoice, the first being made on 19 June 2006 for £215,000 and the last being on 18 July for £639,958.68. The total price paid by Asylum to PMTC was £4,169,958. The money flow for this deal shows a company called Bronteum Ltd (a Gibraltar company) paying a total of £4,206,400 to Morning Dew Trading Ltd (a Canadian company which was Asylum's customer in deal March 3) in eight instalments, the first being on 26 May 2006 at 13.33.09 and the last on 18 July. Morning Dew paid Phone Deal World, Asylum's customer in the deal, nine separate payments, the first being on 26 May at 15.57.03, Phone Deal World then paid Asylum in nine instalments starting at 16.09.04 on 26 May and the last on 18 July at 18.21.08 hours. Asylum made its first payment at 16.45.17 on 26 May. The chart shows Asylum making a payment of £399,985 from its Barclays account into its FCIB account at 15.10.32 on 17 July. There is no evidence as to where this money comes from, but it coincides with a repayment from the Commissioners of Asylum's VAT repayment claim and we conclude that was the source, there being no other source of money to Asylum revealed by the evidence.

91. There are several other interesting features of the deal of April 7 apart from the timings set out above. First of all it can be seen from the IP addresses that Bronteum made six transfers to Morning Dew using IP 149 254 200 215. Morning Dew similarly used the same IP address for seven of its transfers to PDW, and PDW made seven transfers to Asylum using that IP address. The same IP address was also used by PMTC, Hass Packaging, JSR and Fine Arts of India on varying number of occasions in respect of the same deal. Everyone other than Asylum, Megatek SARL (France), Silus BV (Netherlands) and East Asian Inc (the last three being companies who did not feature in the straight deal chain but who took money out of the money chain) used the same IP address in this deal. On 26 May there were in all forty-eight transfers of funds through the eleven participants, starting at 15.21.08 hours and finishing at 20.42.05, a total time of five hours twenty minutes for the forty eight transactions. Another notable feature is that on its narrative entry for its first payment to PDW, Morning Dew records it as "part payment ref AD604-5412B". This is the same reference as PDW records for all its payments to Asylum. There is no reason for Morning Dew being aware of PDW's trade with Asylum.

92. In April deal 8 a noticeable anomaly is that JSR Ltd, the importer in the straight chains and the defaulting contra-trader, pays £317,744.86 beyond the cost of the deal to Fine Arts of India (its supplier) who passes this sum on to Megatek Sarl, a company in the contra-chain, who pays this sum out in three tranches to Eugon Ionescu in Romania, Dhakan Jewellers in Dubai and HR Imports Ltd. Eugon Ionescu

pays £202,000 of this sum to a Mr Pripal Singh Johal, who is the director of JP Commodities, who is Asylum's supplier in this deal. The money flow in the contra-chain was initiated, as in the majority of these deals by Bronteum, who made a payment to Morning Dew who paid PDW (Asylum's customer in this deal).

93. In respect of deal May 1 there was no evidence from the FCIB documents of a payment by Asylum's customer Gredis BV to Asylum, but there was evidence elsewhere that Gredis paid Asylum via Asylum's ICB account. A payment is made out of the money chain by Modular BVBA to a company called Glade 1 Ltd, which is a company which shares a director with BIP, one of Asylum's suppliers in other deals. There is also a payment out of the money chain by Silus BV to Golden Dirham Trading (Dubai) and another to Mashwara Consultants (Dubai) before Silus passed on the money to Bronteum. This is another deal where the IP addresses are the same for all parties other than Asylum, Golden Dirham and Mashwara. It is noticeable that Glade Ltd also has the same IP address as the parties in the money chain. There is evidence of Gredis paying Asylum into his ICB account on 28 September 2006, after Asylum had paid its supplier JP Commodities Ltd.

94. In deals June 1 and 2 it is noticeable that the transfer of funds from Bronteum to Flashman Trading Ltd and from Flashman to MS Enterprises Ltd both show not only the same IP address as each other but the same IP address as all the previous trades in the money circle other than Asylum in the deal May 1. The same IP address also appears in the July deals in relation to the payment from Bronteum to Bulat 16V (Dubai) and from that company's transfer of funds to SL Handels GMBH (Germany). The same IP address again occurs in the deal August 1 in the transfer between Morning Dew Trading Ltd and Arta Networks SA (France) and again the transfer between Imperia Spolka Z.O.O. (Poland) and Time Line (Leicester) Ltd. Time Line's transferee was Imperia Spolka Z.O.O, but this time to its first account, which used the same IP address when transferring funds to its own second account and as when money was transferred from its second account to Asylum.

95. The Gibraltarian company Bronteum on almost every occasion transferred the funds which enabled the transactions to be undertaken. The only exceptions were deals March 4 and 7 and April 6 where the initial input of funds came from Stardex. In ITW's deals Stardex was also the provider of funds on occasion. In Asylum's money chains Mr Mendes identified four money conduits from outside the United Kingdom: Bronteum, IQ Trading APS, AM Euromoviles and SNV Worldwide Ltd, referred to by him as 'financiers'. Circularity of funds was shown in connection with the majority of the deals and Asylum mainly provided the VAT element from repayments it had received from the Commissioners.

Evidence of Asylum's money transfer

96. Mr Mendes provided a chart showing funds relating to the appeal which had been transferred through one or other of Asylum's three bank accounts. Asylum had opened its account with ICB on 23 June 2006 and there was some overlapping with the FCIB. The chart shows several occasions when there are unexplained transfers from or to RHI and ITW, Asylum's associated companies. There are three transfers of funds from Asylum to RHI, on 10 March 2006, 23 May 2006 and 19 July 2006 in the total sum of £705,000. There are eight transfers of funds from RHI to Asylum,

totalling nearly £1,000,000. There are four transfers of funds from Asylum to ITW of £470,000 in total, and three transfers of funds from ITW totalling £550,000. Asylum has given no explanation for these transfers. Apart from VAT repayments, the only capital introduced into Asylum's accounts was a deposit of £300,000 on 17 March 2006 from an unknown source made in three sums to its account at Barclays Bank, Banstead. There is an unexplained payment of £50,000 by Asylum to Flashman Trading Ltd, a Canadian company to be found in the money flow charts for deals March 3 and June 1 and 2. Flashman was neither a customer of, nor a supplier to, Asylum, but it had on March 3 passed money to the financier Bronteum and on June 1 and 2 received money from Bronteum. The Datastore documents reveal that a Mr Kevin James Carter was the beneficial owner and signatory of both Bronteum and Flashman.

97. On 19 April there is a payment by Asylum to a company called Aventech Ltd (UK) of £340,000 which is not part of any of Asylum's deal chains but which appears in respect of ITW's deal April 2 where that sum, together with a payment of £510,000 is recorded as "repayment of loan (29-11-85 to 19-04-06)". Aventech paid £400,000 to a company called New World Consulting Ltd ("NWC") who paid £550,000 to ITW which was recorded as "loan of behalf of Aventech". (The same funding is recorded in relation to ITW deals April 5, 6, 7 and 8). NWC also appears in the money transaction chains in these same deals. Liban Trust Communications, provided money to ITW in deal April 1, 3, 4 and 10, and May 2. On each occasion a company called SNV World Wide (Cyprus) deposited money with the Liban Trust and also injected funds at the start of the chain to allow ITW to pay its supplier and Liban received funds back at the conclusion of the chains. In May deal 2, ITW had put in the money to pay the VAT to its supplier.

Evidence in respect of ITW and Red House

98. Mr Mendes had examined the ITW documents and bank data in the same way as he had examined the evidence in relation to Asylum. Similarly he produced money flow charts in relation to the twelve deals in which ITW acted as a broker trader which were the subject of ITW's appeal. Mr Mendes identified two separate formats to the transactions which he called "Red House transactions" and "World Wide transactions". In the Red House transactions RHI (Marcello Auletta's company) is the importer and also the contra-trader in the VAT loss chain in three of ITW's twelve deals. On two occasions RHI imported from Bruins consortium in Malta and on the third occasion from Kom Team Sarl. On each occasion RHI supplied Stardex who supplied Tradex, ITW's supplier. On each of the Red House transactions the funding for the commencement of the money flow chain came from Stardex. RHI retained the VAT it had received from Stardex and on two occasions paid it to Urban Enterprises (UK) Ltd, its supplier in a VAT loss chain, and on the third occasion paid the sum to World Wide Wholesalers Ltd in a similar VAT loss chain. Mr Mendes identified four financiers in the Red House scheme.

99. In the World Wide transaction chains, World Wide UK Import & Export Ltd was the importer and the contra-trader in the VAT loss chain. As with the Red House transactions, Mr Mendes found that there were VAT loss chains, that all the money chains were circular an the money came from, and was passed back to, one of six identified financiers on each occasion via a third party. As with Asylum's deals, there

was on many occasions evidence of rapid transfer of funds round the chains (for example in April deal 2 the funds were transferred eleven times in 48 minutes) and on some occasions the same IP addresses were used by apparently unrelated companies and there was also evidence of third party payments, for example April deal 2 were the defaulter, Telecommunications Stores Ltd paid Valssen FZE (Dubai) one of the financiers) in the VAT loss chain.

IP Addresses

100. Mr Andrew Letherby, an officer of the Commissioners, provided a report he had compiled entitled "Report on the Forensic Integrity and Cross Verification of FCIB Servers" which related in particular to the significance of the IP addresses and the principles behind their operation. It is possible to pay to have a permanent IP address, but more usually the addresses are dynamic, and when a computer connects to the internet it will latch on to an available IP address which it will retain until it is switched off or the internet service is interrupted for any particular reason. It cannot be assumed without more that because one address attaches to two payments, it must have been made from the same computer. It is possible for two computers to have the same IP address if they use the same server in a shared hosting company, or share a host server remotely, or share a mobile data connection. Having considered various options, including coincidence, Mr Letherby comes to the conclusion that it is very unlikely that one minute an IP address is used to make a payment in the United Kingdom and very shortly afterwards the same IP address is used to make another payment from another computer outside the UK. The likelihood is that the payments are made from the same computer. There was evidence that a payment takes about three minutes to go through. Marcus Auletta does not dispute Mr Letherby's evidence, but relies on the fact that at no stage does Asylum ever use an IP address which is common to anyone else in the various money chains. We found that on the balance of probabilities on the occasions where the same IP address was used to make payments in the money chains it is because the payment was made from the same computer.

The Grey Market

101. We were provided with a lengthy witness statement from Kevin Findlay giving his expert opinion on the grey market, and on the trading in CPUs in particular in that market in 2006. Asylum had traded in CPUs in its deals March 5, 7, 8 and April 6. Dr Findlay's evidence was not challenged either as to its admissibility or its content. From his witness statement we derive inter alia the following:

102. In 2006 the two dominant CPU manufacturers were Intel and AMD. Supplies were made either directly to assemblers or via authorised distributers ("ADs"), in cases of smaller customers or where it was commercially unviable to establish a direct selling organisation, Intel delivered 65.1% of its CPUs directly to customers and AMD so delivered 43.4%.

103. Intel dominated the market with over 75% by volume (83% by value). ADs of Intel CPUs achieved relatively low gross margins which made it difficult for smaller distributers to trade profitably in CPUs.

104. Dr Findlay identified grey market opportunities as follows:

(1) Sub–distribution

(2) Distributing obsolete/niche components

(3) Providing emergency supplies

(4) Offloading excess inventory

(5) Arbitrage.

In respect of all these opportunities the following commercial behaviour would be exhibited:

(a) Adequate specification of components to buyers and sellers

(b) Best possible market price

(c) Short deal chains

(d) Volume of components traded should be consistent with the market.

In respect of (a) the product description needed to be sufficiently unique to identify the component, if not, a normal businessman would not be able to price it. The description needed to include either the product number, the processor number or all of the five following details:

(a) Brand or processor family e.g. “Intel Pentium”

(b) Speed e.g. 3GHz

(c) Cache, e.g. 2MB

(d) System Bus Speed e.g. 800 MHz

(e) Packaging form, e.g. box or tray.

We note that while inspection reports provided to Asylum for the March deals do provide a sufficient level of detail, this is not the case in respect of its April deal in CPUs. Furthermore the descriptions given in the purchase orders and invoices of Asylum and its trading partners do not provide the above level of detail.

105. Dr Findlay set out the list prices between September 2005 and December 2006. It was his opinion that the price for a CPU should be within 20% of the central list prices. The list price for the CPU’s traded in the March deals was $178 and also for the April trade. This price is within Dr Findlay’s 20% margin, being a little over 80% of the list prices. Dr Findlay also estimated the legitimate grey market in CPU export for 2006 at £1.4 million for Intel, which gives a monthly export average of £116,000 for Intel products. The total value of the four deals undertaken in Intel’s CPUs by Asylum in March and April 2006 was £3,006,124. This is over double the total value of the legitimate grey market exports from the UK in the entire year.

106. In addition to the specific issues above, Dr Findlay would expect a company trading in the legitimate grey market to exhibit various characteristics. Of the seven listed, there were none which Asylum specifically claimed to exhibit. In respect of any claim by Asylum that arbitrage was the grey market opportunity it was exploiting, it had no relationships with assemblies or ADs in other territories and on very many occasions its deal chains were long, given in particular that for each deal chain

evidenced there has to be added on an AD and an original equipment manufacturer at the start of the chain and a customer at the end of the chain.

107. The CPU deals undertaken by ITW and RHI similarly do not reveal any of the characteristics and practices to be expected of a company operating in the legitimate grey market. We conclude from Dr Findlay's evidence that Asylum was not operating in the legitimate grey market in CPUs.

Uncontested Evidence re CPUs

108. Evan Milner is the Compliance and Fraud Investigations Manager for the Europe, Middle East and Africa region of Intel who has worked in Intel Security since January 2001. His evidence inter alia was that the Original Equipment Manufacturers ("OEMs") cartons have Intel labels which show a "Lot Number" or "Finished Product Order" which identifies that the manufacturers batch; ("S Spec"), which identifies the speed an electronic specification of CPUs and a "Box Number" which is a unique number identifying the OEM carton. This process had as at January 2011 been used for over six years and none of the Box Numbers had been used up. Intel System will not permit the same Box Number to be stored twice, other than in very exceptional circumstances.

109. The Commissioners asked Intel to check its records in respect of Asylum's deals in CPUs. In respect of deal March 7 Mr Milner uncovered a reference to a Lot Number which does not exist in Intel's records. The other fifteen Box and Lot Numbers in the deal were genuine. In respect of Asylum's April deal 6 which were invoiced as CPUs the Lot Numbers provided for two of the items did not refer to CPUs but to chipsets, which are products which could never be marketed or sold as CPUs by Intel. The Lot Numbers provided in respect of five other of the items sold do not exist in Intel's records. This is evidence of Asylum's lack of care in respect of the products it was selling.

110. With regard to ITW's sales of CPUs, Mr Milner analysed a sample of the items and in the sample found sixty items which had adequate Intel lot numbers, forty-two items which had invalid lot numbers, and two items which were of a different product type from that specified. The remaining 419 items were not analysed by him.

Uncontested Evidence re RHI

111. Mr Michael Downer, an officer of the Commissioners, carried out investigations between August 2005 and June 2009 into MTIC fraud. In December 2006 he met the Dutch tax authorities who were carrying out a criminal investigation into the freight forwarder Worldwide Logistics BF. It was found by the Dutch that various CMRs found in Worldwide Logistics' records related to fictitious consignments. Some of the CMRs were later produced by A-Z Mobiles and RHI, in RHI's case there were twenty six such documents.

Evidence on behalf of Asylum

112. As stated above neither Marcello nor Elio Auletta attended the appeal hearing. The evidence of both of them was at odds regarding the setting up of Asylum and RHI. Marcello Auletta refers to setting up Asylum in 2004 and doing its first deal in

mid-November, whereas it was in fact registered in 2003. Elio Auletta refers to Marcello Auletta returning 'in approximately' 2004 and coming to work with him unpaid. He continued: "This he did and he established two companies eventually, Asylum ... and Red House International Ltd ..." Given that Elio Auletta was Company Secretary of both RHI and Asylum it might be expected that he would know the years in which they were set up. RHI had in fact been incorporated on 20 April 2002 when its director was Marcello Auletta. It was trading electrical goods in 2005 when it achieved a turnover of approximately £33.7m.

113. On 10 July 2003 Asylum's representative sent a fax to HMRC in respect of its trading 80% in clothing and 20% in computer peripherals. Marcello Auletta started working at ITW with his brother Elio in order to learn about trading in computer components, in circumstances where Asylum had been established for over a year and, as claimed by Marcello Auletta, had by November 2004 undertaken its first deal in non-IT products. It was claimed that Elio Auletta allowed Asylum to use his client base if Marcello used his own funds. It was said by Elio Auletta that Marcello had worked abroad for which he was not paid and that he was down on his luck at this time, similarly he was not paid by Elio Auletta. Marcello Auletta provided us with no evidence as to the source of any funds he had for setting up the businesses, and Elio Auletta merely speculates that Marcello remortgaged his house. The evidence shows that £100,000 obtained from the remortgaging of Marcello Auletta's house went to RHI not to Asylum. The agreement between the brothers was apparently that Asylum would pass 50% of its profits to Elio Auletta but there is no evidence as to whether these were intended to be gross or net profits and there is no evidence that this happened.

114. With regard to Asylum's trading methods, in his witness statement Marcello Auletta states that not all the deals were conducted in one day, and the deal files give the wrong impression that this was the case. However, there is no evidence of negotiations being carried out between Asylum and either its suppliers or its customers prior to the exchange of invoices. In a later paragraph in his witness statement Marcello Auletta states: "The documents are in a logical order as events progressed throughout the day of each deal", and refers later to it being common practice in many commercial business industries to buy and sell a product in one day, a proposition which we accept.

115. Marcello Auletta takes its March deal 1 as an example of how it proceeded in respect of each deal, claiming to;

a) obtain a Companies House printout;

b) do online VAT verification checks;

c) offer stock to its entire customer base;

d) impose Terms and Conditions on his suppliers and customers;

e) obtain Supplier Declarations;

f) obtain inspections reports from the freight forwards;

g) ask freight forwarders to ensure goods are shrink-wrapped and to transport the goods "ship on hold";

h) obtain CMRs and ferry tickets;

i) obtain confirmation that full payment was made within three weeks and once Asylum was paid to pay Asylum's supplier straightaway (sometimes "supplemented" by capital from Asylum);

j) conduct product research by means of a member of staff who is employed to conduct online research of a number of different retailers.

116. These claim were supplemented by Marcello Auletta with the following generic and specific due diligence in respect of Asylum's suppliers;

i) All suppliers were recommended by business associates or by Elio Auletta.

ii) All were met prior to trading on at least one occasion.

iii) Redhill verification was requested and received prior to trading and regular updates were obtained (other than in the case of PMTC, when request was sent on 30 March 2006 but not received until after trading because of delays at Redhill)

iv) HMRC helpline used where delays Redhill.

v) Europa online VAT verification conducted prior to or on the day of the deal.

vi) VAT Registration Certificate was obtained prior to trading.

vii) Certificate of Incorporation obtained prior to trading.

viii) Companies House searches conducted before every deal and update.

ix) Letter of Introduction prior to trading.

x) Confirmation of director's identity prior to trading.

xi) Evidence of director's home address prior to trading.

xii) Evidence of connection to business address obtained prior to trading.

xiii) Third party due diligence visits introduced after January 2006 on all except ARM Gibraltar.

xiv) In January 2006 CTM was appointed to conduct two visits on two UK suppliers per month, to attend all monthly VAT visits by HMRC, to conduct a monthly review of due diligence and to be available to discuss any urgent issues which arose.

117. In respect of the various checks claimed to have been made by Asylum the documentary evidence shows that in many cases the claimed checks were perfunctory or the outcome was ignored. For example, the Companies House printout produced in respect of BIP was out of date at the time of Asylum's deal, but there is no evidence that this was ever queried. Asylum's online VAT checks were almost always with Europa, not with Redhill which gives a more detailed and reliable service. Where there are Redhill checks these were often after the deals had been done. The evidence produced of stock being offered to Asylum and from Asylum to its customer base is in the main undated and untimed, although sent by fax. In March for example only two of the twenty-eight documents disclosed are dated and timed. It is the case that on each occasion all the stock bought by Asylum was bought in its entirety by Asylum's customers. Asylum was never left with stock, nor did it ever have any

stock returned. Given the very large number and differing quantities of items in which Asylum was trading, we find this remarkable.

118. With regard to Asylum's Terms & Conditions which were produced, the declaration is signed and completed on the same day that the goods were purchased and on the same day that the purchase invoice was received, eg in deal April 1 the fax was received by Asylum on 13 April 2006 at 15:56. At 16:11 on 13 April 2006 the purchase invoice was faxed by the supplier, giving 15 minutes for the fax to be received, to be sent to Asylum's VAT advisor, examined and cleared, Asylum to be informed and then for Asylum to confirm to the supplier that the deal could go ahead. There is no evidence to support Marcello Auletta's claim that any of Asylum's supplier declarations were verified by the VAT advisor. The declaration itself is merely a rudimentary checklist. There is no evidence of any creditworthiness checks being carried out by the suppliers on their customers or by the customers on their suppliers.

119. Inspection Reports produced do no more than indicate a count of the boxes and confirmation that the boxes were new. There is no confirmation of the claimed random inspection of a handful of boxes, there is no confirmation of the contents, nor that they were as purchased. With regard to the comfort said to be gained by Marcello Auletta from sending the goods abroad 'ship on hold', which happened on the day of the deal, it is the case that quite often Asylum was not paid until some weeks after the deal, and although Asylum would not in most cases have paid its supplier until it was paid, nonetheless neither Asylum nor its supplier would have any form of security in the meantime. There was considerable financial risk in this way of trading. With regard to the product research, the documents provided by Asylum show research only of retailers' websites, although there are various sites for wholesalers which would have been far more relevant given that Asylum was not supplying any retailers.

120. Marcello Auletta refers to an attempted deal in May 2006 which was cancelled by the intended customer Gredis as pointing to the fact that his trades were genuine. This particular deal was worth £3,195,000 and the order had been confirmed by Gredis, a purchase order had been signed by Asylum and by JPC, Asylum's supplier. There was an invoice for payment sent from JPC to Asylum and the goods were allocated and had been released to Asylum by JPC. The credit note suggests that it had been paid for before Gredis purportedly cancelled it. The cancellation letter states: "With great regret I have to inform you we are cancelling the above mentioned order. Unfortunately my customer is not keeping his end of the bargain. I have not been able to find a new customer for the ordered stock." This is signed by Eric De Bolle, Managing Director. There is no reference to insurance or other monetary compensation. In reply Marcello Auletta sent a fax, not to Gredis, but to Modular BVBA (Gredis' sister company), stating that he was disappointed to receive the cancellation, but saying also "We would appreciate in the meantime if you would help us in our endeavour to source any other potential clients to take this stock." He then sends to Modular BVBA a credit note. Far from providing evidence that the deals are genuine, this particular exchange is completely un-businesslike. It stretches credibility that a genuine customer would help Asylum to find an alternative customer rather than purchase the stock itself and sell it to that customer and make a profit from the deal. Furthermore the report obtained by the Vetting Service on Gredis gave a

credit rating of 6, and it was considered a high risk business. The recommended credit limit was €2,478.00 (Euros) the value of Asylum's intended deal was over £3,000,000. This whole episode shows a lack of commerciality. It also raises the question of why JPC did not hold Asylum to its obligations in respect of making the purchase it had arranged.

Asylum's Suppliers

121. Marcello Auletta referred to two companies which it had rejected as trading partners following receipt of unfavourable CTM reports. The two companies were Hass packaging and Globaltech Services. No report was produced in respect of Globaltech. Hass Packaging appeared frequently in the deal chains March 1, April 1 and 4. The report notes that Hass had traded with BIP, one of Asylum's suppliers, but nonetheless Asylum still traded with BIP.

122. With regard to the specific companies with which Asylum traded, Marcello Auletta claims that none gave him any concerns. In respect of Tradex, he claimed inter alia that he knew the company through Elio Auletta and that he had met the directors; it appeared to him to be a 'very professional outfit with a large amount of trading experience'. The fact that up until 2004, 10 months before it first traded with Asylum, it had traded in oil, did not concern him, nor was he concerned that Tradex had a lease for only eighteen months, and as at 1 March 2006, it had no VAT advisor to undertake due diligence. There is no evidence of Tradex' two trade references, which were supplied on 18 November 2005 with its letter of introduction, being followed up by Asylum. CTM's due diligence visit report was prepared for Asylum as well as RHI and ITW four months after Asylum's first deal. There were no Terms & Conditions between Tradex and its suppliers and customers. Despite Asylum's claim that CTM checked on two transactions where Asylum had purchased from Tradex prior to its visit in March 2006, Asylum was notified by letter from Officer Smith on 1 August 2006 that all three supplies from Tradex had been traced to a defaulting trader with a tax loss of £179,000.

123. BIP was introduced to Asylum by a third party who is not named by Marcello Auletta. Asylum traded with BIP on 28 October 2005 just eight days after receiving its trading forms. BIP had only been formed on 7 January 2005 and its VAT Certificate was only issued on 26 October 2005. There is no evidence of Asylum carrying out due diligence on BIP prior to trading. CTM's report is dated 8 March 2006, five months after Asylum's first deal with BIP. It disclosed that the persons 'authorised to trade' had only one and a half and one year's of experience respectively in 'the industry', and that BIP had made third party payments in the past. It appears not to have been noted that, as the commissioners found on a visit, BIP traded from a residential block of apartments.

124. Marcello Auletta does not say how he first made contact with JPC. JPC was only formed on 14 March 2005 and its VAT Certificate was issued on 19 July 2005. Its first deal with Asylum was on 27 October 2005. Marcello Auletta had recommended CTM to JPC, and yet JPC used CTM as a trade reference to Asylum on its second trading application form and CTM prepared a due diligence visit report on JPC for Asylum and RHI dated 28 March 2006. That report noted the monthly turnover as being £9,000,000 ie £108,000,000 per annum. The VAT returns show a

total turnover of £21,218,752 for the past thirteen months, a fact which would have been known to CTM, although it could not have been known to Marcello Auletta at Asylum. However, the report did state that the Company had no assets, and Asylum could have checked the accounts submitted to Companies House. The premises from which JPC operated were owned by a director of JPC but were only leased to JPC on a month by month basis, another factor which should have given cause for concern. There is no evidence of any creditworthiness check on JPC. Marcello Auletta relied on the fact that HMRC had not visited JPC for four months at the time of CTM's visit, and that Mr Ahmed of CTM told him that he had "no problems" with JPC, and "I have never been notified by CTM of any issues concerning JPC to this day", which is a surprising statement in the context of this case where JPC is one of the alleged contra traders. Also in relation to period 12/05 JPC had at the instructions of its customer instructed its freight forwarders to deliver the goods to a third party in Belgium rather than directly to its, JPC's, customer. JPC were notified on 7 February 2006 of HMRC's decision to deny its claim in respect of this. Both JPC's subsequent appeals failed, the last appeal being on 26 October 2007 and in the High Court. Also by a judgment released on 16 September 2011 the Tribunal upheld an earlier decision by HMRC to deny JPC's claim to input tax and found it had knowingly participated in transactions connected with the fraudulent evasion of VAT. We would expect both these cases to be known to CTM.

125. PMTC were introduced to Asylum through an (unnamed) business associate, but Marcello Auletta knew of Philip Temme, the Director, when the company was operating as a transport company. In respect to PMTC Asylum did verify it with Redhill, however the declared trade classification of PMTC was "other freight transport by road", a matter which apparently did not concern Mr Auletta who claims that he was aware that PMTC had notified HMRC that it had changed its trading pattern. He does not state how he became aware of this. There is no evidence of PMTC trade references being pursued by Asylum. Asylum's first deal with PMTC was on 30 March 2006, just a month after the company's introduction to Asylum. CTM's report, dated 22 May 2006, shows a lack of experience in wholesale trading, no other employees than Mr Temme, no assets, only a 6-month lease, yet a monthly turnover of £8,000,000 with only two suppliers and three to four customers. CTM did not have access to PMTC's deal or due diligence files. In his witness statement Marcello Auletta states: "There were no indications either through my due diligence, nor when purchasing from them, that fraud would be present in my supply chains."

126. Marcello Auletta was introduced to Ketan Thakrar trading as Arm Gibraltar by Elio Auletta. There was a Europa check but no Redhill check was asked for by Asylum on Ketan Thakrar until 10 May 2006, two months after the March deal 3. There is no evidence that Ketan Thakrar's trading references were followed up, there is a 'company site visit' report signed by Marcello Auletta stating Arm was visited on 20 May 2005, 10 days before the letter of introduction from Arm to Asylum. The only other due diligence is a VAT Certificate issued on 16 May 2005 and a demand for payment from Three Valleys Water. After its first purchase of Ketan Thakrar in 2005, Marcello Auletta discussed being its sole distributer and taking over the manufacturing side of the business, but this last did not take off, although the distribution is said to have continued. We have seen no contractual documents relating to this. Marcello Auletta is right to say that he would not have had access to the Police National Computer, and thus had no means of knowing Ketan Thakrar's

previous involvement in fraud. However it is to be expected that someone planning entering into a business arrangement would have had a full due diligence report prepared on the prospective business partner, which did not happen in this case, and that he would have been aware that Mr Thakrar had been disqualified from being a company director, which was no doubt why he traded as 'Arm Gibraltar' (see paragraph 33 above).

127. High Level Trading ("HLT") was a customer of Asylum introduced by Eilo Auletta. (See Notebook and FCIB evidence above). On the basis of this introduction and a company registration certificate in German (un-translated), Asylum commenced trading with HLT. Its first deal was on 25 October 2005, the same date as its letter of introduction to HLT and as a faxed letter of introduction from HLT's Director, Jellab Mustapha. The company registration certificate was not faxed until 14 February 2006. In 03/06 Asylum sold over £1,000,000 worth of goods to HLT in three separate deals.

128. Morning Dew was introduced by an (unnamed) existing client. The company was incorporated on 15 March 2005 and Asylum made contact in March 2005. Marcello Auletta claims he started trading with Morning Dew in June 2005 but the letter of introduction is dated 10 October 2005. A Certificate of Incorporation was provided and is signed by a Mr Richard Shaw as director, however Marcello Auletta dealt with a Mr David Andrews. There is a letter of recommendation dated 20 March 2006 from RHI signed by Marcello Auletta and sent to Marcello Auletta as Director of Asylum. There is no evidence of any further due diligence.

129. MSE contacted Asylum at the end of 2005 and Marcello Auletta met its Director, Mohammed Patel, in the United Kingdom in February 2006. Marcello Auletta saw a letter of introduction (undated), a copy of Mr Patel's passport, company registration documents (in French and un-translated) and an office utility bill. He obtained a personal bank statement and a completed trade application form which shows Mohammed Patel's United Kingdom address. He conducted several online verifications and trade references were provided, but there is no evidence these were followed up. He instructed The Vetting Service to conduct a due diligence visit, its report was sent to Asylum after 8 August 2006, five months after the 03/06 deals. It states that Mohammed Patel is a British passport holder and lives in the United Kingdom, and MSE exports only, making no sales in France where it is based. The Vetting Service could not verify the registered address of the company and no documents were provided. Although the company recorded IMEI numbers, these were not checked for duplication.

130. Evolution SARL was recommended to Asylum by an (unnamed) business associate. Marcello Auletta stated that he had obtained the documents he required, but he does not say that these were in French, as was the case, and there is no evidence that they were translated. The VAT registration of Evolution was checked on the Europa site. Evolution agreed Asylum's Terms & Conditions on 25 April 2006. Asylum only did one deal with Evolution, and that was on 27 April 2006, prior to its instructing JH Law in July to conduct a due diligence visit to the French offices. Its due diligence report is dated 1 August 2006 and had been made for another client. Evolution was incorporated on 12 May 2005 and had a turnover of £26.5m in its first

year of trading. Despite its high turnover, its credit rating given by Experian was 'moderate' with a limit of €3,000.

131. Marcello Auletta was introduced to Eric de Bolle, Gredis NV'S Director, by an (unnamed) third party in the context of Gredis' sister company, Modular BVBA. He carried out due diligence on Gredis in May 2005, but the company documents provided are in Flemish and un-translated. There is no evidence that Asylum followed up the references provided. The Vetting Service was instructed to provide a due diligence report. This is dated September 2006, but Asylum had traded with Gredis on 23 May 2006 (deal May 1). The report states: "One of Mr de Bolle's company's (sic) has previously been suspected of MTIC fraud." Marcello Auletta's response to this was to berate the Belgian (and the UK's) tax authorities for using aggressive tactics and to ask Mr de Bolle himself about it. He accepted Mr de Bolle's denial of connection with fraud and explanation that this related to a company with which one of his other companies had traded. Marcello Auletta described this as the "only negative indicator" in the report, whereas there were numerous other negative indicators, including inter alia that its credit rating was only 6, there was a recommended credit limit of €2,478 (Euros) (the value of Asylum's deal was £3,000,000) and in the space of three months the business had gone from dormancy to a turnover of over £20,000,000.

132. Marcello Auletta met the Director of SL Handels GMBH ("SLH"), Satbunder Gill, through a recommendation, again from an unnamed source. Its letter of introduction attached some documents in German which were un-translated. The director's home address was in the United Kingdom and he was a British citizen with a Halifax bank account. Two trade references were provided, but were not followed up. In a letter to Asylum dated 18 July 2006, SLH confirmed receipt and acceptance of Asylum's Terms & Conditions. Beyond confirmation of its VAT registration there was no other due diligence performed by Asylum on this company.

133. Marcello Auletta had met the director of Phone Deal World ("PDW") (Portugal), Gregory Warren, who lived in the United Kingdom, some years prior to trading with it. PDW had sent an undated letter of introduction to Asylum, including the United Kingdom passport of Gregory Warren, a business card, a document purporting to be a VAT Certificate but which was in Portuguese and un-translated, as were a number of other documents. There is no evidence of further due diligence prior to or after Asylum's initial trade with PDW in February 2006. Marcello Auletto had said he was aware that Gregory Warren had owned other businesses in the United Kingdom but further enquiries might have revealed that three of Mr Warren's five previous companies had been de-registered for VAT and had been made insolvent with debts to HMRC of £434,259.

134. Marcello Auletta was introduced to Imperia Sp Z.O.O's director by an (unnamed) third party in June 2006. Asylum was supplied with its VAT registration, a completed trade application form, a copy of the director's passport and a business utility bill. The company confirmed compliance with Asylum's Terms & Conditions but only faxed this confirmation on 18 August 2006, the date of its trade with Asylum. Marcello Auletta checked the Europa site before its trading with the company in August 2006. It was only in September 2006, after first trading with Imperia, that Asylum instructed The Vetting Service to visit the company in Poland.

In its letter of introduction, the company had referred to a very wide portfolio of services (there were 30 in all), and to it "now in process of sourcing and supplying household products…." but there was no reference to wholesaling mobile telephones, CPUs or satellite navigation equipment. Marcello Auletta had to travel to Poland subsequently to meet the director as "I had difficulty in securing payment from Imperia". The fact that the account was later settled satisfied Marcello Auletta that the 'two negative' indicators in the report could be ignored. In fact the report contained seven negative indicators, including the fact that due to "difficulties with their bank" Imperia could not trade, trade references and the accountants' reference were outstanding, the company did not insure its stock outside Poland and no financial information had been provided.

Freight Forwarders

135. Marcello Auletta himself visited J&J Freight but did no other due diligence on the company nor on MSG Freight. He claims that CTM conducted visits on behalf of Asylum to 1st Freight Ltd, Forward Logistics (Heathrow) Ltd, Humber Freight Ltd and Point of Logistics Ltd. No reports of such visits were provided and no documentation has been disclosed in respect of any insurance policies held by the freight forwarders, nor information supplied as to whether Asylum was covered by the freight forwarders' policies, given that they would be holding several million pounds of goods in their warehouse.

136. Asylum questions whether the freight forwarders would divulge any details about a supply it was about to make, the Commissioners assert that Asylum could and should have made enquiries as to whether the goods, the subject of the proposed transactions had recently been imported into the United Kingdom and the number of parties through whose control the goods had passed whilst in the warehouse. It was not expected that Asylum could obtain the names of those parties, but Asylum would have learned that all the goods in which it traded had recently been imported, and in all the March deals, other than deal March 3, the goods had passed through many companies, and in the case of deals March 4 and 8 there were five UK companies before Asylum's supplier, Tradex. Had Asylum obtained this information it would, or ought to have, raised the question as to why so many companies which added nothing the product had been involved in trading in them in such a short space of time.

Marcello Auletta – general comments

137. Marcello Auletta denies any connection to fraud and claims to have conducted his trade as an honest businessman. It was stated by Marcello Auletta in paragraph 17 of his witness statement that: "Officers have always told me to do everything that I can to avoid fraudulent supply chains", and he referred to rejecting two companies on the basis of visits by CTM to those companies (see above paragraph 121). Despite this, Marcello Auletta later states: "It took HMRC until after my 06/06 transactions to warn me about fraud. After which time I held meetings with each supplier to say that, unless I could be sure about the integrity of the supply chain, I couldn't trade with them. In fact Asylum dealt with both BIP and JPC in July and August, despite seven joint and several liability letters having been sent in respect of both companies to Asylum on 6 July concerning earlier deals with them. Mr Smith's evidence shows that the earliest veto letter was sent on 17 May 2005 and warned Asylum about inherent problems in the industry. In a visit on 2 August 2005 three MTIC officers

visited Asylum and discussed the repayment return for 05/05 and Marcello Auletta asked questions about joint and several liability on that occasion. RHI was also visited in August 2005 and Marcello Auletta confirmed that he had received and read Notice 726 about joint and several liability. That Notice also contains a description of the prevalence of MTIC fraud. There were three HMRC visits prior to March 2006 and on 18 May 2006 Asylum was informed that a transaction undertaken in 11/05, where its customer was HLT, had been traced to a tax loss.

138. In respect of a visit on 16 June 2006 by Officers Simmons and Smith, Marcello Auletta states: "I asked Mr Simmons what I should do if fraud was detected in one of my supply chains ... as I didn't believe that a small number of occasions would necessarily mean that I had to cease trading. I knew there were risks but I believed they could be managed. As Mr Smith rightly points out, we would have discussed due diligence checks, because my Officers always told me that I need to conduct good due diligence to avoid fraud. If, as Mr Smith appears to be saying now, that it didn't mater how much due diligence I did, I still wouldn't have avoided the alleged fraud, why were the officers telling me to do due diligence and why didn't they simply say at an early stage (eg in January 2006) 'fraud is so rife in your industry, you are unlikely to avoid it'. Providing me with literature, such as Public Notice 726, only enhanced my belief that I could avoid fraud. The suggestion I put to Mr Simmons (and in effect Mr Smith) was that, if fraud was detected in a supply chain, I would ask my trusted supplier to cease trading with its supplier in order to break the chain to the fraud. I could resume my healthy business relationship and the link to that fraud would have been broken. Mr Simmons agreed that it would be acceptable (presumably he meant acceptable to HMRC) to break the link in that way and to continue trading with my supplier. To me it was endorsement of the industry I operated in. The only conclusion that could possibly be drawn from this is that fraud was not rife and that I could avoid it by taking remedial action. This is what I understood Mr Simmons to mean and this assisted with my decision making and due diligence process." Mr Simmons did not give evidence or provide a witness statement, but Mr Smith in evidence said that he had no recollection of such a conversation and later said that it was definitely not something that Mr Simmons would have been likely to accept.

The Appellant's case

139. Although neither he nor Marcello Auletta appeared, we were supplied with a skeleton argument by Mr Ahmed on behalf of Asylum. In it he submitted *inter alia* that the Commissioners must not only prove that a fraud had been committed, that the fraud was connected with Asylum's transactions and that Asylum knew, or should have known, of this. With regard to contra-trading, he submitted that the Commissioners must prove a conspiracy to commit fraud between all parties in both chains. Furthermore, it should be shown that Asylum knew or should have known that fraud existed in the contra-trader supply chains. Given that the transactions involved different goods and on different days, it seemed to Mr Ahmed impossible to understand how Asylum could have known of this. We were referred to the case of *Mobilx* (supra) where at paragraph 75 Moses LJ states:

> "… the ultimate question is not whether a trader exercised due diligence but rather whether he should have known that the only reasonable explanation for

> the circumstances in which his transaction took place was that it was connected to fraudulent evasion of the VAT. The Tribunal might have concluded that Mr Peters should have known that the transactions into which he entered were connected with fraud, by reference to the unconventional nature of those circumstances (a finding it came close to making at para 2 – 8) but it was not the only decision within the bounds of reasonable conclusion."

This being a very high threshold, it was submitted that the evidence would need to be cogent and compelling to impute such knowledge.

140. Asylum relied on the decision of the Tribunal in the case of *Brayfal*, a case in which the Appellant, Brayfal, did not record the IMEI numbers of the mobile telephones it was exporting. The members had disagreed with the Tribunal Judge in that case and had upheld the appeal, in the second hearing (the case having been referred back to the Tribunal by the High Court) they had similarly upheld the appeal and commented on how wholesalers operate in the real world. The suggestions of the Commissioners in that case as to how a company should operate were dismissed. The factual similarities (i.e. lack of contractual agreement, the supplier holding the required stock in the right quantities, delivery to a country other than to the customer, the use of the FCIB Bank, and a poor credit rating for a customer) between the way the appellant had operated in that case and the way Asylum operated were relied on.

141. With regard to due diligence, it was suggested that the onus was on the Commissioners to say what Asylum could have found, i.e. what results would have indicated fraud had the checks suggested been conducted at the time, and to serve the relevant material in evidence, which had not been done. In the present case the evidence of what could have been discovered made it clear there was no possibility for Asylum to have identified the fraud, this of itself was said to be sufficient to end any argument that Asylum "should have known" of the fraud.

142. With regard to actual knowledge, the Tribunal was referred to the case *Blue Sphere Global* (supra) which was cited in support of the proposition that it was not enough to show that Asylum's transactions might be connected with fraud, the Tribunal would have to find that Asylum was so directed by fraudulent controlling minds that it knew without doubt that its transactions were for fraudulent purposes, thus making the director a fraudster himself, with specific instructions from others in what must be a conspiracy to defraud the Revenue. Again it was not pleaded either that the director was a fraudster nor that there was a conspiracy.

143. It had also not been pleaded that the fraudsters created the clean chains with the sole purpose of hiding the fraud in the dirty chains and must also be a party to the conspiracy. Mr Ahmed relied on *Livewire* in which Lewison J stated:

> "In my judgment in a case of alleged contra-trading, where the taxable person claiming repayment of input tax is not himself a dishonest co-conspirator, there are two potential frauds:
>
> (i) The dishonest failure to account for VAT by the defaulter or missing trader in the dirty chain; and

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

It was submitted that there was clear evidence in the present case that the contra-traders were being visited by HMRC officers and were being monitored. It must have been known to the contra-traders that they could not hide a fraud in their supply chain, they did not cover up the fraud and they could not cover up the fraud. In a contra-trade construct a trader had to be part of a conspiracy to defraud the Revenue if he was to be deprived of the right of deduction; furthermore, the timing of the transactions was of the utmost importance.

144. Mr Ahmed criticised the Commissioners for not having served statements from the officers who visited the contra-trader companies. Each company in the chains had been allowed to deduct their input tax, which was inconsistent with the Commissioners' case. Asylum was so far removed from the alleged defaulting traders that it was the company least likely to know about the fraud. The Tribunal should consider what actually happened and what evidence was actually available to Asylum at the time.

145. We were referred to *Mobilx* at paragraph 60 where Moses LJ emphasised that the focus should be on the purchase and he stated:

> "But a trader must be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion."

146. Mr Ahmed relied on the High Court judgment in *Mobilx* where Floyd J stated:

> "16. Complete absence of evidence, or the evidence being to the contrary effect, are two of the grounds on which it may be said that a Tribunal was not entitled to reach a conclusion of fact. It is also well settled that a Tribunal is not entitled to find serious allegations established against the party who calls relevant witnesses unless those allegations are clearly formulated and put in cross-examination. As Briggs J said in *HMRC v. Dempster*:
>
> > "… it is a cardinal principle of litigation that if serious allegations, in particular allegations of dishonesty are to be made against a party who is called as a witness it must be both fairly and squarely pleaded, and fairly and squarely put to that witness in cross-examination."

147. The Tribunal case of *G Comms Limited* was cited as support that even if circularity of funds were pleaded, it was not evidence of actual knowledge, only that a party should have known. Similarly we were referred to the Tribunal case of *Blada Limited* where the final decision was that *Blada* should have known of the fraud, not that it had actual knowledge.

148. Mr Ahmed by his email of 19 November withdrew his reliance on the case of *POWA (Jersey) Ltd* and his submission that various aspects of the case had not been pleaded.

149. In the case of circularity of funds the evidence was not challenged by Mr Ahmed other than in respect of the opinion of the witnesses with regard to it. The evidence of IP addresses was used to support Asylum's position that it was not controlled and did not know of the alleged overall scheme to defraud. Whist it was accepted that some of the traders' bank accounts appeared to be controlled from one computer, Mr Ahmed submitted that the transfers from Asylum's account were controlled by its company officials and, even if the Tribunal found that there was an overall scheme involving Asylum's suppliers and customers, Asylum could very easily have been an innocent dupe. It was further submitted that in fact it would seem sensible for the fraudsters to have an innocent dupe with parties making stock offers and requests that allowed a profit.

150. With regard to the argument that Asylum had taken a large share of the VAT and, therefore, must be a knowing participant, because no fraudster would allow an unconnected exporter to take the lion's share, this was not accepted as a proper analysis and it was pointed out that the missing trader was left with a considerable profit, given the massive volume of transactions. With regard to the price paid by Asylum, the Tribunal was asked to accept that it had purchased at a fair market price and sold at a fair EU market price. It had not been pleaded that the price paid was too low or too high.

151. A further argument advanced by Mr Ahmed was that the Commissioners' actions were not fair and proportionate in that they did not deny the input tax of the party seeking to rely on purchases from the alleged fraudsters. Furthermore it was not proportionate to deny the input tax to a company far removed from the alleged fraud after making virtually no attempt to recover the input tax from the alleged defaulter. It was disproportionate to deny one party its rights on the basis of perceived irregularities with paperwork, while allowing other parties to exercise the same right. The treatment of the Appellant therefore appears to be inequitable. It was important for the Tribunal to look at any facts, factors or criteria known to Asylum at the time it entered into the deals in question, rather than what can be concluded with hindsight.

152. The joined cases of *Peter David and Mahageban* in the CJEU were relied on for the proposition that not any connection with fraud, no matter how tenuous will do. If the alleged connection is not with fraud "previously committed … at an earlier stage of the transaction", or with "fraud committed by seller or by another trader, acting earlier in the chain of supply" there is no basis on which a tax authority in any member state can refuse a taxable person the benefit of the right to deduct. For that reason, the contra-trade construct must be inadequate to deny a taxable person its right to deduct, and with regard to the double contra-trading allegation, this was fanciful at best.

153. Mr Ahmed referred the Tribunal to the legislation contained in the Directives which provide that taxable persons have a right of deduction of input tax. The right of deduction was enacted in UK domestic law by sections 24-26 of the VAT Act 1994 whose provisions were mandatory. There was no provision in the VAT Act qualifying the taxable person's right of deduction, notwithstanding the terms of Articles 22(8) and 28c(A) of the Sixth VAT Directive. Thus, under Community law, taxable persons have a right of deduction of input tax which in principle may not be limited. It was submitted that there is no purported limitation on that principle in UK

domestic law. The law at both Community and UK domestic levels is quite clear: there is no legal basis on which Asylum's right of deduction can be denied.

154. Finally, it was submitted that the "missing VAT" was the net amount for which each missing trader failed to account (being, in respect of each deal chain, a lesser sum from the amount of input VAT being reclaimed by Asylum), and Asylum ought to have received credit for the difference between the total amounts of repayments claimed and the missing VAT.

The Commissioners' Case

155. It was acknowledged by Mr Foulkes that the burden of proof was in all respects upon the Commissioners, and that the standard was the normal civil standard as formulated by Lord Hoffman in the case of *In Re B* at paragraph 13:

> "… proof that the fact in issue more probably occurred than not."

156. The following principles were relied by the Commissioners:

(i) It is for HMRC to establish to the civil standard that the Appellant knew or should have known that its transactions were connected with fraud, and that they were in fact connected with the fraudulent evasion of VAT. It is not sufficient to establish that Asylum knew or should have known that it was more likely than not that its transactions were so connected. However, if a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud, and if it turns out that the transaction was connected with fraudulent evasion of VAT, then he should have known of that fact.

(ii) It is not necessary to establish that Asylum knew or should have known of the nature or mechanism of the fraud, or the identity of the participants.

(iii) In the context of a contra-trading case such as this, the connection of Asylum's transactions with the fraudulent defaults in the contra-trader's "dirty" chains is established by the fact of the offsetting of the contra-trader's input tax from its transactions in those dirty chains against its output tax from its transactions in its clean chains in the same period. It is also established by the conclusion that the deals were connected to a dishonest contra-trader, acting as part of a scheme to defraud the Revenue.

(iv) HMRC asserts, as per the Tribunal's decisions in cases such as *Regent Commodities Limited v. HMRC* and *Martem Limited v. HMRC* that this logic extends to 'double-contra' trading cases such as the present appeal.

(v) In considering whether the *Kittel* test is satisfied, the Tribunal should look at all the circumstances surrounding the transactions, and should not look at a given transaction in isolation. The Tribunal should not unduly focus on the question whether a trader has acted with all due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions takes place if the only reasonable explanation for them is that his transactions have been or will be connected to fraud. Where the trader

has not asked all appropriate questions, then the Tribunal should consider what the trader omitted to do, and what it could have done.

157. It was submitted that the Commissioners were not required to prove that the Appellant's trading partners were fraudsters. In *Mobilx* Moses LJ at paragraph 62 concluded:

> "The principle of legal certainty provides no warrant for restricting the connection, which must be established, to a fraudulent evasion which immediately precedes a trader's purchase. If the circumstances of that purchase are such that a person knows or should know that his purchase is or will be connected with fraudulent evasion, it cannot matter a jot that that evasion precedes or follows that purchase. That trader's knowledge brings him within the category of participant. He is a participant whatever the stage at which the evasion occurs."

We were also referred to the decision of Roth J in *POWA (Jersey) Limited* at paragraphs 20-39 where he conducted an exhaustive review of the claim by that Appellant that privity between it and a fraudster was required for *Kittel* to have effect, before concluding at paragraph 39:

> "… the judgment of the Court of Appeal is clear authority, binding on the Upper Tribunal, that the fact that the trader claiming credit for input tax did not deal directly with a fraudulent trader that was more remote in the chain does not preclude his being denied repayment under the rationale of *Kittel*."

158. From the outset of the case HMRC's pleadings had made it plain that the fraud alleged went far beyond the actions of the defaulting traders and that the transaction chains in their entirety had been orchestrated as part of an overall scheme to defraud the Revenue. Similarly the three decision letters stated this and Asylum's notices of appeal made it plain that it understood the allegation that was being made by the Commissioners about the context of its transactions.

159. With regard to Mr Ahmed's submission that there was a lack of proportionality, the Commissioners contended that proportionality is irrelevant, and cannot even if it were shown, act as a bar to a finding that Asylum acted fraudulently. Mr Foulkes referred us to the case of *Mobilx* where at paragraph 66 Moses LJ stated:

> "It is not arguable that the principle of fiscal neutrality, legal certainty, free movement of goods and proportionality were infringed by the Court itself, when they were at pains to preserve those principles."

160. With regard to Asylum's argument that it ought to have received credit for the difference between the total amount of input tax repayment that it claimed and the amount of VAT defaulted upon by the fraudulent defaulting trader, Mr Foulkes submitted that the approach was wrong in law. We were referred to *Mobilx* paragraph 65 where Moses LJ stated:

> "The *Kittel* principle is not concerned with penalty. It is true that there may well be no correlation between the amount of output tax of which the fraudulent trader has defrauded HMRC and the amount of input tax which another trader

has been denied. But the principle is concerned with identifying the objective criteria which must be met before the right to deduct input tax arises. Those criteria are not met, as I have emphasised, where the trader is regarded as a participant in the fraud. No penalty is imposed his transaction falls outwith the scope of VAT and, accordingly, he is denied the right to deduct input tax by reason of his participation."

161. It is the Commissioners' case that the evidence of the connection with fraud by the mechanisms of the direct, single and double contra-chains to tax losses in each instance described above is in and of itself evidence not only of a connection with fraud, but is also evidence of an overall scheme to defraud the Revenue. Further, it was submitted that the fraud alleged could not have occurred without both planning and design. In the case of the straight chains they were designed to create an artificial distance between the broker, Asylum, and the fraudulent defaulters, and in the contra and double contra chains they were designed to distance Asylum from the fraud, and to disguise it to avoid detection by the Commissioners. It was submitted that in all of the disputed transactions Asylum was participating as a key player in the fraudulent scheme which was so organised that all the participants must have had knowledge that they were participating in transactions connected with the fraudulent evasion of Value Added Tax.

162. Mr Foulkes pointed to the patterns of repetition and similarity in the chains as a feature of the overall plan and design, in particular the repetition of traders across Asylum's chains, as well as the overlap between these and ITW's and RHI's suppliers and customers, and it was submitted that it was not by accident that this occurred, but by design.

Reasons for Decision

163. We accept the Commissioners' submissions of law where set out in paragraphs 156, 159 and 160 above, and adopt them as part of our reasoning.

164. It was acknowledged on behalf of Asylum that there is evidence of fraud in respect of all its deal chains other than deal March 3, and in the contra-traders' deal chains also. We are satisfied on the basis of the evidence we have seen that, on the balance of probabilities, this is the case and also that the Commissioners have suffered tax losses in respect of each and every deal carried out by Asylum and that those losses are fraudulent. We have set out above why we also find that Asylum's deal March 3 was connected with fraud. We accept Mr Foulkes' submission that, by reason of the presence in Asylum's deal chains of a contra-trader, where this is the case, Asylum's deals are thereby connected with fraud. The principal issue for the Tribunal is therefore whether or not the Commissioners have shown that, on the balance of probabilities, Asylum knew or should have known of this fact, in respect of all of its deals.

165. Asylum relies principally upon there being no direct evidence that it knew that the various parties with which it was trading were acting fraudulently. Whilst we accept that this is the case, nonetheless in deciding this case we adopt the approach enunciated by Christopher Clark J in the case of *Red 12* where at paragraphs 109 and 111 he stated:

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

…

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

166. The deal chains are characterised by:

(i) the participants all at the time of the deals in question being comparatively recently established in the trade sector concerned;

(ii) all were on quarterly returns (thereby enabling them to obtain VAT repayments quickly without alerting the Commissioners to tax losses in the contra-trader's dirty chains);

(iii) all had dramatically increased turnovers within a very short period of time and all had few staff; all had customers which (largely) paid for stock without inspecting or taking ownership of the goods;

(iv) all had suppliers which extended substantial lines of credit (and allowed the contra-traders to ship their goods overseas) without any written agreements;

(v) all engaged in back-to-back trading and never took physical possession of the goods, which remained with the freight forwarders;

(vi) all traded with companies in the EC which were also recently formed and whose directors frequently had strong connections with the UK;

(vii) all failed to conduct due diligence at all or such due diligence as they conducted was inadequate;

(viii) all when subject to investigation and extended verification by HMRC became non-compliant;

(ix) all traded in chains which were absent of manufacturers, authorised distributors, retailers and end users;

(x) none made any losses on their deals; and

(xi) always made greater profits of their dirty broker deals by comparison with their clean acquisition deals.

167. The traders are repeated across Asylum's various chains, as well as featuring in ITW and RHI's deal chains. There is a pattern of overlapping and repeating trading relationships, which indicates an orchestrated scheme created to defraud the Commissioners. As an example we would refer to paragraph 25 of Appendix 2 where we describe how the director of PMTC specifically directed goods to be released to Asylum and not to its own customer JPC, and to paragraph 96 where we have set out Asylum's payment of money to Flashman, a company which was neither its customer nor its supplier, but whose director was also the director of Bronteum, the financier in some of the money chains.

168. We were given no reason why Asylum and Marcello Auletta's other company RHI should both trade in similar goods, but in a different manner. RHI had been acting as a contra-trader and offsetting its goods. Asylum never traded with the companies with which RHI traded in VAT periods 03 and 06. There is evidence of substantial transfers of money between ITW and Asylum, and also that ITW supplied RHI in April 2006. We were given no explanation for the way Asylum and RHI were financed nor why they and ITW traded as they did in relation to each other, sharing suppliers and customers as they did.

169. We take into account Dr Findlay's evidence that the total value of the four deals undertaken in Intel CPUs by Asylum in March and April 2006 was £3,600,124 which is over twice what would be expected to be the total value of the legitimate grey market exports from the United Kingdom for the whole year.

170. As set out in paragraph 107 above, we conclude from Dr Findlay's evidence that Asylum was not operating in the legitimate grey market in CPUs. We note however that it was only dealing in CPUs in March 2006 and not thereafter.

171. We have set out in Appendix 2 in some detail the evidence contained in the notebooks found by the Commissioners which show connections between the various parties in Asylum's deals March 4 and March 7 and 8. There is also evidence therein relating to earlier deals of Asylum and also ITW. We have set out above at paragraph 78 our reasons for finding that these notebooks provided evidence of fraud, and that we accept that the notebooks demonstrate pre-planning of the transaction chains and the operation of a controlling mind. For the reasons set out above we reject Asylum's submission that they are consistent with its being an innocent dupe.

172. The evidence obtained from the FCIB records backs up the Notebook evidence in particular in respect of the company High Level Trading, Asylum's customer. It shows that all the companies, Asylum including, made the payments concerned in multiple stages at different times and frequently on different days, and frequently did so with great rapidity. It shows clear circularity of funding within the FCIB, and linkage between the circular flow of funds and Asylum's transaction chains. The money flow evidence reveals the contra-traders' activities in using receipts from one acquisition transaction to assist in funding another dispatch transaction itself linked to a fraudulent default. We have referred in paragraphs 99 and 100 to the recurrence of the same IP address on many occasions and sometimes in respect of different deals,

and our acceptance of the evidence of Mr Letherby that this is unlikely to be as a result of a different computer being used. Whilst Asylum did for the most part put the VAT element of its deals into the money chain, and did not ever use the same IP address as any of the other traders, we do not accept that this is evidence that it was not a participant in the fraudulent scheme. Apart from the fact that the evidence obtained from the notebooks is reflected in the money chains, and the timing of the payments, there is the unexplained payment of £50,000 by Asylum to a company called Flashman Trading Limited who is neither a customer of, nor supplier to Asylum, but does appear in the money flow charts for deals March 3, June 1 and June 2, where on March 3 it had passed money to the financier Bronteum, and on June 1 and 2 had received from money from Bronteum (see paragraph 96 above). Mr Auletta has given no explanation for the evidence uncovered by Mr Mendes insofar as it relates to Asylum. In particular he has provided no evidence of how Asylum or RHI were funded, or of the money transfers revealed which are set out at paragraph 108 above.

173. Mr Auletta points to Asylum's due diligence as evidence of its trading in a business-like manner, however, when its practices are examined in detail it is apparent that Asylum frequently did not carry out due diligence until after it had traded with the company in question (e.g. BIP and JPC); did not take up the trade references provided (e.g. Tradex, PMTC, Ketan Thakrar); traded with companies which had only been in business for a very short time (Tradex, BIP, JPC, PMTC); and traded with companies that had only very short leases on their property (JPC, PMTC). In the case of Ketan Thakrar t/a Arm Gibraltar (Deal March 3) he did not (apparently) check that Mr Thakrar was disqualified from being a company director, despite setting up in business with him as a distributor. There is no evidence that any of the various documents from Asylum's customers were translated where these appeared in, variously, French, Flemish, German and Portuguese. There is no evidence that Mr Auletta spoke those languages. On several occasions Asylum's customers had low credit ratings (Evolution, Gredis) and it did not follow up the trade references for Gredis, MSE or SLH. We find that Asylum both ignored information that was in its possession at the time of the transactions and also failed to obtained information which was reasonably available or to ask appropriate or reasonable questions about the companies with which it had intended to trade.

174. On the basis of the notebook evidence, the money chain and banking evidence obtained from FCIB and Asylum's bank accounts, and from Asylum's lack of concern about the financial status and business practises of its trading partners, we find that Asylum was involved in a fraudulent scheme to defraud the Commissioners.

175. It was submitted on behalf of Asylum that in considering whether or not it had knowledge of the different frauds, the Tribunal must only take into consideration what evidence was available to it at the time, and not what Asylum could only have known by applying hindsight. We do not accept that this is correct. If it were so, we would be prevented from drawing inferences from evidence subsequently obtained which is relevant to Asylum's knowledge at the time but which Asylum itself could not have been aware of specifically, for example the money chains uncovered by Mr Mendes or the notebooks, the existence of which could not have been known directly by Asylum. The money chains and the notebooks both provide strong evidence that

Asylum was party to an elaborate plan to defraud the Commissioners and that Asylum knew of that plan at the time it made the various deals subject to this appeal.

176. It was submitted on behalf of Asylum that it had been unfairly discriminated against in relation to the decision of the Commissioners to deny the right to deduct input tax as opposed to others in the chains of transactions. This non-discrimination argument is of no application to proceedings where the Commissioners have denied an appellant's right to deduct input VAT on the basis of the principle in *Kittel.*

177. It was submitted by Asylum that the ECJ in the case of *Mahageben kft; Peter David* made 'clear beyond doubt that not any connection with fraud, no matter how tenuous will do. If the alleged connection is not with fraud "previously committed … at an earlier stage of the transaction", or with "fraud committed by the seller or by another trader acting earlier in the chain of supply", there is no basis on which a tax authority in any member state can refuse a taxable person the right to deduct. And with regard to the double contra trading allegation, this is fanciful at best.' In the present case the evidence is of a well-planned and co-ordinated scheme to defraud the Commissioners. The moment that the first sum of money was transferred in respect of any of the deals was in our judgment when the scheme was put into operation. In the present case the money flow charts show that in respect of all of Asylum's deals there was a payment made to Asylum's customer directly or indirectly by someone who was either not involved in the deal chains (e.g. Bronteum) or, as in the case of Stardex (deals March 4, 7 and 8) by someone whose activities have been shown by the notebooks to be part of a pre-planned fraudulent scheme. Similarly in all the subsequent deals which involve contra-traders the money flow starts prior to the payments by any of the parties in Asylum's deal chains and from a party not connected directly with the deal chains other than in the case of deal April 6. There Stardex again made the initial payment before it received any payment from its customer Tradex, who was in fact the last party in the deal chain to pay. In *Mobilx* at paragraph 62 Moses LJ said:

> "The principle of legal certainty provides no warrant for restricting the connection, which must be established, to a fraudulent evasion which immediately precedes a trader's purchase. If the circumstances of that purchase are such that a person knows or should know that his purchase is or will be connected with fraudulent evasion, it cannot matter a jot that that evasion precedes or follows that purchase. That trader's knowledge brings him within the category of participant. He is a participant whatever the stage at which the evasion occurs."

178. All the above matters lead us to what we consider to be an inescapable conclusion that Asylum knew that it was taking part in a fraudulent scheme. Whilst our finding that Asylum was a knowing participant in a fraudulent scheme to defraud the Commissioners is sufficient to dispose of this appeal, in case we are wrong so to find, we also find that there can be no other reasonable, or indeed other, explanation for Asylum's repeated dealing in chains whose participants are so regularly found to have been failing to pay their VAT, nor for its being able to trade without any apparent method of funding its trade other than its earlier VAT receipts, than that it knew its own deals were connected with fraud. For all the above reasons we dismiss this appeal.

179. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

MISS JILL C GORT
TRIBUNAL JUDGE

RELEASE DATE: 26 April 2013