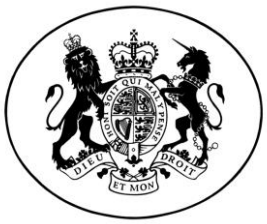

TC00716

Appeal number: MAN/08/0043

VALUE ADDED TAX- – MTIC-sale of Urine Testing Strips- appellant's repayment claim refused on grounds that the appellant knew or ought to have known that the transaction was part of an MTIC fraud - set off of £6,372,415.99 and £6,689,480.88 of VAT by two contra traders – appellant in 'clean chain' knew that the deals were part of a VAT fraud – appellant argued 'abuse of power' HMRC failing to notify of potential fraud, which gave rise to a loss of the appellant's 'legitimate expectation' – tribunal's power to hear - yes – no 'abuse of power' or of the appellant's 'legitimate expectation' - appeal dismissed

FIRST-TIER TRIBUNAL

TAX

EUROSEL LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS (VAT) **Respondents**

TRIBUNAL: DAVID S PORTER (Judge)
BEVERLEY TANNER (Member)

Sitting in public in Manchester on 7, 8, 9, 10, 11, 14, 15 and 16 June and 6 July 2010

Jeremy Woolf for the Appellant.
Jeremy Benson QC and Vinesh Mandalia, his Junior, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

1. Jeffrey Paul Jordon (Mr Jordon), Managing Director, of the Appellant (Eurosel) appeals on behalf of Eurosel against the decision of the Respondents (HMRC) contained in their letter of 19 December 2007 denying Eurosel's entitlement to deduct input tax of £267,850 in respect of the period 06/06 arising from the export of Urine Testing Strips. Mr Jordon says that he neither knew nor ought to have known that the transaction was connected with fraud. HMRC say that Mr Jordon carried out little due diligence and any reasonable businessman would have known or ought to have known that the transaction was connected with fraud or with a fraud in a related chain. As the hearing progressed HMRC suggested that Eurosel were parties to the fraud.

2. Jeremy Benson QC (Mr Benson) appeared on behalf of HMRC with Vinesh Mandalia, his junior. Mr Benson produced a skeleton argument and written submissions by way of summing up. He called the following witnesses who gave evidence under oath:

Allistair Duncan Strachan
Eleanor Joan Jones (nee Carnes)
Andrew Nicholas Charles
Roderick Guy Stone
Julie Mary Sadler
Michael Quarty
Frank Spackman
Karen Maconald

The following unchallenged witness statements were produced to the tribunal:

Ian M Lester a verification officer, since retired, whose evidence was taken over by Mr Strachan
Michael James Downer, who produced evidence of two discs recovered by the West Midland Police, which had been found at the house of a Mr Bhupinder Singh Samara during the course of a criminal investigation into a conspiracy to commit murder.
Stephen John Mills, who was responsible for finding the documentation evidencing the incorporation, shareholding and directors of Digikom Limited (Digikom) details of which appear later in this decision.
Margaret Davies Business Centre Director at Brampton, who gave evidence of Eurosel's occupation of a unit at the site.
Daniel O'Neil who gave evidence with regard to UR Traders, who were not relied on as a defaulting trader for the purposes of this appeal

3. Mr Woolf appeared on behalf of Eurosel, produced a skeleton argument and written submissions by way of summing up and called Mr Jordon and David Walker,an employee of PJA Wholesalers Limited (PJA) as witnesses, who gave evidence under oath. He produced the following unchallenged witness statements to the tribunal:

Chris Haigh who gave a business reference of his involvement with Mr Jordon.
David Condliffe a buying director for Enterprise OTC, with whom Eurosel had dealt over many years, who also gave a business reference
.

We were also provided with 38 lever arch files a large number of which contained details of HMRC's witnesses' working papers.

4. We were referred to the following cases:

R v IRC Exp Unilever [1996] STC 681

Polanski v Conde Nast [2005] 1WLR637

Optigen Ltd and others v HMRC [C-354/03]

Axel Kittel and another v Belgium [C-439/04]

R v Just Fabulous (UK) ltd and another v HMRC [2007] EWHC 521(Admin)

Calltel TelecomLtd and Opto Telelinks (Europe) Ltd vHMRC [2007] V 20266

Ecotrade v Agenczia della Entrate [2008] STC 2626

Nettoo Suprtmarket v Finanzami [2008] STYC 3280

Reemtsma Cigarettenfadriken v Ministero della Fianze [2008] STC 3448

R (pap Teleos) v HMRC [2008] STC 706

Blue Sphere Global Ltd v HMRC [2009] EWHC 1150 Ch,STC 2239

Late Editions v HMRC [2009] UKFTT 166

Calltel telecom Ltd; and another v HMRC [2009] EWHC 1081 (Ch)

Livewire Telecom Ltd; and another v HMRC [2009] EWHC 15 (Ch)

Mobilx ltd (in administration) v HMRC [2009] EWHC 133 (Ch)

Oxfam v HMRC [2009] EWFC 3078 (Ch)

Megtian v HMRC [2010] EWHC 18 (Ch)

Moblix Ltd (in administration); and others v HMRC [2010] EWCA Civ 517

CGIU Group (Europe) Limited v HMRC LON/2007/937, 27 April 2010 (unreported)

Preliminary issues

1. Mrs Tanner advised the tribunal that she had known Mr Strachan, one of the witnesses for HMRC, when she worked, some 17 years ago, for HMRC in their fraud team. She left HMRC in 1996 and worked for Hammonds solicitors thereafter. The parties confirmed that they had no objection to Mrs Tanner sitting as the member. Mr Benson asked that the Statement of Case be amended by reference to *Moblix Ltd (in administration); and others v HMRC* [2010] EWCA Civ 517 and by including further details with regard to the Digikom transactions. We agreed that the amendments could be added. In the event Mr Woolf, on behalf of Eurosel, agreed the tax loss in the Digikom chain. Mr Benson also wished to introduce evidence in relation to a letter from Concorde, one of Eurosel's suppliers but, as Mr Woolf had not had an opportunity to consider the letter and there had been ample opportunity for Mr Benson to require its production prior to the hearing, we disallowed its production

Missing Trader Fraud

6. Most readers of this decision will be familiar with the way in which Missing Trader Fraud operates. Dr John Avery-Jones gave a helpful introduction in *Livewire Telecom Ltd; and another v HMRC* [2009] EWHC 15 (Ch):

> "In order to demonstrate where the loss arises from MTIC fraud we start with a simple example of an import of goods by X, who sells them to Y, who exports them. The tax on acquisition (import) by X is cancelled by input tax of the same amount, and the output tax charged on the sale by X will be cancelled by the input tax repaid to Y on the export, so that the United Kingdom exchequer receives no net tax".
>
> If both X and Y are fraudsters Y will have to finance the output tax charged by X because X disappears with it, and Y will recover the same when it is repaid to Y by HMRC on Y's repayment claim.
>
> "The only gain by the fraud is if HMRC pay the input tax to Y, when the exchequer is left with the loss of the amount of the import tax: The non-payment of the output tax by X is merely the recovery of what Y put in. If the exporter is innocent of that fraud he is entitled to repayment of the input tax that he has actually paid even though this represents tax never paid by X and the exchequer is left with the same loss of the amount of input tax".

The case law, as now developed in *Moblix Ltd (in administration); and others v HMRC* [2010] EWCA Civ 517, provides that an exporter will not be innocent if he knew or ought to have known that his transaction was connected with the fraudulent avoidance of tax.

7. Carousel fraud was rife from 2003 up to 2007, when the reverse charge was introduced. Any loss to the exchequer only occurred when the input tax was refunded on a repayment claim. HMRC had been repaying substantial sums of money, in many cases well in excess of £10,000,000. The total loss to HMRC during those years amounted to in excess of £2 billion each year. It appears that many of the frauds have been financed by third parties outside of the various transaction chains.

8. We think it would be helpful to set out how the money flows in such schemes and, in that regard we have been much helped by the evidence given by Mr Stone, who also confirmed that losses only occur when the repayment is made to the exporters in

the transactions. The participants in the chain are all seen to make a small profit, and between the beginning and end, make appropriate VAT payments to the Revenue. However, they do not necessarily pay each other the correct amounts, either under the apparent contracts, or of VAT. They are required, if the transactions are fraudulent, to make an initial contribution to the scheme, in this example half the VAT liability due to their supplier, so that they carry some of the risk and thereby reduce the risk of the fraudsters receiving nothing. When the repayment is obtained by the Broker, he will have sufficient money to take the balance of his profit and to pay his outstanding VAT liability to his supplier. That supplier will then be in a position to pay his outstanding VAT to the defaulter, who will then receive all the VAT he should have paid to HMRC, but which he intends to keep, less a small contribution to the profits down the chain. The outsider, who financed the transaction from the beginning, is presumably repaid his original loan plus any agreed interest.

9. *Example*

£1,025,625 is introduced in to the scam by A (the supplier in Europe) or B (the Defaulter) as a payment to E to enable him to buy the goods from D. The amount includes some of the profit to be made by the participants down the chain. No VAT has been paid at this point and D, in paying his supplier C, pays half the VAT due to C, which D is confident he will be reimbursed from his VAT repayment. C pays the price of the goods, which includes a small profit and half of the VAT due on his transaction, to B. B will have then received half the VAT, he intends to keep, and at this stage is in a position to refund the loan of £1,025,625 to his lender plus, presumably, any agreed interest. Many of these transactions took place through the First Curacao International Bank (FCIB), which appears to have been the bank of preference and has since been closed down by the Dutch Authorities. All the money appears to have taken approximately 2 ½ minutes to pass through the account, so that the initial loan, in the example £1,025,625, is only at risk for that length of time so long as all the participants pay their share of the money as soon as they receive it.

- A (in the EU) sells the goods to B (the Defaulter) for £1,000,000

- B sells the goods to C (the Buffer) with a profit of 1% for £1,010,000

  B charges VAT of £176,750 at 17.5 %

- C pays the full price for the goods and half the VAT of £88,375 to B and sells the goods to D (the Broker) with a small profit of ½ % for £1,015,050

  C charges VAT of £177,633.75 at 17.5% to D

  C pays VAT to HMRC of £883.75 the difference between the £177,633.75 and £176,750

- D pays the full price for the goods but only pays half his VAT liability of £88,816.88 by way of payment of the VAT to C and sells the goods to E (in the EU) with a profit of 4% for £1,055,652

- E does not pay D the full price but only the original advance payment of £1,025,652

leaving D to recoup the shortfall of his profit and his VAT liability to C from the repayment.

- D applies to HMRC for a repayment of VAT of £177,633.75

being 17.5 % of £1,015,050 (his selling price and assuming, for the sake of this example, there is no other VAT).

D obtains a repayment from HMRC of		£177,633.75
D recovers his VAT payment of	£88,816.88	
and the balance of his profit of	£ 30,000	£118,816.88

Leaving a balance of		£ 58,816.87

D owes a further £88,816.87 by way of VAT to C, who accepts the sum of £58,656.75 which C then pays to B as the balance of the VAT that he presumably has agreed to pay to clear his liability.

As a result the participants receive the following:

A/B have already received part of the VAT from C	£88,375.00
and receive the balance above	£58,816.87

Making a total of	£147,191.87
Less the balance of their stake being	£ 15,652.00
the £1,025,625 introduced and £1,010,000 returned by C	---
making a profit of	**£131,539.87**
C receives his profit of	£ 5,050.00
Less the VAT paid to HMRC of	£ 833.75

Making a profit of	**£ 4,216.25**
D receives his VAT of £88,816.87and his profit of	**£ 40,602.00**

D will be operating on a monthly VAT cycle and C on a quarterly cycle. If the sale to E can be brought as near to D's month end as possible, the repayment will be accelerated.

As the fraudster expected to obtain the repayment from D, D would only need to pay a proportion of the VAT and take some of his profit. He can recoup the shortfall from the repayment. That way the fraudster could ensure that they received the appropriate amounts from the scam and D would obtain a refund of the money he had introduced to the chain. The middleman C only makes a small profit because he effectively does very little and takes very little risk. He merely pays the price for the goods with the

money provided by A. D (the broker) usually takes the largest profit because he takes the risk that the repayment may not be made. All the parties require the monies to be paid as soon as they are received to minimise the risk of a party failing to make a payment.

10. We were told by Mr Stone that HMRC were investigating some 34,000 cases in June 2006. Assuming only 15,000 of that number had already received £131,539.87, as in the example, the fraudsters would receive approximately £1.9 billion in those transactions. They were in fact receiving substantially more. The latest published estimates (*Measuring Tax Gaps,* December 2009) disclose potential losses in 2005-6 of up to £5.5 billion and in 2008-9 of up to £2.5 billion.

11. HMRC introduced a more robust verification system in 2006 and as a result the fraudsters changed the shape of the scam. Instead of making repayment claims in excess of £10,000,000 they inserted another chain (an apparent – clean - chain), and the Broker appeared in the new chain as well as the dirty chain. In that way the Broker was able to set off the output tax in supplying the clean chain in the United Kingdom against the input tax he had incurred on a transaction from Europe in a similar chain. When HMRC received the application from the exporter in the clean chain it would not be alerted to the fact that the repayment in that chain was financing the fraud in the dirty chain. As a result a considerable VAT liability could be washed out of the system without alerting HMRC and the repayment claim was reduced to a substantially lower figure in the Brokers return.

This case relates to Eurosel's clean chain and two dirty chains both of which appear to have washed out in excess of £6,000,000 by way of contra-trading.

The Law.

12. In view of the decision in *Moblix Ltd (in administration); and others v HMRC* [2010] EWCA Civ 517 we think it would be helpful, before considering the evidence, to indentify the law as we understand it.

13. *The legislation.*

The right to deduct is contained in sections 24 -29 of the Value Added Tax Act 1994 (the Act). Section 25 requires such a person to account for and pay any VAT on the supplies of goods and services which he makes and entitles him to a credit of so much of his input tax as is allowable under s 26: see s 25(2). Section 26 gives effect to what is now Article 168 of EC Council Directive 2006/112 (the VAT Directive) and allows the taxable person credit in each accounting period for so much of the input tax for that period as is attributable to supplies made by the taxable person in the course or furtherance of his business: see s 26(2).

These provisions are in mandatory terms. If a trader has incurred input tax, which is properly allowable, he is entitled, as of right, to set it against his output tax liability or to receive a repayment if the input tax credit due to him exceeds that liability. He is required to hold evidence to support his claim (see article 18 of the Sixth Directive and regulation 29(2) of the Value Added Tax Regulations 1995 (SI 1995/2518). As a result the right to deduct or the right to a repayment is absolute, and no element of

discretion is conferred on the tax authority, save that the authority may accept less evidence than normally required; it has no right to demand more evidence than that prescribed by article 18. The right is also immediate , that is it may be exercised "when the deductible tax becomes chargeable". The only limitation is the practical one that, although deductibility is determined on a transaction by transaction basis, the mechanical process of deduction or repayment is effected by reference to prescribed accounting periods.

14. *The case law*

The case law has developed from *Optigen Ltd and others v HMRC* [C-354/03] which decided that a repayment must be made to a trader, who is innocent of the fraud, even though the transaction did not amount to an economic activity, through *Axel Kittel and another v Belgium* [C-439/04] which extended the concept of knowledge to include a trader, who ought to have known that there was a fraud, to *Moblix Ltd (in administration); and others v HMRC* [2010] EWCA Civ 517, which refers to the various cases and has refined the concept of knowledge and the evidence required to prove it. In the light of that decision, we do not think it is necessary to trace the development of the concept through all of the cases we have been referred to, but rather to refer to Lord Justice Moses' observations in the Court of Appeal. We have been assisted in that by the observations of both Mr Woolf and Mr Benson in their final submissions. Moses LJ stated;

"…The scope of VAT, the transactions to which it applies, and the persons liable to the tax are all defined according to objective criteria of uniform application. The application of those objective criteria are essential to achieve:- (see *kittel* para 42, citing *BLP Group* [1995] ECRI/983 para 24) the objectives of the common system of VAT of ensuring legal certainty and facilitating the measures necessary for the application of VAT by having regard, save in exceptional circumstances, to the objective character of the transaction concerned." [Paragraph 24]

15. "In Kittel after §55 the Court developed its established principles in relation to fraudulent evasion. It extended the principle, that the objective criteria are not met where tax is evaded, beyond evasion by the taxable person himself to the position of those who knew or should have known that by their purchase they were taking part in a transaction connected with fraudulent evasion of VAT… It extended the category of participants who fall outwith the objective criteria to those who knew or should have known of the connection between their purchase and fraudulent evasion. Kittel did represent a development of the law, because it enlarged the category of participants to those who themselves had no intention of committing fraud, but who, by virtue of the fact that they knew or should have known that the transaction was connected with fraud, were to be treated as participants. Once such traders were treated as participants their transactions did not meet the objective criteria determining the scope of the right to deduct…"[paragraph 41]

16. ".A person who has no intention of undertaking an economic activity, but pretends to do so in order to make off with the tax he has received on making a supply, either by disappearing or hijacking a taxable person's VAT identity, does not meet the objective criteria which form the basis of those concepts which limit the scope of VAT and the right to deduct (see Halifax § 59 and Kittel § 53). A taxable person who knows or should have known that the transaction which he is undertaking is connected with fraudulent evasion of VAT is to be regarded as a participant and, equally, fails to meet the objective criteria which determine the scope of the right to deduct"; [paragraph 43]

17. Mr Woolf submitted that the Court of Appeal in *Mobilx Ltd v HMRC* [2010] EWCA Civ 517 para 65 considered that no right to recover input tax arose just because the amount of input tax paid by a trader exceeds the tax loss. He considered the Court of Appeal's reasoning to be flawed and accordingly reserved the right to argue the same on behalf of Eurosel in a higher court. If the Court of Appeal is correct in saying that the supplies are outside the scope of VAT it should in any event follow that no output tax liabilities should have arisen on the supplies rendered to Eurosel and a refund of the output tax should be paid for that reason. The decisions of the European Court in *Ecotrade v Agenczia delle Entrate* [2008] STC 2626 at p 2647 paras 60-68 and *Reemtsma Cigarettenfadriken v Ministero delle Finanze* [2008] STC 3448 at p 3471 para 41 suggest that any procedural rules that enable HMRC to both deny the input tax and retain the output tax are contrary to European Law.

18. His submission is misconceived. The European Court of Justice in *Optigen Ltd and others v HMRC* [C-354/03] has made it clear that a trader can recover his output tax even though the transaction is outside the VAT scheme. Both *Kittel* and *Moblix* confirm that where a trader meets the objective criteria for compliance with the VAT regime, it is not open to the Authorities to withhold any tax repayment. If, however, a trader does not comply with the objective criteria, because there is a fraud, that trader cannot recover any tax. Moses LJ at paragraph 30 states:

"The Court (The European Court of Justice when considering *Optigen*) rejected the United Kingdom's argument that unlawful transactions fell outside the scope of VAT. Fiscal neutrality prohibits the distinction between lawful and unlawful transactions; such a distinction must be restricted to transactions concerning products which by their very nature may not be marketed, such as narcotic drugs and counterfeit currency (see paragraphs 49 and the Advocate General's Opinion paragraph 40). By its rejection of the United Kingdom argument, the Court made it clear that the reason why the fraud vitiates a transaction is not because it makes the transaction unlawful but rather because where a person commits fraud he will not be able to establish that the objective criteria, which determine the scope of VAT and the right to deduct, have been met."

And at paragraph 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";

As the Advocate General stated at paragraph 40:

"As becomes clear from the commissioners own description of what they consider to constitute carousel fraud, its characteristics is that it makes use of lawful economic channels in order to facilitate the retention of money paid as VAT"

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

At paragraph 61 "A trader who decides to participate in a transaction connected to fraudulent evasion, despite knowledge of that connection, is making an informed choice; he knows where he stands and knows before he enters into the transaction that if found out, he will not be entitled to deduct input tax. 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";

20. Moses LJ also expressed concern that HMRC have in the past placed too much importance on a traders' failure to carry out due diligence and not enough on the circumstantial evidence available. At paragraph 75 he stated.

" 75 The ultimate question is not whether the 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 VAT…..

21. We have decided that the legal test is that a trader will not be entitled to a repayment if he knew or ought to have known that his transactions **were** connected with fraud on the basis that the only reasonable explanation for the circumstances in which the transactions took place was that they were connected with such fraudulent evasion. In contra-trading cases HMRC's ability to establish a connection between the actual tax losses in the contra-trade to the specific repayment claim in the clean chain is extremely difficult. This is not least because of the timing of the payments, where

the Broker, in the clean chain, will be on monthly returns, and the transaction to which that repayment relates, will be some two or three months later, dependent on the accounting dates in the dirty chain. In *Livewire Telecom Ltd; and another v HMRC* [2009] EWHC 15 (Ch) Mr Justice Lewison stated:

Paragraph 102: "In my judgement in a case of alleged contra-trading, where the taxable person claiming repayment of input tax is not himself a dishonest 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.

Thus it must be established that the taxable person knew or should have known of a connection between his own transaction and at least one of these frauds. I do not consider it is necessary that he knew or should have known of a connection between his own transaction and both of those 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."

Mr Benson referred us to *Blue Sphere Global Ltd v HMRC* [2009] EWHC 1150 Ch,STC 2239 in paragraph 44 the Chancellor held that:

"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 transactions in which there is a common party whether or nor 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 the 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 transferred to E (BSG) in the clean chain. Such a transfer is apt, for the reasons given by the Tribunal in *Olympia* to conceal the fraud committed by A in the dirty chain in its failure to account for the input tax received from B.

46. Not all persons involved in either chain, although connected, should be liable for any tax loss. The control mechanism lies in the need for either direct participation in the fraud or sufficient knowledge of it."

The Chancellor concluded at paragraph 55.

"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 a party to both the clean chain with E and the dirty chain A constitutes a sufficient connection it is not enough to show that E ought to have known of the fraudulent 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 a dirty chain inevitable in the sense of being pre-planned."

We have concluded that HMRC must establish either that Eurosel knew or ought to have known of the defaults in the Digikom and/or the Casa Commodities Ltd (Casa) chains or that it was party to a transaction which caused it to participate in those frauds.

Burden of proof

22. In Mobilx Ltd (In Administration) –v- HMRC [2010] EWCA Civ 517, Moses LJ considered where the burden of proof lies and observed (at paragraphs 81 and 82) that;

"..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.

"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 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 that his transactions have been or will be connected to fraud. The danger in focusing 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.

Standard of Proof

23. These are civil proceedings and, as such, the standard of proof is the ordinary civil standard i.e. on the balance of probabilities. The case of *Reventhi Shah (Administratrix of the Estate of Naresh Shah Deceased) v Kelly Anne Gale; Kelly Anne Gale v Jason Grant, Mark Young, Paul Hilton, Samantha Easton* [2005] EWHC 1087 (QB) (concerning a civil action for unlawful killing) made it quite clear that there is a single civil standard of proof (i.e. on the balance of probabilities) applicable in all civil proceedings regardless of the allegations levied. Lewison J (as he then was) stated:

> "In my judgment, it would be wrong to approach this case on any basis other than the balance of probability with appropriate respect paid to the need for cogent evidence to reflect the serious nature of the allegation and the inherent improbability that this 22 year old young lady of good character should involve herself in such conduct as that alleged. I simply do not accept that it is appropriate, as a matter of law, to require a higher standard of proof simply because of the nature of the allegation. If murder, why not allegations of rape or the most serious fraud."

25 Before considering the facts it also necessary to deal with Mr Woolf's contentions on behalf of Eurosel, both in his opening statement and his written submission, as to the alleged "abuse of power" and Eurosel's "legitimate expectations". In Mr Woolf's opening statement, he suggested that the alleged losses relating to U R Traders Limited, in the Digikom chain, if brought into account, would amount to double counting, as Digikom had not sort to recover any input tax on those transactions. During the course of the hearing, Mr Benson confirmed that evidence of the U R Traders Limited transactions had been submitted, merely for the sake of completeness, and that HMRC were not relying on those transactions to establish a loss. In those circumstances we have no need to consider Mr Woolf's submissions in that regard. However, he did raise in his submissions the following:-

26 Even if the Tribunal were to consider that Eurosel should have known of the fraud, Eurosel would submit that any neglect by HMRC must be even greater. In the previous quarter HMRC traced transactions following precisely the same chain of supply to Casa Commodities Ltd (Casa), who they are alleging was acting as a contra-trader during the period. In addition no warnings were given to Eurosel about the risks of MTIC fraud or possible improvements that could be made to its due diligence procedures. Instead by authorising a repayment of the input tax in the March quarter HMRC gave the impression that there were no grounds for concern about the traders with which Eurosel were dealing. If Eurosel had been given any warning that PJA was acquiring goods from a potentially suspect source, it would have sought to ensure that it did not continue to acquire supplies from that source unless appropriate assurances were obtained. Although HMRC may have questioned Eurosel about its due diligence procedure, there is also no evidence of HMRC suggesting any changes that Eurosel should consider adopting. The decision of the European Court in *R (Teleos) v HMRC* [2008] STC 706 at p 736 para 58 makes it clear that the principle of proportionality is relevant when resolving whether the burden should be placed on the taxpayer or on the state. To completely deprive a taxpayer of any right of recovery when HMRC has been at greater fault than the taxpayer would offend principles of

proportionality and the *Kittel* doctrine therefore does not require a complete denial. Mr Woolf considered the failure to provide such information was outrageously unfair and therefore can be regarded as an 'abuse of power', if HMRC deny the repayment claim. He also stated that the decision of the High Court in *Oxfam v HMRC* [2009] EWHC (Ch) 3078 suggests that public law points can now be raised in the tribunal in relation to claims for input tax. The reasoning of the High Court in that case has now been followed by the Tribunal in *CGI Group (Europe) Limited v HMRC.* The Appellant submits that HMRC's contentions are so outrageously unfair that they can properly be regarded as an abuse of power: see *R v IRC Exp Unilever* [1996] STC 681 at 697d.

27 *Oxfam v HMRC* [2009] EWFC 3078 (Ch) dealt with Oxfam seeking to challenge HMRC's refusal to amend the terms of Oxfam's method of apportioning its input VAT between its business and non-business activities, which had been agreed in October 2000. Oxfam wanted to change the method because the parties understood that the case of *Church of England Children's Society v Commissioners of Revenue and Customs* [2005] EWHC 1692 (Ch) decided that the receipt of unrestricted voluntary donations was not a supply for VAT purposes and the income was therefore outside the scope of VAT. However, since the unrestricted voluntary income from donations was, by its nature, available to fund all the Society's activities, some of which were business activities for VAT purposes, the VAT incurred on unrestricted fundraising expenditure was recoverable by the Society in part. The effect of the change would have been to increase the recovery rate of 75% VAT in respect of the business/non-business apportionment under the current method to around 85% to 90%. The tribunal had held, and Mr Justice Sales concurred with their finding, that Oxfam had entered into an arrangement, which was not based on a binding contract, but on an agreement between the parties, which produced a fair method, in their case to apportion the various streams of expenditure and income in the charity. The case of *Church of England Children's Society* did not alter that agreement as the parties had considered the method to be reasonable in 2000. In relation to legitimate expectation the case went on to decide that although the agreement with HMRC to use the Approved Method Formula by Oxfam did not constitute a binding contract, it clearly did amount to an express assurance by HMRC that Oxfam's recoverable input tax would be calculated by reference to that formula. Accordingly, the question whether HMRC were bound in law to accept the validity of Oxfam's claim for additional recovery of input tax for the three years before the judgement in *Church of England Children's Society,* by application of the Approved Method Formula read with that judgment, had to be determined by reference to the doctrine of 'substantive legitimate expectation' in public law. Mr Justice Sales commented:

> "47. The law in relation to the protection of substantive legitimate expectations is still in a state of development. The scope for its operation is potentially wide, ranging from general statements of policy which cover a large number of cases to assurances given specifically to one or a few persons. The present case falls at the latter end of the spectrum….
>
> 50. In my view, in a case such as this, involving an assurance given to only one person and where there is no irrationality on the part of the public authority in

adopting a different approach, the absence of detrimental reliance on the part of the person to whom the assurance is given is fatal to the argument that to modify the assurance would involve an abuse of power on the part of the public authority which gave the assurance."

We observe that there is clearly a detriment to Eurosel arising from the failure of HMRC to alert it to the possibility that it was involved in a fraudulent chain resulting in the refusal to repay the VAT. Mr Justice Sales continued:

"51. The general position in public law is that discretionary powers are conferred on a public authority in order to allow that authority to make judgments about how to treat specific cases. Where many cases fall to be considered, it will often be sensible for the authority to promulgate a policy indicating how it will deal with individual cases. A public authority is free, within the limits of rationality, to decide on any policy as to how to exercise the discretion; it is entitled to change its policy from time to time for the future (e.g. as its perception of public interest changes in the light of new circumstances); and a person who falls within the scope of the policy is only entitled to have whatever policy is lawfully in place at the relevant time applied to him.

52. Since there is a rule that a public authority is not entitled to fetter its discretion, it is obliged to keep open the possibility of not applying that policy in a particular case if the specific circumstances of that case warrant that disapplication of the policy in relation to it: see e.g. *British Oxygen Co Ltd v Board of Trade* [1971] AC610. Thus an individual who would suffer from the application of the policy in his case is entitled to contend that the policy should not be applied to him, and the public authority has to consider the contention on its merits. In addition, since the public authority may not fetter its public law obligations to consider how it should exercise its discretion in the public interest, it may disapply a policy which favours an individual by having regard to the particular circumstances of that individual's case, even though the policy remains unchanged, provided the authority acts fairly and rationally in doing so; see e.g. *R (Mullen) v Secretary of State for the Home Department* [2004] UKHL 18."

Oxfam's case failed for four reasons:-

1, It has suffered no detriment

2. The agreed formula produced a reasonable relationship between recoverable income tax and Oxfam's own taxable business supplies. It had no legitimate expectation that the Approved Method Formula would be altered to accommodate the changes in *Church of England Children's Society.*

3. The judgment in *Church of England Children's Society* falsified the common assumption of the parties as to how the formula would in fact operate.

4. HMRC acted properly in correcting the formula as it did for a powerful overriding public interest.

Mr Justice Sales considered that this tribunal does have the power to hear matters of public law in relation to appeals under section 83 VATA. He added:-

80 "I am conscious that this is a procedural point of importance that I am departing from a widely held view that the Tribunal's jurisdiction is more limited and that I am doing so without the benefit of detailed argument to the contrary before me. Until the issue is authoritatively ruled upon at a higher level than this court, I think the prudent course for a taxpayer who wishes on public law grounds to challenge a relevant decision of HMRC falling within the scope of one of the headings in section 83 Value Added Tax Act 1994 may be to seek to put such grounds in the course of an appeal to the Tribunal, but at the same time to issue a protective judicial review claim within time in case it is later determined that – contrary to my view in this judgment - the Tribunal has no jurisdiction in the matter."

28. As far as we are aware Mr Woolf has not issued a protective judicial review claim, nor have either party suggested that this Tribunal cannot consider the matter. In *Calltel Telecom Ltd* HMRC had alerted the Appellant, on several occasions to the fact that many of their transactions had ended with a defaulter. They did not, of course, name the defaulting trader as they could not. In other cases HMRC have taken the view that how a trader operates is a commercial consideration for the Trader and it is no part of their responsibility to necessarily alert that trader to the possibility that the trader is involved in an MTIC fraud. In fact there are many cases where to do so would be counter productive and jeopardise the investigations. HMRC have over the years advertised in the press and to trade generally the risk of MTIC fraud. HMRC issues notice 726, which alerts traders to the potential of MTIC fraud. That notice does not specify at paragraph 1.4 that such frauds can involve goods other than computers telephones and ancillary equipment we suspect because the contra-trading activities commenced after it had been printed. Mr Jordon has accepted, as appears later in this decision, that he is aware of MTIC fraud, but only as a result of reading about it in the press and hearing about it within the trade. As Mr Justice Sales suggested in *Oxfam*:

"…..In addition, since the public authority may not fetter its public law obligations to consider how it should exercise its discretion in the public interest, it may disapply a policy which favours an individual by having regard to the particular circumstances of that individual's case, even though the policy remains unchanged, provided the authority acts fairly and rationally in doing so."

29. We consider that the advising of traders of a potential MTIC situation is not a 'public law obligation' and we do not believe that it is necessarily prudent for HMRC to advise all individuals, who might be involved in MTIC fraud, of that fact. We do

not, therefore, accept that it is either an abuse of HMRC's powers or a breach of Eurosel's 'legitimate expectations' for them not to have been informed that they might be involved in an MTIC fraud.

The Facts

30. The parties have accepted that there are three issues which need to be satisfied in orderto justify HMRC's refusal to make the repayment of £267,850 to Eurosel:

1. There must be a fraudulent loss of tax.
2. The claim for the input tax of £267,850 must arise from a transaction 'connected' with the fraudulent evasion; and
3. It must be established that Eurosel, through Mr Jordon, knew or should have known that the only reasonable explanation for the circumstances in which the purchases took place was that it was a transaction connected with such a fraudulent evasion.

In this appeal it is necessary to consider the activities of the two contra-traders Casa and Digikom Ltd (Digikom) and to identify the tax loss arising from their activities. Mr Woolf on behalf of Eurosel has conceded that there is a tax loss in Digikom and although he challenged Julie Mary Sadler he conceded that here had been a tax loss**.** We do not, therefore, propose to do more than identify some typical chains in relation to Digikom. Mr Andrew Nicholas Charles gave evidence with regard to the transactions of Casa and we propose to deal with his evidence first. We do not propose to identify all the defaulter chains but to establish that a tax loss has arisen as a result of the contra trading.

Casa Commodities

31. Ian M Lester was the original verification officer in relation to the dealings with Casa. His evidence was not challenged by Mr Woolf and Mr Lester did not appear at the Tribunal. Andrew Nicholas Charles (Mr Charles), who works with the MTIC fraud team at Sheffield, and is Mr Lester successor, gave evidence to the tribunal. Casa (then called Golden Yonder Limited) was formed on 12 February 2003. The original proprietor was Amanda Karen Goldston, who, prior to her sale of the business, dealt in mobile phones. She sold the business on 30 March 2005 to Michael Smith for £2000, who confirmed his purchase to HMRC on 14 June 2005 and confirmed its trading activity in general wholesale and commodities, including MP3 players, memory sticks, scandisks, monitors, mobile phones and cameras. In addition, the company has traded in urine testing strips, cosmetics, diamond tip drills and saw blades. Mr Smith changed the companies name to Casa Commodities Ltd. In buying the company Mr Smith was able to utilise the existing VAT registration without need to apply for new one. By October 2005 Casa was trading from 14 Water Street, Newcastle under Lyme, Staffordshire. On a VAT visit in June 2007 the building appeared to be closed down and as a result HMRC decided that Casa had 'gone missing' and HMRC de-registered the company from 22 June 2007. Casa has not appealed the de-registration.

Mr Charles produced details of Casa's VAT returns from 30.6.02 to 31.12.06 which revealed an increase in its turnover for the first 15 months from £333 to £4,075,128 rising to £76,094,375 by the end of June 2006. For the periods 03/06 to 09/06 he gave evidence of the following transactions, which were documented in the exhibits to his witness statement.

3/06
There were 19 imported deals to various brokers, who subsequently sold the goods to EU customers.
One such transaction was through PJA and Eurosel, who sold on to Phista Trading Limited (Phista). This is the 'perfume deal, referred to later as the first transaction that Eurosel had with Phista on which it recovered its VAT entitlement. The total value of all the transactions for this quarter was £18,394,454
6/06
There were a further 35 imported deals to various brokers. Four such transactions (the subject of this appeal) were through PJA and Eurosel, that were sold onto Phista. The remaining 31 deals were all from businesses registered for VAT in member states, relating to goods sold through Casa to UK registered businesses at the standard rate. The total value of all the transactions in this quarter was £36,400,559.62.
9/06
There were 5 imported deals to various brokers, which subsequently sold the goods to the EU. The total value of these transactions was £5,160,457.50
As a result Casa was able to claim total supplies for the three tax periods of £59,995,470.

So that Casa could off set the output tax on the imported transactions, it was necessary for it to create an input tax liability by arranging purchases from suppliers in the UK, which it could then sell into the EU. During the same periods it completed the following transactions:
3/06
There were 14 supplies where Casa bought from UK suppliers and sold to EU customers. The total for the transactions in this quarter was £ 20,820,442.25
6/06
There were 28 deals where Casa purchased goods at the standard rate from a UK VAT registered business (Digikom) and sold those goods to Phista registered for VAT purposes in Cyprus, creating an input tax claim of £6,689,480. The total supplies in this quarter amounting in total to £38,693,815
9/06
There were 10 supplies in this quarter amounting to £10,278,160
The total for the three quarter periods was £69,792,417.25

The VAT claimed on the deals by Casa and the brokers can be summarised as follows:

Period 3/06
VAT claimed by Casa from UK suppliers £3,580,709.75
VAT claimed by UK brokers £3,443,995.88

Period 6/06. (The period the subject of this appeal).
VAT claimed by Casa from UK suppliers £6,689,480.88
VAT claimed by UK brokers £6,372,415.99

Period 9/06

VAT claimed by Casa from UK suppliers £1,240,926.40
VAT claimed by UK brokers £903,080.06

Totals for periods 3/06 to 9/06
Total VAT claimed by Casa £11,511,115
Total VAT claimed by UK brokers £10,719,491

32. Mr Charles submitted that it is significant that the sum of input tax claimed by Casa in the periods 3/06 to 9/06 is within £791,624 of the input tax claimed by the brokers in respect of the deal chains where Casa was the acquirer. In other words the input tax claimed by the brokers in respect of the acquisition deals is 93.1% of the sum of the tax losses involving Casa. The variance of 7% (100% - 91%) is small enough to suggest contrivance of the transactions.
In the period 06/06, which concerns this appeal, Casa made a repayment claim of £391,365.88 against a turnover of £76,094,375.00. Had Casa not acted as a contra-trader in this period, its repayment claim would have amounted to approximately £13,316,515.00. An analysis of the trading pattern between Casa and Phista in June 2006 reveals that Phista purchased £39,693,415.00 of goods from Casa and Casa purchased £5,189.605of goods from Phista. Both Casa and Phista have 'gone missing' without paying any VAT. We are satisfied from the evidence that there has been a tax loss arising from Casa's trading transactions.

Digikom
33. In view of the findings in relation to Casa Mr Woolf accepted on behalf of Eurosel that there had been a tax loss in the Casa chain and he accepted that there had been a loss in the Digikom chain arising from its dealings with Pentagon Ltd. He confirmed that Eurosel accepted the evidence given by Julie Mary Sadler the officer from Birmingham investigating Digikom. We need to consider her evidence as it is necessary to establish the contra-link with Casa

34. Mrs Sadler was allocated Digikom as an investigation of possible contra trading in April 2007. Digikom was incorporated on 11 January 2005 and registered for VAT, with an expected turnover of £800,000 to £1,200,000 on 1 May 2005. The principal shareholder was Mark Quibell and Michael Jones was a further director. The company operated from 171 Robin Hood Lane, Hall Green, Birmingham B28 0JE. According to its business records all trading had been wholesale 'back to back' transactions in mobile phones, computer components and other electrical items. Their trading activity was unusual in that all its goods, sourced from the EU, were sold to UK VAT registered businesses and all goods, bought from UK VAT registered business, were sold to the EU. Mr Quibell dealt with the due diligence enquires and Mr Jones kept the Day Book records on his lap top but failed to produce the records. The company obtained its supplies from Prabud in Hungary and Powertec Computer Components of Portugal. The company did not store any goods as Mr Quibell said that they all remained with their freight forwarders. Digikom carried no insurance and kept no records of computer parts numbers. The company banked with FCIB and took 60 days credit.

Export deals.

35. Using the department's Electronic Folder and VAT Information and Exchange System (VIES), Mrs Sadler traced back Digikom's 61 EU dispatches in the VAT period 1 January 2006 to March 2006 though the supply chains to a defaulting trader. These deals reveal supplies from Lets Talk Limited (which used a hijacked VAT number) to Digikom and also from Termina Computer Services (a defaulter) to IPartner Ltd via Hexamon to Digikom. She has been unable to trace Termina Computer Services and she has assumed that it is a defaulter.

Mrs Sadler listed 61 transactions from Hexamon Ltd (based in Wednesbury) to Digikom. We have examined the following example:

- Deal 134 refers (as to part) related to

  "18,000 AMD Athlon 64 * 2 4600 + Socket 939 Dual Core 2.4 HGZ 512K costing £265 each"
  totalling £4,770,000 with sales tax £834,750 Purchased from Hexamon for a total consideration of £5,604,750.
- The same products were sold by Digikom to Scorpion Electronics LDA in Portugal, for £4,788,000 net of VAT showing a profit of £18,000 or 0.35%.
- The goods were shipped through Alpha Freight Forwarders Ltd to Scorpion c/o Gina Logistics in Spain. Alpha confirmed that the goods had been inspected and all the stock was accounted for and verified.
- Payment passed through Scorpion's FCIB account on 22 June 2006

All the other deals follow a similar pattern. 42 of these 61 UK purchases, which resulted in EC dispatches, were bought from Lets Talk Ltd, the hijacked company. Andrew James Whitehead and David Dudley, the actual Directors of Lets Talk Ltd said that they had never issued invoices numbered under 200. As a resultof her investigations Mrs Sadler issued a letter of assessment for £11,785,070.37. An additional assessment of £18,644,572 has been raised for the period 1 March 2006 to 8 March 2006.

The remaining UK purchases relating to those transactions in February 2006 to March 2006, which resulted in EU dispatches were also bought from Hexamon. All these transactions were traced from Termina Computer Services Ltd > IPartner Ltd > Hexamon.

As far as IPartners are concerned, an assessment of £4,904,103.77 has been raised and is unpaid. Further assessments of £6,474,124; £736,688.75; and £1,462,593 have been raised and remain unpaid. Hexamon has indicated that it had not made any supplies and HMRC had been unable to obtain any information from them. The company was de-registered for VAT purposes on 11 April 2006. It appears that Hexamon had reclaimed input tax of £42,177,777.82 in March 2006 and April 2006.

Acquisition deals

36. Mrs Sadler had examined the onward customer chain of 127 deals in the period 1 January 2006 to 31 March 2006, which were all bought from EU suppliers. All the deals have similar characteristics; Digikom bought the goods from an EU trader and then sold them on to a UK VAT registered limited company. All the deals that were fully traced through their customers' chain were sold back to companies in the EU. All 62 purchases from Dunas & Pinheiros (Dunas) were sold through chains of UK customers to Phista. Dunas began trading on 23 February 2006 and declared its trading activity to be computer wholesaling. The partners were Nathan Lee Denton and John Parton. Their FCIB account appears under the name of Mr Denton. Mrs Sadler produced to the tribunal a full listing of the 42 deals from Dunas, which passed through Casa as the broker, to Phista. The majority of the invoices relate to various Nockia mobile phones.

37. Mrs Sadler exhibited a substantial number of acquisition deals for the period 03/06 and 06.06 . She exhibits 118 deals from Digikom's full listing. We have examined some of the following examples:

- 118 deals with a total net purchases value of £212,045,542.20 and input tax of £37,107,969.88, which have been bought from UK VAT registered traders, all were dispatched to three EU customers – Phista, Scorpion Electronics LDA and Estocom Distribution.
- 109 deals – total net purchase value of £161,485,002.50, where the goods have been acquired from EU VAT registered traders and all were supplied to 6 UK VAT registered traders. In this period the goods acquired from the EU have come from four suppliers Dunas, Powertec, Georitual Unipessoal LDA and Prabud, all registered for VAT in their home countries during the period 1 January 2006 to 31 July 2006

For example

Deal no 103

- This was a transaction from Prabud Electronics KFT on 1 June 2006 of 2000 Nokia N71 mobile phones sold to Digikom for £538,300.
- Digikom sold them to Greystone UK Trading Ltd for £539,200, who in turn sold them to:
- Digital Satellite 2000 Ltd t/a Powerstrip (the Broker) for £540,000.
- Powerstrip sold them to Nano Infinity for £577,800 in the EU

The payments went through FCIB

38. Mrs Sadler summarised Digikom's trading from 1 January 2006 to 30 June 2006. In that period they have purchased goods from an EU company Dunas, which passed through traders in the UK, which sold the goods to Phista in Cyprus. She suggested that the only reason that the goods were sold through the UK was to illegally recover the VAT. Digikom also purchased goods from other EU - Companies: Powertec, Prabud KFT and Georitual Unipessoal LDA. None of the operatives of these companies can be traced.

One of Digikom's suppliers in the VAT period 30 June 2006 was Pentagon the hijacked company. Mrs Sadler produced eight transactions in which Digikom purchased digital cameras and camcorders from Pentagon and sold them to Phista.

These transactions took place during the periods 14 to 21 June, when the transactions, the subject of this appeal, were taking place between Casa and Eurosel.

Mrs Sadler confirmed that in the period 1 April 2006 to 30 June 2006 Digikom declared net sales of £223,428,201 and output tax of £15,711,838 and net purchases of £219,796,504 and input tax of £38,462.638, with a repayment claim of £7,435,637.69. This return is undergoing verification and no final return has been submitted.

The Tax loss deals

38. These deals have been traced from a UK supplier to Digikom to a defaulting trader. The defaulting traders were Pentagon (UK) Ltd (Pentagon a hijacked number) and Premiere Insurance Services Ltd (Premiere), that supplied First Associates Ltd, that, in turn, appeared to supply Digikom. Premiere traded with U R Traders Ltd. HMRC have conceded, however, that there was no loss from this source, as no claims have been made by either party for VAT. As a result those deals can be ignored for the purposes of this appeal.

HMRC have therefore relied on the deals through Pentagon. Mr Spackman and Mr Davis visited the legitimate Pentagon company. The company accountant, Jim Legend, confirmed that Pentagon had never traded in any goods other than stationary and data supplies that it sells to its franchisees. He also confirmed that the telephone numbers were incorrect and produced a totally different letterhead. Pentagon, the subject of these transactions, was a company that had hijacked the legitimate Pentagon's VAT tax number. As a result, an assessment was issued to the hijacked Pentagon on 13 August 2007 for sales made by them to Digikom amounting to £24,796,084. It appears as if Pentagon obtained its supplies from TQL Ltd (TQL), which was registered for VAT on 1 August 2002. TQL's principal place of business is recorded as Angorfa Court, Upper Denbigh Road, St Asaph, Denbighshire. Kelvin Corry, a director of TQL, stated that TQL and his other company Julecom Ltd had gone into liquidation at the end of December 2007. The liquidators confirmed that there had never been any sales to either the legitimate or highjacked Pentagon companies. As a result of these enquiries Mrs Sadler inspected the records for Casa Freight and Removals Ltd (Casa Freight), a sister company to Casa. Casa Freight applied to register for VAT on1 June 2006. Michael Smith was the principal director, as he was of Casa. Although its warehouse had been visited on 23 August 2006 and was seen to have contained various goods, it had not been possible to carry out an inspection as the premises were always locked and shuttered. HMRC had tried to meet with Mr Smith and Rory Venables, his co-director but without success. All the Casa companies were de-registered on 22 June 2007.

39. In his witness statement, Mr Lester suggested at paragraphs158 to 164:

> "As a result of my examination of HMRC database to identify the businesses involved in the deal chains for the periods 3/06, 6/06 and 9/06, I believe that the contra scheme has three distinct phases.

162. In phase one, contra traders, Casa and Digikom, have submitted VAT repayment returns. The brokers, who have supplied EU customers, have also submitted repayment returns. The scheme will achieve a successful conclusion if the VAT return for Digikom is repaid by HMRC without any adjustment. Successful conclusion will be achieved because the input tax claimed by Digikom on supplies by the defaulters and missing traders will not be matched by payment of the corresponding output tax. Throughout the rest of the scheme any input tax claimed will be matched by the declaration and payment of output tax.

163. In phase two, if HMRC verify and disallow all or a proportion of the input tax claimed by Digikom, then the result could be a large value tax due rather than a repayment return. If Digikom fail to pay the amended tax due on its return, it will become a defaulter in its own right. The effect of Digikom becoming a defaulter is that the input tax claimed by Casa and the other brokers will no longer be matched by payment of the output tax. The scheme will achieve a successful conclusion if the VAT returns submitted by Casa and the brokers are repaid by HMRC without adjustment.

164. In phase three, HMRC consider that the input tax claimed by Casa on supplies by Digikom should be disallowed as Digikom has become a defaulter having failed to pay the output tax charged. Thus the repayment VAT return submitted by Casa is converted into a large value tax due return. If Casa fail to pay the amended VAT return, it will also become a defaulter. The effect of Casa defaulting is that the input tax claimed by the brokers will not be matched by payment of the corresponding output tax. The scheme achieves a successful conclusion if the VAT returns submitted by the brokers are repaid by HMRC without amendment.

We are satisfied from the evidence that there will be a tax loss arising from the transactions carried out by Digikom and Casa, which will be brought to fruition if HMRC make the repayment claims from the various Brokers, including Eurosel.

Eurosel

40. Mr Stachan gave evidence as to the four Eurosel transactions the subject of this appeal and their connections to Casa and therefore Digikom. Mr Jordon and Mr Walker gave evidence as to the transactions between Casa and PJA. Mr Walker was able to give details of his deals with Casa and Mr Jordon of his deals with Phista. Each denied any knowledge of the transactions other than the ones between themselves. It is significant, however, that Mr Walker and Mr Jordon both knew Mr Smith when he worked at PJA. We intend to deal with the evidence and undisputed facts by considering the entire transactions from the sale by Dunas to Casa to the sale by Eurosel to Phista. Some of the facts are agreed, whereas others were contentious. Where there is dispute, we set out the evidence in detail. Where the evidence is agreed, we say so.

41 Mr Jordon lives at ‘Lime Tree Barn’ Balterly Green, Cheshire and his company Eurosel operates from a small rented office at Brampton House, Queen Street,

Newcastle under Lyme. Mr Jordon owns all the shares in the company and his wife, Janet Jordon, is the company secretary. The company was formed on 16 November 1998, and registered for VAT on 1 December 1998. It identified its business classification as, 5143 wholesale electrical household goods and 5147 wholesale of household goods. It began to change its pattern of trading in 2005 when it started selling products to Europe. The European business had been sporadic up to that period and the returns from 03/04 to 03/05 reveal purchases in the order of £250,000 to £300,000. However the European sales for 03/06 were £460,015 and for 06/06 were £1,589,500.

42. Mr Jordon explained his general approach to business. He said that he had always traded in a wide range of products with other businesses rather than private individuals. Invariably, he found suppliers with a surplus of available products and then he looked for a purchaser with a need for such products, and vice versa. He dealt predominantly in the 'grey' or 'secondary' market. He has cultivated his customers on a personal basis, meeting them at trade fairs, by cold calling and responding to advertising and entertainment opportunities. He has also dealt with Woolworths, Tesco and Poundstretcher in the past. He spends a considerable amount of time travelling in the UK and overseas, meeting, developing and working with trade contacts. He has a property in Spain, when there he plays golf and meets and entertains customers. He first met Philip Stavrou at a golf club in Spain in 2004. Mr Stavrou told him that he was a director of Phista, which appeared to deal in similar products to Eurosel. His company was based in Cyprus. It appears that Phista was not incorporated until 2005. We think it is unlikely that Mr Stavrou advised Mr Jordon of the name of his company at that time. Mr Jordon had, however, met Mr Stavrou on another occasion and kept in touch by telephone. It transpired from the evidence, that Mr Stavrou actually lived in Leicester. Mr Jordon denied any knowledge of this. As Mr Jordon purported to know Mr Stavrou well, through his golfing connection, we find it extraordinary that Mr Stavrou had never disclosed to Mr Jordan that he lived in England and that his business was based in the same geographical area as Eurosels offices.

43. Eurosel's first transaction with Phista arose from a meeting Mr Jordon alleged he had with Mr Stavrou in Spain sometime before March 2006. Mr Stavrou had indicated that he would like to buy, amongst other products, perfumes. We are not clear as to how this deal was set up as Mr Jordon produced to the tribunal, at the request of Mr Benson at the end of the hearing a fax ostensibly addressed to Philip (Stavrou) and dated 05/09/05 in which Mr Jordon offered to sell him amongst other products

Gucci perfume
Issy miyake
Opium perfume
Estee Lauder

The name 'Philip' appears over a typexed smear. Mr Benson expressed surprise that Mr Jordon had been able to produce this fax, but no other, as Mr Jordon said that he destroyed his earlier faxes. Mr Jordon had not retained the note confirming the date that the fax was sent. He said he never retained them. On the evidence we think it is unlikely that this was a fax sent to Mr Stavrou. The evidence with regard to the fax is

not compatible with the statement by Mr Jordon that he had met Mr Stavrou in Spain. In the light of that we suspect that Mr Stavrou contacted Mr Jordon. Either way Mr Jordon contacted his friend Mr Walker at PJA who indicated that they could supply:

2500 * Boss Motion	@ £21.84 each
3000 * Gucci Rush	@ £15.97 each
3000 * MP3 Power Blade	@ £91.58 each
3418 * CK escape	@ £22.75 each
Making a total of	£ 455,009.50
Plus VAT of	£ 79,626.66
Total Price	£ 534,636.16

The payments were made through the FCIB.The VAT of £79,626.66 appears to have been paid into the account by Eurosel on 11 April 2006 followed by £460.009.50, being a payment for the goods by Phista. Further comment is made later in this decision as to these payments, when considering the movement of the cash in the transaction relating to the Urine Testing Strips. The full amount of £534,636.16 for the perfume was paid out to PJA at the same time. Eurosel applied to HMRC for a repayment of £160,000 the overall VAT on this transaction. HMRC were a little concerned and advised that they would need to verify the transaction, which they did. As a result they subsequently made the repayment to Eurosel. Mr Jordon should have been put on notice that he needed to take care in light of the fact that HMRC felt it was necessary to verify a transaction in perfume, a product, which he had accepted, was subject to counterfeiting

Mr Jordon seldom inspected any of the goods in which he deals. However, as a safe guard, he informed his suppliers that he would want to carry out an inspection in advance of purchasing the goods to keep them aware of the possibility. In cross-examination, Mr Benson had expressed surprise that Mr Jordon did not inspect any goods. He noted that he had inspected the purchase of Ruck Sacks from PJA in March 2006 when they had only been valued at £3000. He was even more surprised that Mr Jordon had not wished to inspect £1,589,500 of Urine testing Strips, which were at freight forwarders only 15 Miles from Mr Jordon's office. Although the transaction for the perfumes was not substantial, it was fairly large in comparison to Eurosel's earlier trading. It is also significant that Eurosel's profits had been falling over the previous years. A transaction of this size, with a new supplier, would be very attractive. Mr Benson pointed out that the company's profits had been reducing as follows:

Year to 31 December	Turnover £	Profit £
2000	4,388,062	170,377
2002	2,434,180	63,764
2002	2,608,395	61,687
2003	2,469,089	(-163,056) (bad debt £158,547)
2004	1,236,315	75,675
2005	2,724,807	50,090

As we have stated above, we believe Mr Stavrou contacted Mr Jordon having last spoken to Mr Jordon in 2004. Mr Jordon did not think that was an unusual practice. Mr Benson pointed out that Phista was involved in the retail sale of household appliances and radio and television goods. Mr Jordon did not think that it was peculiar that Phista would be looking for perfume. He said that his trade classification (see above) did not relate to any particular product either. Mr Jordon also accepted that perfumery was an area where there was a large amount of counterfeiting taking place. Mr Benson referred Mr Jordon to Phista's letter heading on their invoices. The telephone number of the company in the heading is in fact a mobile number. He suggested that Mr Jordon might have thought that to be strange. Mr Jordon said that he had not been aware of that until Mr Benson pointed it out. He confirmed that he did not inspect the stock of perfume in spite of the fact that he had inspected the Ruck Sacks the previous month. The deal took place at the end of March which is the end of Eurosel's VAT quarter. Mr Jordon could not see the benefit of that until Mr Benson pointed out to him that it would make it much quicker to obtain his repayment. Whilst the perfume transaction was substantial compared with the earlier trading pattern, the transaction in relation to the Urine Testing Strips represented 95% of the company's purchases in June and over 50% of the previous year's entire turnover.

Urine testing Strips

45. Mr Jordon alleged that after the perfume transaction Mr Stavrou telephoned him and gave him a small shopping list of products that he wished to purchase, these included 20,000 to 25,000 Urine Testing Strips. Mr Jordon suggested that that the general description of the goods required would have been satisfactory as Mr Stavou would have settled for branded or unbranded strips. Mr Benson produced to the tribunal two different boxes of Urine Testing Strips and noted that one carried out 8 tests and the other 2. He suggested to Mr Jordon that it would have been necessary to identify which strips Mr Stavou required. He further suggested to Mr Jordon that Eurosel must have been asked to provide Mutlistix 8 SB pregnancy kits by Mr Stavou. Mr Jordon had been unable to demonstrate from where he obtained the name. He had emailed Coughlan Danny, at Enterprise Ltd, and asked for Multistix 8 SG 100 pack pregnancy kits. Mr Coughlan had replied

> " regarding our conversation this morning I can confirm that I have 29 X Multistix 8 SG Reagent strips 100s currently in stock.- I am able to sell this stock at a cost of £16.50 to yourself. Just a query – you have asked for Multistix 8 SG pregnancy kits – these are not pregnancy kits but test strips which test blood for proteins, PH etc. Can you please confirm with your customer if this is what they are after to avoid confusion?".

Under cross examination Mr Jordon became confused. He had said that Mr Stavrou only asked for Urine Testing Strips and pregnancy kits. Mr Benson suggested to Mr Jordon that Mr Stavrou must have been specifically asked for Multistix 8SG pregnancy kits, as he used this description when contacting Enterprise, who advised him of his error. Mr Jordon said that he had spoken to other suppliers before he contacted Enterprise Ltd. Mr Benson suggested that that could not be the case as those

suppliers would also have advised him of the error. We are satisfied on the evidence that Mt Stavrou had asked for these specific Urine Testing Kits. Mr Jordon did not buy from Enterprise Ltd because they could not supply a large enough number either then or later and, because there would be a delay in obtaining the kits, the price would vary. The kits were also date sensitive in that they had a short shelf life. The photocopy of the Bayer Strips box produced to the tribunal was numbered and Bayer has confirmed that only 38,000 Bayer Strips with those numbers were produced.

45 Mr Jordon confirmed that there had been an occasion when the police came to warn him about some mouthwash in which Eurosel had been dealing. They thought it might be stolen. The police confirmed it had nothing to do with Eurosel, but Mr Jordon accepted that as a consequence he had some experience of stolen goods in the market place and he needed to be careful. On another occasion Eurosel was trying to sell a large quantity of Duracell batteries to Enterprise, a company which was well known to Mr Jordon and part of the Lloyds Pharmacy group. Mr Jordon discovered that the goods were stolen and he did not proceed with the transaction. It ended up as a court case and Mr Jordon was pleased that he had not provided the goods. Mr Jordon confirmed that the bad debt of £158,547 in 2003 had arisen because he had taken a consignment of perfume from Kenco, a company with which he had done business in the past. It appeared that Kenco had agreed to sell the perfume to one of its customers, Flexicare Limited, but had been too busy in the run up to Christmas 2002, and had asked Mr Jordon to deal with its customer. Mr Jordon had said that he did not know the customer but Kenco had assured him that its customer had plenty of money and that if the deal went wrong they would cover the debt. He therefore arranged a bill of exchange with his bank payable in 30 days. The customer failed to pay. It turned out that Flexicare Ltd were a very dubious outfit in Belfast. Mr Benson suggested that in the light of Mr Jordon's previous experiences with the perfume, mouthwash and batteries it might have made sense to ring up Bayer to check that the goods were neither stolen nor counterfeited. Mr Jordon said that Bayer would not have given him the information. We suspect that that is probably correct. Mr Jordon said that he trusted Mr Stavrou and he had dealt with Mr Walker for a very long time. He did not think he needed to query the transaction.

44. It is significant that the next large transactions that Eurosel entered in to after the perfume sales to Phista were the four sales of the Urine Testing Strips. Both the perfume sale and the Urine testing Strip sales were for substantial amounts of money significantly larger than the average sale that Eurosel had had for some time. The four transactions for the Urine testing Strips were as follows:

Purchase date	Supplier	Product	Quantity	Price	Total for sales
26.06.06	PJA wholesalers	Urine Testing Strips	20,000	374,000	
27.06.06	Ditto	Ditto	20,000	374,000	

29.06.06	Ditto	Ditto	20,000	374,000	
29.06.06	Ditto	Ditto	25,000	467,500	£1,589.500

Mr Jordon had not thought it necessary to examine the Urine Testing Strips worth in excess of £1,500,000 as they were a recognised product manufactured by Bayer, a well known pharmaceutical company. He did not think it was necessary to inspect branded commodities, this in spite of the fact that freight forwarders premises were only 15 miles from his. Further more, he understood that he did not need a pharmaceutical licence to sell the goods. Mr Stavrou had informed Mr Jordon that he wanted the goods delivered to a warehouse in Belgium. This did not strike Mr Jordon as peculiar any more than the suggestion that Mr Stavrou needed 8,500,000 Urine Testing Strips, on the face of it, for Cyprus. Mr Jordon said that he understood that Mr Stavrou had a wide range of potential customers for pharmaceutical products, namely hospitals and care organisations. Such customers were located throughout Europe rather than confined to the smaller country of Cyprus. The Belgium destination seemed to him to be logical and sensible. In any event, he preferred a road delivery where he expected the goods to be accompanied throughout their journey. In view of the fact that he had not taken time to inspect the goods, it is surprising that he would have been concerned about the goods being accompanied on their journey. Further more, he does not seem to have appreciated that by distributing the goods from Belgium, Phista would have to have charged VAT on each further transaction. He had arranged for Jade Logistics Limited (Jade) to act as the freight forwarders, as they had been recommended by Mr Walker. He confirmed that he was aware that Jade was owned by PJA.

47. PJA had agreed that Eurosel need only pay them for the Urine Testing Strips when it was paid. All the transactions were 'back to back'. There appeared to be no agreed time limit for the payment. In fact Mr Jordon had suggested that he had hoped to retain the money for a short time to maximise his cash flow. PJA made no check with Eurosel to see if it would be able to pay £1.5 million if Phista failed to pay. Mr Jordon had suggested that he would have to have sold the goods elsewhere if Phista failed to buy the goods. Judge Porter asked how he would have financed the purchase of the goods from PJA in those circumstances. Mr Jordon said that the bank would lend him the money. We find that to be extremely unlikely. Eurosel's overdraft facility was only £50,000 at the time of the transaction and was later increased to £160,000. We very much doubt that the bank would have lent him £1,500,000 to pay PJA. We do not believe that it crossed Mr Jordon's mind that he might have to purchase the goods from PJA if Phista failed to pay him, because he thought that was unlikely to happen as his repayment claim would be met as before. He has, after all, not been asked to pay the additional VAT of £149,286 which is still outstanding to PJA.

48. PJA had indicated to the freight forwarders that the title to the goods remained with PJA. On that basis Mr Benson suggested that Eurosel could not part with the goods until PJA was paid. Mr Jordon conceded that Eurosel appears to have parted with the goods on 5 and 6 July but had not been paid until 17 July 2006. Mr Jordon indicated that the title clause was an irrelevance. We believe that in these transactions,

which tended to take place on the same day that might well have been the case. We doubt, however, that it is a good commercial practice. Mr Jordon confirmed that he would expect his customer to pay for the goods, prior to the customer receiving them.

49. Mr Benson referred to the last deal where the order appeared to be for 25,500 Urine Testing Strips. PJA issued a credit note for 500 as Eurosel had ordered 25,000 strips. Eurosel's invoice to Phista is for 25,000 Urine Testing Strips. Mr Benson then referred to the FCIB account detail provided by Eurosel to HMRC during their investigation of the transaction. The details had been entered **by** Phista and they had sent a copy to Eurosel to prove payment. The narrative says:

"Part payment **25,500** urine testing strips."

The report was provided in July 2007, but Mr Jordon said that he had not been aware of it until the hearing. When cross-examined he said that he had spoken to Mr Stavrou to ask if he would like a further 500 Urine Testing Strips. Mr Stavrou had declined as he only wanted round thousands. We have found Mr Jordan's evidence to be very contradictory and unconvincing. Even if he had spoken to Mr Stavrou, which we doubt, there would have been no reason for Phista to have referred to other than 25,000 Urine Testing Strips. There is no way that Phista would have known that Eurosel's supplier PJA had supplied 25,500 Urine Testing Strips unless the transaction had been orchestrated through Casa. If Phista had a prearranged sale with Casa and PJA then it seems to us that the entire transaction was orchestrated and they had expected a sale of the Urine Testing Strips to Eurosel.

50. David Walker, who was employed by PJA, dealt with Eurosel. He had been in business on his own account but he had been diagnosed with cancer in 1993 and he had to give up his business. When he had recovered he went to work for Scoopstock Limited, which later dealt in mobile phones. It was during that employment that he became acquainted with Mr Hughes, who owned Jade. As a result, David Hughes offered him a job with PJA. He confirmed that whilst he was working with Jade in 2003, there had been a raid carried out by HMRC during which David Hughes had been questioned, but no charges had been brought. Marcus Hughes, David Hughes's brother, had been arrested and eventually imprisoned in 2006 for dealing with drugs. He had first met Mr Jordon in 1980 and he knew him socially as they had played football together. He had commenced business with Eurosel in 2005. Mr Benson referred to a Trade Application Form, which Mr Walker had asked Mr Jordon to complete on behalf of Eurosel. Mr Walker confirmed that he had copied the form from another supplier and that he had not paid much attention to it. He accepted that Mr Jordon had ticked all the boxes in response to the questions on quality control. One of those questions was:

"Do you conform to HMRC guideline Notice 726 relating to MTIC fraud?"

Mr Jordon, when cross-examined on the same point, suggested that he had not actual read the questions but merely ticked them automatically presumably to obtain the business. We do not believe either account. They are both businessmen, who admit to having been in business for some time. We do not believe that they would fail to read

a form, which they both considered was necessary for the purposes of their businesses. Mr Walker said that he was contacted by Mr Jordon for the purchase of the Urine Testing Strips and that he had approached several of his contacts including Casa. Casa confirmed that they could supply 85,000, which he eventually agreed to sell to Mr Jordon for £18 per box. He confirmed that the delivery of the goods had been subcontracted by Jade to IT Scotland, who had warehouse facilities in Scotland. They also had a warehouse in Belgium and they in turn subcontracted the delivery to Crossroads. Mr Walker confirmed that he was aware that Mr Smith, now working for Casa, had been a director of PJA. PJA had dealt with Casa on other deals for about two years and treated Casa as a general trader. He understood that HMRC took the view that the transaction between Casa and PJA was prearranged, which he refuted. Mr Walker confirmed that Mr Jordon did not know the source of the goods and he would not have told him, because he would not have wanted Eurosel to buy directly from Casa. Mr Walker was aware that Mr Jordon was concerned about the matter as, although he had paid for most of the goods, he refused to pay the balance. He thought the balance was about £160,000. (The various payments are discussed in more detail when we consider the FCIB account and the flow chart provided by Mrs Jones). Mr Walker said that PJA still owed Casa for its purchase of the goods. From the flow chart referred to below it appears that PJA owed Casa approximately the same amount as Eurosel owed PJA. It appears that, even at the date of the hearing, Casa has made no attempt to recover the monies owed by PJA. Nor has PJA pursued Eurosel, presumably because any money they received from Eurosel would have to be paid to Casa. In accordance with the flow chart, Eurosel owed PJA £149,286 and PJA owed Casa £145,281.21. If the payments had been made, PJA would have received £4004.79 profit less the VAT it presumably paid of £734.75 making its anticipated profit of £3,261.04. Mr Walker, in the interest of full openness, referred to two events with which he had been involved. The first concerned a sale to an EC customer. It appeared that the VAT number was invalid and the transaction was subject to VAT. The other event was late in 2005 when PJA had agreed to pay a deposit of £30,000 to a supplier of Morco Boilers. PJA had been unable to sell the goods and agreed to return them to the supplier and to be refunded for the deposit which had been paid. Mr Walker met the supplier at Donnington Services and just as he received the money he was confronted by several individuals running towards him. He did not know who they were and drove off with the money in the car. He was eventually stopped by the police and arrested and the money and the car were taken off him. In February 2007 PJA applied to the Magistarate's Court for the return of the money but it was confiscated as forfeit.

51. We found Mr Walker to be an unreliable witness and his evidence was less than convincing. He appears to have had the misfortune to work with several people, who have been in trouble with both HMRC and the police. We thought he had more information about the transactions than he was prepared to divulge. In spite of the fact that we were told that no credit was given to any body, other than that the payments could be made when the moneys were received, it appears that Eurosel was given credit of £149,286 by PJA and PJA was given credit of £145,2812.21 by Casa. Significantly the figure represents about one half of the VAT due on the transactions. This appears to fit in with the model described at paragraph 9 above.

FCIB

52. Mr Jordon said that the company had always banked with the National Westminster Bank. However, on three occasions the bank had taken more than six days to transfer monies overseas. He had made several complaints to the bank and, as a result, he set up an account with the FCIB on 2 April 2006; ref 04-801-204192-01 to use "Exactpay" a same day transaction system. He has since reverted to the National Westminster Bank, because they have introduced a "Propay system" which enabled the bank to remit funds more efficiently. Mrs Jones gave evidence for HMRC as to the payments through the FCIB. She produced printouts of the FCIB accounts for Eurosel, PJA, Casa, Dunas and Phista for the periods of the Eurosel transactions the subject of this appeal. The Dunas account was in the name of C A Nathan Denton. From her records it appears that no money passed through the account for Dunas. Mr Woolf suggested that this was because they were to be paid in 90 days. Mrs Jones said that the Dunas/ Denton account was closed on 3 May 2006 before the transactions with Eurosel took place. She had not been able to find any other account in the name of C A Nathan Denton or Dunas and the money could have been paid into another account.. On the balance of probabilities, and from the evidence before us, we believe that Dunas never was paid. It is unlikely that the financial transaction relating to Dunas would have been in a different account to all the others The FCIB had a unique number for every transaction within the bank. It is therefore possible to trace not only the payments but the likely timescale of them because the numbers are sequential. She also established the dates of the payments and the time scales involved. There were 325 transactions in the entire bank between the payments to Eurosel and their further payments to PJA, On that basis she calculated that the transactions for Eurosel took just over two minutes. Whilst her time scale calculation is clearly an estimate we accept that the transactions were handled very quickly.

53. Mrs Jones confirmed that she could not say with complete certainty that her allocation of the monies necessarily relates to these transactions, but she considers it to be highly probable. The figures she has obtained for Eurosel match the transactions very closely. Further more the payments from Casa to Phista are in the same time scale and within the appropriate bank range in accordance with their numbers from EB 1137401 to EB1144333. We agree with Mrs Jones, it is unlikely that the transactions on 17 and 20 July could relate to any other deals. The time scale between the payments is such that they must relate to the Urine Testing Strip deals. Mrs Jones has produced a flow chart (which we have reproduced in the annexure to this decision). The chart shows that the initial injection of funds, amounting to £1,610,000, was paid to Phista by Casa. That money went up the chain with an amount being added, as a contribution to the VAT, by the other parties in the chain and Casa received back £1,647,475. The exercise does not make any sense unless the parties were aware that the repayment would finance the transactions. The chart shows:

1.Mr Jordon was asked by Mr Benson about two payments into the FCIB account from Eurosel's account. These were for £79,827.93 on 11 April 2006, which appeared to be the VAT for the perfume deal and £65,404.84 on 7 July

2006. When cross-examined Mr Jordon said that he could not remember what those payments were. We find it extraordinary that Mr Jordon could not remember having made the two payments, which represented marginally more than his overdraft facility at the time, and in a period of 4 months represented £145,232.77.

2. Phista only paid Eurosel £1,568,475 in 5 instalments. Two on 17.7.06 and three on 20.7.06 as follows:

Date	Unique number	Amount
17 July 2006	EB1137422	£230,000
17 July 2006	EB1137649	£130,000
20 July 2006	EB1144327	£470,475
20 July 2006	EB1144346	£369,000
20 July 2006	EB1144350	£369,000
Total		£1,568,475

The original price for all the Urine Testing Strips was £1,589,000
Mr Jordon was not paid the balance of his profit of (£20,525)

Mr Benson asked Mr Jordon why he had not asked Phista to pay the full amount in one payment of £1,589.000. If they had done so Mr Jordon would have realised that Phista had underpaid £20,525. Mr Jordon said that he had not appreciated that Phista had underpaid him by £20,525 until later. He said that he spoke to Mr Stavrou, who had said that he would pay the balance to Eurosel on the next transaction. Mr Benson also asked Mr Jordon how often he checked his computer for payments, as Mr Jordon had confirmed earlier that he was a very busy man and did not get into his office very often. We found Mr Jordon's answer to be very unsatisfactory. He had confirmed that he needed to switch on his computer, which was usually turned off for security reasons. He would have needed to do have switched it on every day if he was to have looked at it on the two days in question. In spite of his heavy schedule, he must have turned his computer on on the 7th and 20th, because he knew the money was coming in on those days. Nor did he give us a satisfactory answer as to why he made 5 separate payments on different days. He had said that he had wished to maximise his cash flow by retaining the money he received from Phista, before he paid it to PJA. This he clearly did not do as the payments he made to PJA (as set out at paragraph 1 above) were sent out to PJA within 2 ½ minutes of their receipt from Phista. He also said that on a 'back to back' arrangement, payment was to be made before the goods could be released. He confirmed, however, that he believed the goods had been released on the 5 and 6 July some 11 days before he was paid. No satisfactory answer was given as to why he allowed the goods to be passed to Phista before they had been paid for by them.

2. On receipt of the instalment payments from Phista, Eurosel paid PJA £1,648,464, but by six direct transfers. The first two on 17.7.2006 amounting to £293,000 and £130,000 (mirroring the first two payments from Phista of £230,000 and £130,000) and four further payments on 20.7.06 of £470,475, £390,000, £348,000 and £16,989 .The payments were £149,286 short of the full amount payable under the contract interestingly equating to almost half of the

VAT of £267,750 payable on Eurosel's transaction. Mr Jordon had introduced £79,827.93 on 11 April presumably as his contribution to the VAT liability.
3. PJA paid Casa £1,647,475, again by 6 separate amounts on the two days and the payments were £145,281.21 short. Interestingly, again, amounting to almost half of the VAT of £267.006.25 due to Casa. Presumably PJA will have accounted to HMRC for the VAT from its two transactions amounting to £743.75 (£267,750 output tax on its sale to Eurosel and £267,006.25 input tax on its purchase from Casa). At this point PJA is showing a cash profit of £3261.04. (The VAT received of £149,286 minus the VAT paid of £145,281 and the VAT to be paid to HMRC of £743.75). This was the profit it expected to make from the transaction. Casa will at this stage have received £37,475 , being the total payment by PJA of £164,475 less its original stake of £1,610,000, and the contribution of the VAT from PJA of £121,725 making a total of £159,200 .

Due diligence and risk

53. It appears that Mr Jordon supplied a raft of information to HMRC in support of the repayment claim on the occasion of the sale of the perfume. This included:

- FCIB bank account details
- Details of earlier EU customer accounts for Sonidos de Sabinillas in Portugal and Alltronics Ltd. These showed that Mr Jordon was aware that FCIB was being used for whole sale trading as early as the middle of 2005.

In relation to Phista

- A shareholder's certificates identifying Mr Stavrou as a shareholder.
- A beneficiary bank account details (FCIB) for Phista.
- A certificate naming the director and company secretary of Phista.
- A certificate of VAT status for Phista and its registered office:
- A certificate of incorporation dated 31 May 2005.
- An un-translated form (Greek language) for Phista.

It was not, however, established when the documents were first obtained.

It appears that he made no enquires about PJA on the basis that Mr Walker was well known to him. He had completed the Trade Application Form referred to above, indicating that he had read notice 726, which in fact he had not. He had not seen the Notice prior to the transactions in relation to the Urine Testing Strips.

54. He confirmed, however, that he understood the principal of joint and several liability, extended security and invalid invoice as he had been trained as a lawyer. He indicated that he had a vague knowledge of the MTIC trade but, as he was dealing in goods which were unidentified as involved in the fraud, he had not paid any attention to the likelihood that they might be involved in a fraudulent trading activity. He confirmed that he did not make third party payments but he understood that if he had been asked to do so he would have been put on notice to be careful. Mr Jordon said that he had dealt with many of his customers for many years and that he did not feel he needed to make further enquiries about their validity. For example, he knew that PJA owned Jade the freight forwarders. He did not think that, knowing his customers, Jade would pass that information onto PJA, so that PJA could deal directly with his customers. if that were to take place he would never have traded with them again, and that that was understood by Mr Walker. We find that attitude to be very naïve.

Mr Jordon never took out insurance. He said that Eurosel relied on the freight forwarders' insurance. It would appear that he never checked whether the freight forwarder had insurance. He assumed that they had. How he could assume that when he did not take out cover himself is unclear.

55. We find Mr Jordon's method of doing business lax in the extreme. His methods do not meet normal business standards and procedures. He is prepared to take risks that in the present circumstances are unwarranted.

Submissions

55. Both Mr Benson and Mr Woolf have provided us with written submissions, which they elaborated on at the hearing on the 6 July 2010. We propose to refer to the salient points as we see them. Mr Benson submitted that the evidence establishes that there was fraudulent evasion of VAT in the deal chains of the alleged contra-traders. Mr Strachan set about tracing the goods purchased and sold by Eurosel in the period 06/06 up through the chain of transactions to the acquirer of the goods. Mr Benson submitted that each of the four transactions had been definitely identified as leading up to tax losses through the two contra-traders Casa and Digikom. The repayment claim made by Eurosel is linked to a fraudulent tax loss, by virtue of the off-setting exercise conducted by the contra-traders. Mr Woolf on behalf of Eurosel has conceded that there was a fraudulent loss of tax in consequence of the sales purported to have been made by Pentagon to Digikom, although Eurosel does not make any admission about who is responsible for the fraud. It is submitted that Eurosel knew or ought to have known that the four transactions were connected with fraud. Pentagon was a hijacked trader, as established by the legitimate company, who confirmed that although the address on the invoices appeared to be correct, the telephone numbers were not and the invoices issued by the company were different in design. An assessment was raised on 13 August 2007 for £24,796,084 based on supplies that were purportedly made by Pentagon to Digikom in April, June and July 2006. That assessment included the sum of £16,666,771 representing the deals in June 2006. The assessments have neither been paid nor appealed. Mr Benson submits that the default arises by reason of the fact that the VAT registration of Pentagon has been hijacked to further the fraud. The evidence establishes that the default is fraudulent rather than something that has arisen for innocent reasons.

56. Mr Charles gave evidence as to the transactions by Casa. All the Casa broker deals have been traced to Digikom. Mr Charles confirmed that the purpose of contra-trading is to take VAT out in the repayment claim. In period 06/06, Casa made a repayment claim of £391,365.88 against a turnover of £76,094,375.00. Had Casa not acted as a contra-trader in this period, its repayment claim would have amounted to approximately £13,316,515.00. Analysis of the traders FCIB records establishes that the monies used to fund the deals that are the subject of this appeal, start with a payment by Casa to Phista on the 17th July 2006 and that the monies cascade through the accounts of the traders, but ultimately are returned by payments from PJA to Casa.

Mr Benson submitted that analysis of the FCIB statements of the traders establishes circularity of payment that is not to be found in a free market and true commercial environment. Rather, it is evidence of pre-arranged, contrived transaction chains, in which Eurosel plays an integral role. In cross-examination, it was put to Officer Mrs Jones by Mr Woolf that there had been previous trading between Casa and Phista and that the payments made by Casa to Phista might relate to previous purchases by Casa from Phista. That proposition was rejected by Mrs Jones. The evidence establishes that as at 28 June 2006, Phista had purchased goods to the value of £39,693,415.00 from Casa. Casa had purchased goods to the value of £5,189,605.00 from Phista. Although Phista therefore owed Casa considerably more than Casa owed Phista, it is curious that there is evidence of payment by Casa to Phista, but not by Phista to Casa

57. Mrs Sadler gave evidence of the transactions with Digikom. Her evidence was not seriously challenged by Mr Woolf on behalf of Eurosel and there was, in reality no attempt by Eurosel to show that transactions undertaken by Digikom in the relevant period did not form part of a contrived chain of transactions, the purpose of which was to affect a fraudulent loss to the Revenue. Mr Benson submitted that any proper analysis of the transaction chains reveals an obvious pattern to all of the transactions, involving a sequence of traders drawn from a finite pool. The ability of the traders to generate a turnover of the magnitude contended, in such a short period is, Mr Benson submitted, implausible in a genuine commercial market. HMRC has carefully recreated the deal chains and the 'defaulter officers' have carefully drawn their conclusions about the tax due from the relevant traders

58. Mr Benson submitted that the transactions in respect of which Eurosel seek an input tax credit are connected with the fraudulent evasion of VAT by Casa and Digikom. He accepts that the burden of proof rests with HMRC and that the standard of proof is on the balance of probabilities. The legal test in *Mobilx ltd (in administration) v HMRC* [2009] EWHC 133 (Ch) as stated by Moses LJ:

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

In determining 'knowledge' or the 'means of knowledge', the Tribunal is entitled to look further afield than the contract of sale to and the contract of sale by Eurosel. In *R (Just Fabulous) –v- HMRC* [2007] EWHC 521, Burton J. *(looking at contra-trading chains)* considered the test in *Kittel* and held [para 43], that the words that 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.The

test was also considered in *HMRC –v- Livewire Telecom* [2009] EWHC 15 (Ch). In his judgement Lewison J. made clear that an appellant does not have to know (or have means of knowledge) of the identity of the missing trader;

> "..I accept that the trader need not know the identity of the missing trader but unless he knows or should have known that there was (or was likely to be) a missing trader somewhere in the dirty chain, I do not see how it can be said that he knew or should have known that his transaction was connected to fraud.."

Eurosel's case is that the focus of such due diligence as it carried out, was on its immediate suppliers and customers and that the due diligence consisted of proportionate checks. To that end, HMRC refer the Tribunal to paragraphs 6 and 7 of the judgement of Floyd J. in *Mobilx –v- HMRC* [2009] EWHC 133 (Ch);

> 6. "Of course, an otherwise innocent trader can only do so much to ascertain whether its supply line is "clean" or "dirty" (to use the expressions used in MTIC fraud cases). It can make enquiries of its immediate supplier, including enquiries as to the diligence with which its immediate supplier checks, in turn, on its supplier. Beyond that, the immediate supplier cannot as a matter of commercial reality be expected to reveal the identity of its own suppliers without risking being cut out of the business.
>
> 7. In the light of the difficulties of making enquiries beyond the immediate supplier, there is a danger in reading paragraph 51 of Kittel in a narrow sense and as suggesting that provided proper checks are carried out by the trader on a supplier, then the trader's claims to repayment of VAT are not capable of challenge. That is not, in my judgment, a correct view. Suspicious indications obtained by a trader from carrying out due diligence checks on its supplier are one, but not the only basis from which it may properly be inferred that a trader knew or should have known of its implication in VAT fraud. The test to be applied is that set out in paragraph 61 of the Judgment, and indeed in the Court's final determination at the end of the judgment. Paragraph 51 needs to be understood in the sense that "all reasonable precautions" may, in some cases, involve ceasing to trade in specified goods in a particular market, at least in the particular manner in which the trader undertakes that trade".

Mr Benson submitted that having heard the evidence and observed the witnesses, (applying the burden and standard of proof appropriately), the evidence in this case demonstrates that Eurosel was willingly involved in fraud. At the very least, it is clear that Eurosel through Mr Jordan should have known that the relevant transactions were connected with fraud.

59. The Tribunal has had the opportunity of hearing Eurosel's Director, Mr Jeffrey Jordan, give evidence and will have formed a view as to his credibility. Mr Benson

submitted that the evidence clearly establishes that Mr Jordon knew or should have known on behalf of Eurosel that the transactions were connected with fraud. The accounts for Eurosel revealed that its profits had been falling and in the year to 31 December 2005 the net profit was £50,090. The four deals amounted to £1,589,500 and represented 95% of the purchases for the period 06/06. Deals of such a size should have put Mr Jordon on notice to make further enquiries. Mr Jordan concedes, in his first witness statement, that although he did not understand what the term 'MTIC' meant at the time of entering into the 06/06 transactions, he was aware from local and national press that there was substantial VAT fraud arising from mobile telephones and computer parts. He had after all ticked all the boxes in the trade application form provided by PJA in 2005, one of which asked if he was aware of the HMRC Notice 726 relating to MTIC fraud. Mr Benson submitted that the tribunal should reject the suggestion made both by Mr Jordon and Mr Walker that they took little or no notice of the questions. Eurosel had never dealt in Urine Testing Strips previously and Mr Jordon conceded in cross-examination that he was unfamiliar with the product. In a genuine market, Mr Stavrou from Phista would have wanted to maximise his profit. Mr Jordon could not explain why Phista did not purchase the Urine Testing Strips directly from Casa, instead of paying an inflated price to Eurosel. It appears that the goods were delivered to Phista before they were paid for. Mr Jordon suggested that the fact that the title still belonged to PJA was irrelevant as the incorporation of the wording as to title on PJA's invoice was meaningless. For reasons which remained unexplained, there appeared to be no formal documentation or method of confirming when the goods could be released by Jade to Phista. They were in any event released before they were paid for. When cross-examined as to the payments Eurosel had made to the FCIB account, Mr Jordon was vague and unconvincing. He stated that he was a very busy man and that he was seldom in his office. He somehow managed to be at his computer to receive and transfer the payments made by Phista on the 17 and 20 July. Nor could he satisfactorily explain why, having received the payments from Phista in parts, he paid PJA in the same parts rather than waiting for the full payments from Phista. If he had so waited, he would have realised that Phista had underpaid him. Despite the fact that there was a shortfall in the payment from Phista to Eurosel and thus a shortfall in the payments between each of the traders, no trader has taken any steps to recover the goods or to recover the balance due to it. Mr Benson submitted that Mr Jordon's account of Eurosel's trading model was devoid of any commercial reality and that the general nature of Eurosel' business model would have put any reasonable businessman on notice that he was not involved in a legitimate trade.

60. It is noteworthy that in all four of the deals that are the subject of this appeal, Eurosel and its counterparties, have gone to some lengths to order and source the Urine Testing Strips within the course of a few days and to complete the necessary purchase orders and invoices in the course of one day. However, there is then a delay between the goods arriving in Europe and Phista making payment to Eurosel. The result of that is a delay in the goods being released to Eurosel's customer. It is worthy of note that Mr Jordan claimed in cross-examination that his recollection was that the goods were released all together either on 6 or 7 July 2006; That is despite the fact that Eurosel did not receive any payment at all until the 17 July 2006. Further more, the report to Phista from the FCIB of the 25,500 Urine Testing Strip, supplied to Eurosel during the investigation of the transactions, could only arise in the event that

the transactions were contrived, because otherwise, Phista would not have known of the additional 500 units that were the subject of a credit note issued by PJA.

61. Mr Jordon's approach to due diligence on behalf of Eurosel was a curious mix of the inadequate and the unnecessary, and perhaps betrays the notion that the very limited enquiries carried out were completed simply for the benefit of HMRC. Mr Jordon claimed that he had dealt with Mr Walker, of PJA, over many years and that he had known him since 1985. As a result he had made no further enquiries of PJA. As far as Phista was concerned, again Mr Jordon claimed to have met Mr Stavrou in 2004. It appears that he had obtained some details of the company, but it was unclear when. Mr Jordon did not carry out any credit checks nor ask for trade references. There was no due diligence paperwork in relation to the freight forwarders, nor were there any written contractual terms. As in the case of *Calltel telecom Ltd; and another v HMRC* [2009] EWHC 1081 (Ch) the due diligence in this case could have provided no assurance to Eurosel that it could trust those with which it dealt to deliver legitimate goods from a legitimate source or to have them paid for by those to which they were sold.

62. There is no explanation as to why a legitimate trader would trade under the trading model of Eurosel in the absence of fraud. The Tribunal are entitled to conclude that Eurosel would inevitably have suspected that the transactions that are the subject of this appeal were both contrived and connected to fraud. Eurosel has provided no other legitimate explanation for the business model it claims resulted in these transactions, and any indication or explanation of why it decided to ignore such clear indications of fraud. If the Tribunal is not convinced of Eurosel's actual knowledge of the connection to fraud then, at the very least, the evidence shows that Eurosel ought to have known of the connection to fraud. Specifically, Eurosel should have been alerted *inter alia* by the following;

a) The characteristics of the goods being traded;

i) Easily transportable high value goods;

ii) Goods bought in large quantities that Eurosel intended to sell to a customer outside of the UK, and thus placing Eurosel in a 'repayment' position;

b) The characteristics of the relevant transactions;

i) The transactions were back to back, but there was then a delay in payment being made to Eurosel and the goods being released to the EU importer.

ii) All of the transactions involve purchases and sales in the same quantities;

iii) All of the stock was held by freight forwarders

iv) All traders accede to releasing goods before payment is made;

v) Eurosel was not require to make payment to its supplier until it had

received payment from its customer despite the delays in payments being made;

vi) The goods were being purchased by Phista based in Cyprus, but were being delivered to Belgium:

vii) In the light of the difficulties that Eurosel had previously encountered in respect of a bad debt related to stolen goods, HMRC and the Tribunal are entitled to expect that thorough 'due diligence' would have been conducted in relation to each of Eurosel's trading partners and that Eurosel would have taken heed of the information revealed. Mr Benson submitted that Eurosel failed to take every precaution that could reasonably be required of it. He submitted that Eurosel failed to take reasonable and proportionate action to ensue that its transactions were not connected with fraud.

Mr Benson submitted that the evidence enables the Tribunal to be satisfied to the requisite standard of proof that;

a) The relevant transactions that are the subject of this appeal were connected with the fraudulent evasion of VAT; and

b) Eurosel knew or should have known that the deals were connected with the fraudulent evasion of VAT.

Accordingly, HMRC submit that the Appeal be dismissed.

63. In his submissions Mr Woolf also confirmed that the three issues are; a fraudulent tax loss; a connected transaction to that loss; fraud which Eurosel either knew or ought to have known was connected to those transactions. On the issue of loss of tax, Mr Woolf submitted that there has been no tax loss in the chains of transactions in which Eurosel directly participated: this is conceded by HMRC. Eurosel concedes that there has been a fraudulent loss of tax in consequence of the sales by Pentagon to Digikom. HMRC are relying on alleged contra-trading by both Casa and Digikom to create the relevant connection between the supplies by Eurosel and the fraud. In *HMRC v Livewire* [2009] STC 643 at p 673 para 92, p 674 para 101, p 675 para 106 and p 676 para 109 Lewison J considered that the transactions in the dirty chain could only be relevantly connected with transactions in a clean chain if the transactions in the clean chain were "designed" to hide transactions in the dirty chain so that all the transactions can be considered to be "orchestrated". Mr Benson seeks to suggest that there is an automatic connection between clean and dirty chains when a person exports and imports goods in the dirty chain. Reliance is placed on the High Court judgment in *Blue Sphere v HMRC* [2009] STC 2239.

64 The comments in *Blue Sphere v HMRC* [2009] STC 2239 at p 2256 paragraph 44-46 have to be viewed in their proper factual context. In that case the Tribunal at

paragraph 147 considered that there was a "connection" between the chains. In particular it relied on "The reduction in Infinity's net liability to VAT for period 06/06 to £471.72 on a turnover figure of £343,000,000, with a similar position for 03/06 giving a net VAT liability of £76.53 on a turnover figure of £211,000,000". That clearly suggests that the "contra-trader" was adopting a deliberate policy of seeking to match its imports and exports. On appeal, the taxpayer was seeking to suggest that there was no "connection" because the relevant clean chain occurred before the dirty chain and there was no finding that the contra-trader was himself fraudulent. What Sir Andrew Morritt was correctly accepting was that a desire to off-set could itself create the relevant connection and so the Tribunal's finding should be upheld. However, it would be wrong to suggest that he went so far as to find that a connection exists when the transactions do not occur with reference to each other. In paragraph 44 he said that the process of offsetting "can connect two transactions". He did not say it always connects them. HMRC also refer to the decision in *Calltel v HMRC* [2009] STC 2164. However, the defaults in that case occurred in the same chain and the Court therefore did not give consideration to this issue. Eurosel has conceded that Digikom was a contra-trader. However, in order to establish its case, HMRC have to establish that Casa's import of goods and sale of them to PJA and Eurosel both form part of an orchestrated scheme to try and hide the export of goods in the dirty chains by Digikom. Mr Charles, who had only recently been made a relevant witness, was not able to give any evidence of the genesis of any of the transactions. He was unaware as to whether there had been any negotiations between the various parties regarding the price of the Urine Testing Strips. Both David Walker and Mr Jordon had negotiated a price. Nor has Mr Charles produced any evidence of dealings between other parties in the purported chains. If he had they might have revealed that the prices had been negotiated between those parties as well. Such evidence would have caste some doubt on whether the dealings were contrived. Again the margins for each of the parties were different, which suggests that the chains may not have been contrived. The fact that broker deals result in a large gross profit may partly be attributed to logistical and associated costs and different prices in different markets. Eurosel was not aware of any orchestration. The initial request for the Urine Testing Strips came from Phista. Neither Eurosel nor Phista had pre-determined that the Urine Testing Strips should be acquired from Casa. If the transactions were orchestrated and part of an ongoing conspiracy it is surprising that Phista underpaid Eurosel by £20,525. Further more, Mr Woolf contended, if the transactions were contrived it is surprising that Eurosel was allowed to reduce the final order from 25,500 to 25,000.

65. Mr Charles was unable to explain how the alleged tax losses were being allocated between the different brokers. HMRC has produced a schedule of assessments against different brokers, but it does not explicitly address this issue, and therefore why the refusal to make the repayment to Eurosel is appropriate. If Casa was deliberately contra-trading in order to mask the deals in the dirty chain, it would be reasonable to expect much smaller claims. This would have two potential benefits. It would make it less likely that HMRC would investigate into a return. It would also mean that HMRC could not disrupt that traders business by refusing their claim. If the chain is contrived, the profits in the clean chain must be indirectly funded from the dirty chains. If one looks at the Payments Schedule (see annexure), the difference between the price paid by Casa for the strips and the price paid to Eurosel by Phista is

£76,000. If one assumes that similar profits were made in the original dirty chain and the chain between Digikom and Casa the total payments to UK participants in the scheme would be £228,000. The total VAT disallowed to Eurosel is £ 267,550. This means that the UK participants in the alleged scheme would have received a sum equal to 85% of the lost tax. However, if there was a scheme, there were clearly also foreign entities involved, for example Dunas & Pinheiros and Phista. Mr Stone suggested in his evidence that the orchestrator, who was funding the scheme, was likely to be someone from outside the chains. It would be very surprising that their collective "cut" should be so small.

66. HMRC has sought to rely on the circularity of money payments. The fact that no payment has been made to Dunas can be explained by the fact that its supplies were provided to Casa with 90 days credit. The details of Casa's bank account only go to 2 August 2006, which is before the payment became due. So it is not surprising that no payments to Dunas are reflected in those sheets. Although Dunas did not have a FCIB account, Mrs Jones accepted that they might have been paid in some other way. If no payment was ever made, this was likely to have been caused by Casa's financial problem. The payments to Phista may well have related to earlier deals. HMRC seek to suggest that it is surprising that Casa sold goods to Phista and also to companies that sell them to Phista. It is worth noting that the Tribunal considered that there was nothing surprising in a trader that appears in different positions in different chains in *Our Communications Ltd v HMRC* [2008] UKVAT 20903 paragraph 142. It would obviously be surprising that Phista did not approach Casa if it knew it was the supplier, but it may well be very understandable if it did not. HMRC has adduced no evidence about the extent to which the alleged brokers were regular suppliers to Phista. An examination of the genesis of deals may also have provided an explanation for why this was the position. Mr Woolf submitted that the chains were not orchestrated because they were too obvious. They should have been made more complicated. For example: Different VAT accounting periods should have been used: Eurosel should not have been seen as taking the largest profit; the transactions in different member chains could have been made less contrived; Digikom could have used traders with a broader range of customers than Casa. HMRC has made comments about Casa's and other companies' lack of cooperativeness. However, it is quite probable that this could be due to acute financial problems, directly or indirectly caused by HMRC's refusals to repay input tax. For example the failure to pay input tax to Eurosel has limited its ability to pay PJA which in turn has limited its ability to pay Casa. David Walker has given evidence that Mr Smith told him that Casa would have liked to challenge HMRC's demands if it had had the funds to do so. The evidence about lack of payment incidentally shows that HMRC's claim that there was no risk of non-payment is patently incorrect. HMRC have placed reliance on the back-to-back nature of trades, which enables traders to deal with little capital and a number of related features outlined below. A large number of these features apply to the Eurosel's trading in transactions that it has never been suggested are connected with fraud. The Tribunal also accepted that they were also consistent with legitimate trade in *Our Communications Ltd v HMRC* [2008] UKVAT 20903. Even if some transactions undertaken by Casa may be contra-trading it does not follow that all Casa's sales were orchestrated. Mr Woolf, therefore, submitted that the chain the subject of this appeal was not orchestrated. During cross-examination, Mr Stone

indicated that contra chains are generally shorter than defaulting chains. This is because it is obviously desirable to keep the "overheads" as low as possible. In this case there are no buffers between Digikom and Casa when Digikom sold goods to Casa. Nor were there any buffers between Casa and its sales to Martem Ltd, Storme International, Chestergrove Promotions, Jumbo Skips or Farm Marketing. In this case, neither PJA nor Eurosel have sought to be anything but cooperative with HMRC, so it is difficult to see how there could have been any benefit to a fraudster in having an extra company PJA in the chain. He submitted that different considerations apply to this chain due to the fact that, PJA, is an additional participant.

67. Mr Jordon denies that he and Eurosel were involved in fraud. Mr Jordon is a reputable trader whose clients and suppliers are also reputable. Eurosel has, since the transactions, been granted monthly returns. Mr Stone confirmed that he did not think it appropriate to grant such an application to a trader, who was knowingly involved in MTIC trading. The reasonable inference must therefore be that HMRC did not regard Eurosel as a knowing participant. HMRC have set out a series of incidents, which they say, show that Mr Jordon and hence Eurosel were knowingly participants. Both Mr Stone and Mr Strachan confirmed that many of those trading procedures could equally apply to the 'grey market'. Mr Woolf submitted that it is very easy to look at transactions in great detail with hindsight and then to criticise a taxpayer who was a party to the transactions. However, Eurosel was not acting with hindsight and the issue is whether the fraud should have been apparent to it if it was exercising reasonable care. Points that a reasonable businessman exercising reasonable care would not have noticed should therefore not be relevant. What it is reasonable to expect a trader to do must depend on all the facts, including factors such as the nature of the goods being traded and whether there has been any evidence of MTIC fraud tainting prior transactions. When assessing what it is reasonable to expect a person to do, one very important consideration is what a trader has been told by the tax authorities about the risk of the fraud impacting on his trade or the extent to which he is otherwise aware of the risk. A trader cannot be reasonably expected to take steps against a risk that he has no notice of. As a result Mr Jordon had acted as a reasonable businessman in his dealings with PJA and Phista:

- Mr Jordon was unaware that Phista had not paid Eurosel in full on completion of the deals. He had confirmed in cross-examination that he had difficulty in understanding financial matters, which is why he had appointed an accountant to produce management accounts.
- The transactions had taken place in June probably because that was the accounting quarter for PJA and Casa.
- In relation to Phista, Mr Jordan had met Philip Stavrou twice and done a previous deal with him. HMRC have also not produced a credit check relating to Phista, so HMRC have not produced any evidence that suggests that such a check would have caused any grounds for concern. Certainly there is no reason to assume that the credit check would have made it clear that "the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such a fraudulent evasion". Further more, Mr Jordon had not noticed that the telephone number on Phista's

letterhead was Mr Stavrou's mobile number. Mr Jordon said that it did not surprise him since he usually contacted Mr Stavrou by mobile phone.

- Although Mr Jordon was not an expert with regard to Urine Testing Strips, he was a general trader and had traded in pharmaceuticals previously. He had sold £1 million of nappies previously.
- In its general trading, Eurosel seldom inspect the goods and never carried insurance or had written contracts. HMRC seek to rely on the fact that the goods were sold to Phista rather than to say a hospital. However, Mr Jordan was told that Phista intended to sell the goods to hospitals. It was, in his view, no different from a deal which he had had with a trader from Malta, where the china was delivered to Italy. Indeed he would have found it more suspicious if he had been told that the goods were to be delivered to Cyprus. In any event the point applies equally to a large proportion of Eurosel's trading, which is between two grey market traders.
- Mr Stone had confirmed that the storage of goods at freight forwarders was also common in the grey market. Mr Jordon confirmed that he had never previously been asked to produce written release notes in relation to any goods.
- All four transactions had been negotiated together, so it was not surprising that the price was the same for each. Eurosel had similarly fixed a price when dealing with Gillette shaving merchandise, where the transaction had been over a couple of weeks.
- Mr Jordon had made no credit checks, but as the goods are not generally released until they are paid for, there is no need to incur the costs of such enquiries.
- Eurosel had used the FCIB for theses transactions because at the time the NatWest Bank could not accommodate fast enough payment.
- It was not unusual for Eurosel to pay its suppliers as soon as it had been paid.
- Mr Benson had suggested that Mr Walker's background was such that he could not be believed. David Hughes had been the responsible director and there is no reason therefore to doubt the veracity of Mr Walker, who clearly sought to give honest and frank evidence to the tribunal.

68. Mr Jordon was never sent copies of Notices 700/52 and 726, nor did he receive any warning letters relating to the possibility of fraudulent trading. He was dealing in goods which were not involved in MTIC fraud and it would not occur to him that he could be involved in such a fraud. Even the national press referred to mobile phones and computer chips. Such notes as had been taken of meetings with Mr Jordon, when MTIC fraud was discussed, were not verbatim and Mrs McDonald confirmed, when cross-examined that she might have used MTIC terms as a matter of habit in her report, terms she might not have used when speaking to Mr Jordon. Mr Woolf submitted that in the circumstances the tribunal would be wrong to infer that Mr Jordon had an appreciation that there was a risk that his sale of the Urine Testing Strips might be connected with fraud from these discussions. It was also suggested

this Mr Jordon acknowledged his awareness of MTIC fraud when he signed the application from PJA in June 2005. He had treated the form as a formality and even if he had read Notice 726 it would not have referred to the goods in which he was dealing. Against this backdrop, there are clearly limits to what any reasonable trader could be expected to do, even if they appreciated the remote risk, which Eurosel did not, that its trade might be connected with MTIC fraud. Mr Jordon dealt in hundreds of transactions and from time to time they would not always run smoothly. The two transactions relating to stolen goods and the perfume were two such. There is little that Mr Jordon could have done to avoid those difficulties arising. Given the very small known risks and the difficulties in avoiding those risks, it was submitted that it would be unreasonable to expect Mr Jordon to do more than he in fact did to avoid such remote risks. It would certainly be wrong to infer that he should have appreciated that he was involved in a transaction that could only be justified by fraud because he failed to take any greater checks. Although there were discussions with Mr Jordon about Eurosel's due diligence procedures, it is also highly significant that, before the deals were undertaken, Mr Jordon was never told that he ought to consider changing his due diligence procedures. There is no reference to any advice in the notes kept by HMRC.

69. For these reasons Mr Woolf submitted that Mr Jordon was acting reasonably on behalf of Eurosel. Even if there was any reason for alleging that its procedures were deficient, there is no reason to believe that it should have appreciated "that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such a fraudulent evasion": see paragraph 60 of *Mobilx Ltd v HMRC* [2010] EWCA Civ 517. At most it should have appreciated that there was a possible risk of fraud, which is not sufficient for the *Kittel* doctrine to apply. Accordingly, Mr Woolf submits that the Appeal be allowed.

70. If Eurosel wins its appeal it would seek an award of costs. If it loses the appeal on the basis that it ought to have known of the fraud then Eurosel submits that the appropriate order is no order for costs. Eurosel accepts that if it knew of the fraud, the Sheldon statement would make an order of costs appropriate. However, no finding of dishonesty would have been made against Eurosel if its claim is refused on the basis that it ought to have known of the fraud. Eurosel will effectively have been penalised by the loss of its right to input tax. For the reasons outlined in *Oxfam* above, HMRC have a considerable responsibility for the state of affairs and given that fact it would be unfair to also penalise Eurosel by making an award for all HMRC's costs, which are likely to be high given the instruction of both junior and leading counsel. Mr Woolf finally noted that HMRC also agreed that they would not seek any costs for the final day's hearing.

The decision.

71. We have considered the law and the facts and we dismiss the appeal. As stated at the beginning of this decision, we have decided that the legal test is that a trader will not be entitled to a repayment if he knew or ought to have known that his transactions **were** connected with fraud on the basis that the only reasonable

explanation for the circumstances in which the transactions took place was that they were connected with such fraudulent evasion. We further decide that we do not accept that it is either an abuse of HMRC's powers or a breach of Eurosel's 'legitimate expectations' for it not to have been informed that they might be involved in a MTIC fraud. We have considered the other witness statements referred to at the beginning of this decision, but do not consider that they affect the facts and our view of them. The evidence of Chris Haigh and David Condliffe by way of references for Mr Jordon are no more than confirmation of their commercial dealings with him and tells us little of Mr Jordon's overall character. We set out in some detail below, how the money will be dealt with if a repayment is made. Mr Woolf has indicated that Mrs Jones is not entirely sure that the timing of the payment of £1,610,000 into Eurosel's account from Casa necessarily relates to the transactions, the subject of this appeal. Mr Woolf suggested that the payments could have been made in some other way. In view of the fact that the payments were made on the 17 and 20 July 2006 we consider, on the balance of probabilities, that they form part of an orchestrated scheme set up by Casa.

72. We have found the evidence given by both Mr Jordon and Mr Walker to be less than convincing. We note that Eurosel's profits have fallen substantially over the years and by 2005 were only £50,090. Against that background, the transaction for the perfume and Urine Testing Strips must have been an attractive business proposition. We consider that Mr Jordon should have been put on enquiry as to why he had been chosen to carry out these transactions. After all, he hardly knew Mr Stavrou, whom he said he had met twice, and spoken to on the telephone. He cannot have known him well, otherwise Mr Jordon would have discovered that Phista had only been formed as a company in 2005 and, more importantly, that Mr Stavrou lived in Leicester not Cyprus. As he was not well acquainted with Mr Stavrou Mr Jordon should have made more in-depth enquiries of Phista. In relation to the enquiries he did make, we were not told whether these were before, during, or after the transactions. We consider that Mr Jordon should have been alerted by the use of the mobile phone number in the letter head. Commercial companies normally have land lines. Mr Jordon believed he received the order for the Urine Testing Strips from Phista, based in Cyprus. He understood that the goods were destined for distribution in Cyprus. He did not query why 8,500,000 Urine Testing Strips were to be delivered to a relatively small country with a small population and concomitant significantly small number of males in that population. Yet under cross-examination Mr Jordon suggested that the goods were to be delivered to Belgium for onward transmission to hospitals and others in Europe. As Mr Benson pointed out such further sales would necessitate the addition of VAT in Europe, which, we suggest, should have put Mr Jordon on enquiry as to why Phista would want to purchase the Urine Testing Strips from Eurosel in the first place. As Judge Colin Bishopp said in C*alltell TelecomLtd & Another –v- Revenue and Customs* [207] UKVAT V2066:

"Much will depend on the facts, but an obvious example might be the offer of an easy purchase and sale generating conspicuously generous profit for no evident reason. A trader receiving an offer would be well advised to ask why it had been made; if he did not he would be likely to fail the test set out in paragraph 51 in the judgement of *Kittel*."

73. We also found that Mr Jordon's trading methods were casual in the extreme. He does not appear to have inspected the goods even though the freight forwarders were only a short distance from his business premises. Mr Woolf submitted that in its general trading Eurosel seldom inspected any goods. It is worthy of note that Eurosel's general trading has been at a substantially lower level than the transactions for both the perfume and Urine Testing Strips. It also appears that as the transactions were 'back to back' Mr Jordon would only release the goods when he was paid. Why then did he release the goods on the 5 and 6 July and not get paid until 17 and 20 July? He assured the tribunal that there was no risk in the transaction and that is why he never took out insurance. If he had lost control of the goods on delivery to Belgium, there was a very substantial risk that he might not get paid. There is an inherent risk, particularly relevant in a transaction worth over £1.5 million, that something could go wrong, not least if the goods are exported before payment is made. Any prudent businessman would have insured the risk. Mr Jordon indicated that he would have the goods returned if Phista failed to pay Eurosel and that he would then pay PJA for the goods in any event. We do not believe his suggestion that the bank would have lent him £1,679,286, the purchase price plus the balance of VAT, so that he could purchase the goods from PJA. In the first instance, he would have had to recover the goods from Belgium before he could either re-sell them, or indeed approach the bank. Secondly, if the goods had been in his possession, we very much doubt that the bank would have increased his overdraft from £50,000 to £1,679,286 without security, which Eurosel, and Mr Jordon, could clearly not provide.

It is equally surprising to note from the FCIB figures that Mr Jordon did not pay PJA the full price of £1,797,750 for the Urine Testing Strips. No evidence has been given as to why he was allowed to retain £149,286 other than that PJA has, even by the time of this appeal, not asked for repayment. Mr Walker indicated that Mr Jordon had said that Eurosel would not pay the balance unless it received the repayment from HMRC. Mr Walker indicted that PJA had not pursued the matter as they had not paid Casa £145,281.21 either. The position is even more peculiar when it transpired that Phista had underpaid Eurosel by £20,525. Any prudent businessman in Mr Jordon's position would have expected to pay PJA the full price for the goods of £1,530,000 plus the VAT of £267,750. In fact it appears from the FCIB account that Mr Jordon paid £65,404.84 into the FCIB account on 7 July 2006, even though he could not remember having done so. We cannot believe that Mr Jordon did not recall making both that payment and the earlier payment of £79,827.93 on 11 April 2006. There is no doubt in our minds that that payment of £65,404.84, included in the payment of £118,464, was a payment towards the VAT. £1,568,475 was paid to Eurosel by Phista, which was sufficient to cover £1,530,000 due to PJA for the Urine Testing Strips. Why would PJA allow £149,286 to be outstanding particularly as it had a similar debt to Casa? The only reason must have been that it had told Eurosel that it did not need to pay all the VAT. We have been given no details that the deals in relation to the Urine Testing Strips were other than at the full price. Mr Jordon has given no evidence as to why he was allowed to pay a lesser sum. He has said that he knew nothing of the deal, which PJA had with Casa. He must have been put on notice

that the only reason that PJA might have agreed to allow £149,286 to be outstanding would be that it had not paid a similar amount to Casa. Mr Woolf has submitted that Mr Jordon was acting reasonably on behalf of Eurosel. He states that if there was any reason for alleging that its procedures were deficient, there is no reason to believe that it could have appreciated "that the only reasonable explanation for the circumstances in which its purchases took place was that the transactions were connected with fraud". We cannot accept Mr Woolf's statement. In addition to the matters already considered, no satisfactory answer has been given by Mr Jordon as to how Phista was aware of the 25,500 Urine Testing Strips offered to Eurosel by PJA for which it was given a credit. Mr Jordon told us that he had contacted Mr Stavrou, who said he only wanted 'round thousands' of the goods and declined to accept the additional 500 Urine Testing Strips. On that basis Mr Stavrou would only have expected to be invoiced for 25,000. The only reason that Phista knew of the 25,500 Urine testing Strips offered by PJA must have been because Phista was aware of the transactions.

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Mr Jordon expressed surprise at the tribunal that he had not been paid in full by Phista. It may be that he was inefficient with his financial affairs, but we do not believe that he was unaware that nearly 35% of his profit of £59,500 had not been paid. Nor do we accept his explanation with regard to the sequence of payments to PJA. We are satisfied that he made the payments at the allocated time because he must have been told the payments were being made. We would have expected, in normal circumstances, for Mr Jordon to have asked the freight forwarders to release the goods because he had been paid. There has been no evidence of any contact with the freight forwarders and, even if there had been, it would have been on 5 or 6 July when the goods were actually released, which was well before Eurosel was paid. The sequence of the payments to the various parties was extraordinary in its timing. The payments were paid out of the FCIB as soon as they were paid in, and we were told only took 2 ½ minutes to complete. We have been told by Mr Stone that the payments in most MTIC cases are accelerated to reduce the risk of anyone party failing to make the payments. This would explain why Mr Jordon could not wait until all the payments had been made to make his payments. As Mr Benson pointed out, if he had done so he would have realised that he had not been paid in full. The only logical explanation for Mr Jordon's lack of concern is that he knew he could be able to recover the shortfall from the VAT repayment. In those circumstances he must also have known that he would have insufficient monies to pay the balance of the VAT to PJA. He must have been unconcerned about that as PJA must have agreed that Eurosel did not need to pay the entire VAT liability. PJA could afford to do that anyway as they, in turn, had not paid the full VAT liability to Casa. If the repayment is not achieved PJA would have made its profit of £4004.79 less the VAT of £734.75 it had paid to HMRC, and Casa would have received half the VAT with which it intended to keep. This is further confirmed by the fact that neither Casa nor PJA have sought to recover the shortfall, even at the time of the hearing. Eurosel will not recover the VAT it had funded of £118,464 and will make no profit from the transaction. We do not believe that Mr Jordon would have entered into a transaction in which he could lose £118,464, unless he was fairly sure that a repayment would be achieved. It is also significant that Mr Walker knew Mr Smith from the time he had worked with PJA. As Eurosel had also been dealing with PJA during that period, we

believe Mr Jordon also knew Mr Smith. From the evidence Mr Smith must have known Mr Stavrou because, Casa provided the funds to Phista to accommodate the transaction.

74. The transactions identified in the FCIB account follow our understanding as to how these frauds work, as set out in paragraph 9 above. As indicated above Eurosel has not paid PJA £149,286 and PJA has not paid Casa £145,281. It is inconceivable that the short payments related to the purchase prices of £1,530,000 and £1,525,750 respectively. We are satisfied that the sum of £1,610,000 was introduced by Casa and as such Casa would have expected to receive all its money back ,which it did when it received the first payment of £1,647,475 from PJA. It can be no coincidence that, if the repayment of £267,870 is made, all the positions are resolved. We believe the parties were expecting the repayment to be made, not least because the earlier repayment had been made in relation to the perfume deal. Mr Jordon has said that HMRC had checked his due diligence at that time and had seen fit to repay him. He has made it clear that he expected a similar repayment for these transactions as he has made no change to the way he carried on his business. The mathematics appear to be as follows:

- PJA paid £121,725 towards the VAT of £267,006.25 due to Casa. (£267,006.25 less £145,281.25 the short fall).
- Eurosel made a contribution by paying £118,464 towards the VAT of £267,750 due to PJA (£267,750 - £149,286) of which Eurosel paid £65,404.84 into the FCIB to assist in funding the same on 7 July 2006. This appears to follow the pattern suggested by Mr Stone that each of the participants make a contribution, through a VAT payment, to the scheme.
- If Eurosel obtains its repayment of £267,870 it will deduct the balance of its profit of £20,525 and the VAT of £118,464 which it has already paid. The balance of £128,881 it will pay to PJA to cover the short fall of £149,286. It cannot be a coincidence that the difference between the £128,881 and £149,286 is £20,405, £120 short of the balance of Eurosel's profit.
- PJA will pass the sum of £128,881 on to Casa in repayment of the £145,281.21 it owes Casa.
- Casa will be unconcerned that it is still owed £16400.21 by PJA (£145,281.21 - £128,881) because it will treat that as a contribution to the profits for the other participants. Casa will have received the original £121,725 from PJA and a balance of £128,881 making a total of £250,606. It cannot be a coincidence this figure is only £16,400.21 short of the VAT of £267,006.25 that Casa will set off in its contra deals.

75. We have seen that Casa has no need to pay the VAT to HMRC because of the contra deals to defaulting traders. As Mr Stone indicted, the fraud only arises when HMRC make the repayment. Mr Woolf has submitted that the payment schedule identifies that the difference between the price paid by Casa and the price paid to Eurosel by Phista to be £76,000 (Casa's profit of £12,750; PJA's profit of £4250 and Eurosel's profit of £59,500). If he submits, one assumes that similar profits were

made in the original dirty chain and the chain between Digikom and Casa, the total payments to the UK participants in the scheme would be £228,000 (£76,000 x 3). The total VAT disallowed to Eurosel is £267,550. This meant that the UK participants in the alleged scheme would receive a sum equal to 85% of the lost tax. Hardly, he believes, worthwhile. In arriving at these figures Mr Woolf has only dealt with one side of the equation, he has not taken into account the VAT which Casa and the others will not pay to HMRC. From the above figures, if the repayment is made to Eurosel we have seen Casa will receive £250,606. Using Mr Woolf's multiplier of 3 for that figure the total VAT retained would be £802,650. The VAT not paid by the defaulters of £802,650 represents a very good return of over 70%, even using Mr Woolf's assumed profits of £228,000. We are satisfied that all the circumstances surrounding the Urine Testing Strips transactions have the only reasonable explanation that Eurosel, though Mr Jordon, was a party to the scheme, which has been orchestrated by Casa to defraud HMRC and that Mr Jordon knew that the transactions were fraudulent.

76. In *Livewire Telecom Ltd; and another v HMRC* [2009] EWHC 15 (Ch) Mr Justice Lewison stated:

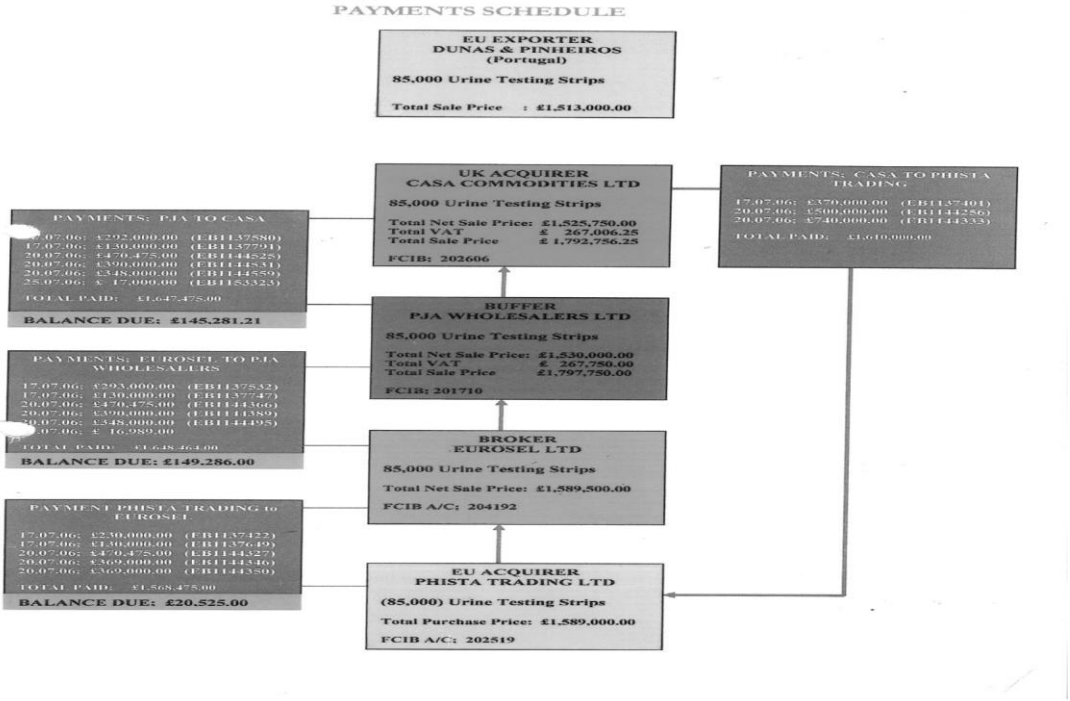
> : "In my judgement in a case of alleged contra-trading, where the taxable person claiming repayment of input tax is not himself a dishonest conspirator, there are two potential frauds:
>
> i) The dishonest failure to account for VAT by the defaulter or missing trader in the dirty chain; and
>
> ii) The dishonest cover-up of that fraud by the contra-trader.
>
> Thus it must be established that the taxable person knew or should have known of a connection between his own transaction and at least one of these frauds. I do not consider it is necessary that he knew or should have known of a connection between his own transaction and both of those 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."

We are satisfied that Mr Jordon knew that the Eurosel transactions were orchestrated and that were therefore connected with fraud. We accept that it is difficult for HMRC to establish that Eurosel, through Mr Jordon, knew of the contra trading and the actual loss of tax. There is however a proven substantial tax loss in the dirty chains. There is no doubt, however, that the transactions were such that any reasonable business man would have been put on notice that there was something wrong. In addition, although we have decided that Mr Jordon actually knew that the transaction was connect with fraud, we are in any event satisfied, on the facts, that Eurosel should have known, though Mr Jordon, from all the circumstances identified above that the transactions were connected with a fraudulent evasion of VAT as that is the only reasonable explanation.

77. We reserve our decision with regard to costs. As we have found that Mr Jordon, on behalf of Eurosel, knew that the transactions were connected to fraud we accept Mr Woolf's submission that the Sheldon principles apply. We also consider that costs must be decided under the earlier rules as Eurosel entered into this appeal on the basis of those rules and not the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. We direct that HMRC submit their application for costs, if they intend to do so, to the Tribunal and to Eurosel within 28 days from the release of the decision and in so doing they raise no cost for Wednesday, 16 June 2010 as provided by Mr Benson's undertaking to that effect. The Appellant shall reply within 56 days with the Respondents right to reply within 70 days. The tribunal will decide the costs on the basis of written representations.

78. 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.

TRIBUNAL JUDGE
RELEASE DATE: 23 September 2010


PAYMENTS SCHEDULE
EU EXPORTER
DUNAS & PINHEIROS
(Portugal)
85,000 Urine Testing Strips
Total Sale Price : £1,513,000.00
UK ACQUIRER
CASA COMMODITIES LTD
85,000 Urine Testing Strips
Total Net Sale Price: £1,525,750.00
Total VAT £ 267,006.25
Total Sale Price £ 1,792,756.25
FCIB: 202606
PAYMENTS: CASA TO PHISTA TRADING
17.07.06: £370,000.00 (EBI137401)
20.07.06: £500,000.00 (EBI144286)
20.07.06: £740,000.00 (EBI144333)
TOTAL PAID: £1,610,000.00
PAYMENTS: PJA TO CASA
17.07.06: £292,000.00 (EBI137580)
17.07.06: £130,000.00 (EBI137791)
20.07.06: £470,475.00 (EBI144525)
20.07.06: £390,000.00 (EBI144531)
20.07.06: £348,000.00 (EBI144559)
28.07.06: £ 17,000.00 (EBI153323)
TOTAL PAID: £1,647,475.00
BALANCE DUE: £145,281.21
BUFFER
PJA WHOLESALERS LTD
85,000 Urine Testing Strips
Total Net Sale Price: £1,530,000.00
Total VAT £ 267,750.00
Total Sale Price £1,797,750.00
FCIB: 201710
PAYMENTS: EUROSEL TO PJA WHOLESALERS
17.07.06: £293,000.00 (EBI137542)
17.07.06: £130,000.00 (EBI137747)
20.07.06: £470,475.00 (EBI144366)
20.07.06: £390,000.00 (EBI144389)
20.07.06: £348,000.00 (EBI144495)
20.07.06: £ 16,989.00
TOTAL PAID: £1,648,464.00
BALANCE DUE: £149,286.00
BROKER
EUROSEL LTD
85,000 Urine Testing Strips
Total Net Sale Price: £1,589,500.00
FCIB A/C: 204192
PAYMENT PHISTA TRADING to EUROSEL
17.07.06: £230,000.00 (EBI137422)
17.07.06: £130,000.00 (EBI137649)
20.07.06: £470,475.00 (EBI144327)
20.07.06: £369,000.00 (EBI144346)
20.07.06: £369,000.00 (EBI144380)
TOTAL PAID: £1,568,475.00
BALANCE DUE: £20,525.00
EU ACQUIRER
PHISTA TRADING LTD
(85,000) Urine Testing Strips
Total Purchase Price: £1,589,000.00
FCIB A/C: 202519

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