[2015] UKFTT 0226 (TC)

TC04418

Appeal number: TC/2012/03999

VALUE ADDED TAX – Whether supplies took place – retail receipts for mobile phones and invoices for wholesale purchases –whether appellant has proved that the supplies took place – whether "runners" buying phones for the appellant did so as undisclosed agents – application of section 47(2A) VATA 1994 – whether Kittel test applicable in respect of wholesale transactions – CJEU decision in LVK considered — appeals in respect of retail receipts dismissed – appeals in respect of wholesale invoices allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GLOBAL CELLULAR LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN
SHAMEEM AKHTAR

Sitting in public at Bedford Square on 16 – 20 June 2014 and 3 March 2015, written closing submissions 17 July, 14 August and 29 August 2014, further written submissions at the direction of the Tribunal on 8 October and 29 October 2014

Tim Brown, Counsel, instructed by CTM Litigation & Tax Services, for the Appellant

Christopher Foulkes, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The appellant, Global Cellular Limited (" GCL" or “Global Cellular”), appeals against the denial by the Respondents ("HMRC" or "the Commissioners") of claims for the recovery of input tax. The input tax claims denied by HMRC relate to the supplies which GCL claims were made to it of mobile telephones by both retail and wholesale suppliers. The wholesale supplies relate only to the VAT period 02/11. The other periods under appeal relate to alleged retail supplies.

2. The amounts of input VAT denied in respect of each VAT period under appeal are as follows:

(1) £266,712.36: period 09/10

(2) £103,831.44: period 10/10

(3) £283,340.84: period 11/10

(4) £157,965.19: period 12/10

(5) £110,409.29: period 01/11

(6) £23,180.69: period 02/11

3. HMRC's case is, essentially, that the denial of input tax is justified on two grounds:

(a) GCL has failed to demonstrate that the goods were supplied to it ; and/or

(b) in relation to receipts/invoices provided by GCL which are not valid VAT invoices, HMRC are entitled to deny a deduction for input tax and HMRC have acted reasonably in the exercise of their discretion pursuant to regulation 29 (2) VAT Regulations 1995 in considering alternative evidence of the charge to VAT.

The evidence

4. In this appeal Mr Asaf Amber ("Mr Amber"), director and shareholder of GCL, and Ms Benita Wagenheim, former office manager of GCL during the periods material to this appeal, gave evidence on behalf of GCL and were cross-examined.

5. HMRC called the following witnesses:

(1) Mr Pankaj Mandalia – an HMRC officer responsible for extended verification of GCL in relation to periods 11/10, 12/10, 01/11 and 02/11;

(2) Mr Andy Eraclides – an HMRC officer responsible for extended verification of GCL in relation to periods 09/10 and 10/10;

(3) Ms Monica Coker – an HMRC officer who gave evidence in respect of NZ Electronics Limited ("NZ Electronics") and Freeway Telecom Limited ("Freeway") which allegedly supplied GCL in the period 02/11;

(4) Mr John Cordwell – an HMRC officer who gave evidence in respect of a business called Call Inn First ("CIF") which allegedly supplied GCL in the period over 2/11; and

(5) Mr Johnny McDougall – European Business Operations Manager of Apple Retail UK Limited;

6. All the witnesses called by HMRC were cross-examined.

7. In addition, we were provided with 15 volumes of witness statements and exhibits.

The relevant statutory provisions

8. We set out below the relevant statutory provisions of domestic and EU law relevant to the present dispute. These were not in dispute.

The Value Added Tax Act 1994 ("VATA")

9. Section 1 of VATA provides that VAT will be charged in three scenarios:

(1) on the supply of goods or services in the United Kingdom(including anything treated as such a supply);

(2) on the acquisition in the United Kingdom from other member states of any goods; and

(3) on the importation of goods from places outside the member states,

10. Section 1(2) VATA provides that VAT on any supply of goods or services is a liability of the person making the supply and (subject to provisions about accounting and payment) becomes due at the time of supply.

11. Section 3 (1) VATA provides that "a person is a taxable person while he is, or is required to be, registered under this Act."

12. Section 4 VATA provides that:

> "(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him; and
>
> (2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply."

13. Any transfer of the whole of property in goods is a supply of goods (section 5 and Schedule 4 para 1 VATA).

14. Section 24(1) and (2) of VATA define "input tax" and "output tax". Pursuant to section 24(1)(a), VAT on the supply to a taxable person of any goods or services used or to be used for the purposes of any business carried on by him is "input tax". Section 24(1)(c) makes the same provision in respect of VAT paid or payable on the importation of any goods from a place outside the member states. Pursuant to section 24(2), "output tax", in relation to a taxable person, means (inter alia) VAT on supplies that he makes.

15. Section 25(2) VATA provides for a tax payer at the end of each prescribed accounting period to be entitled to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

16. Section 26 VATA provides:

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

17. Section 47 VAT Act 1994 provides:

> "(1) Where—
>
> (a) goods are acquired from another member State by a person who is not a taxable person and a taxable person acts in relation to the acquisition, and then supplies the goods as agent for the person by whom they are so acquired; or
>
> (b) goods are imported from a place outside the member States by a taxable person who supplies them as agent for a person who is not a taxable person,
>
> then, if the taxable person acts in relation to the supply in his own name, the goods shall be treated for the purposes of this Act as acquired and supplied or, as the case may be, imported and supplied by the taxable person as principal.
>
> (2) For the purposes of subsection (1) above a person who is not resident in the United Kingdom and whose place or principal place of business is outside the United Kingdom may be treated as not being a taxable person if as a result he will not be required to be registered under this Act.
>
> (2A) Where, in the case of any supply of goods to which subsection (1) above does not apply, goods are supplied through an agent who acts in his own name, the supply shall be treated both as a supply to the agent and as a supply by the agent.
>
> (3) Where services are supplied through an agent who acts in his own name the Commissioners may, if they think fit, treat the supply both as a supply to the agent and as a supply by the agent."

The Value Added Tax Regulations 1995 (SI 1995/2518) ("the Regulations")

18. Regulations made under section 24(6) of VATA may provide for VAT on the supply to a taxable person of any goods or services, and VAT paid or payable by a taxable person on the importation of goods from places outside the member states to be treated as input tax only and to the extent that the charge to VAT is evidenced and quantified by reference to such documents as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases. Section 24(6) VATA gives effect to Article 18 of the VAT Directive, which

refers to documentary requirements which must be satisfied in order to exercise a right to deduct.

19. Part III of the Regulations, "VAT invoices and other invoicing requirements" includes at regulation 13 the "Obligation to provide a VAT invoice" which, so far as is relevant, provides:

> "(1) Save as otherwise provided in these Regulations, where a registered person—
>
> (a) makes a taxable supply in the United Kingdom to a taxable person, or
>
> (b) makes a supply of goods or services other than an exempt supply to a person in another member State, or
>
> (c) receives a payment on account in respect of a supply he has made or intends to make from a person in another member State, he shall provide such persons as are mentioned above with a VAT invoice… […]
>
> (5) The documents specified in paragraphs (1), (2), (3) and (4) above shall be provided within 30 days of the time when the supply is treated as taking place under section 6 of the Act, or within such longer period as the Commissioners may allow in general or special directions."

20. Regulation 14 provides:

> "(1) Subject to paragraph (2) below and regulation 16 save as the Commissioners may otherwise allow, a registered person providing a VAT invoice in accordance with regulation 13 shall state thereon the following particulars—
>
> (a) an identifying number,
>
> (b) the time of the supply,
>
> (c) the date of the issue of the document,
>
> (d) the name, address and registration number of the supplier,
>
> (e) the name and address of the person to whom the goods or services are supplied,
>
> (f) the type of supply by reference to the following categories—
>
> (i) a supply by sale, (…)
>
> (g) a description sufficient to identify the goods or services supplied,
>
> (h) for each description, the quantity of the goods or the extent of the services, and the rate of VAT and the amount payable, excluding VAT, expressed in sterling,
>
> (i)the gross total amount payable, excluding VAT, expressed in sterling,
>
> (j) the rate of any cash discount offered,
>
> (k) each rate of VAT chargeable and the amount of VAT chargeable, expressed in sterling, at each such rate, and
>
> (l) the total amount of VAT chargeable, expressed in sterling."

21. Regulation 16 provides:

> "(1) Subject to paragraph (2) below, a registered person who is a retailer shall not be required to provide a VAT invoice, except that he shall provide such an invoice at the request of a customer who is a taxable person in respect of any supply to him; but, in that event, if, but only if, the consideration for the supply does not exceed [£250] and the supply is other than to a person in another member State, the VAT invoice need contain only the following particulars—
>
> (a) the name, address and registration number of the retailer,
>
> (b) the time of the supply,
>
> (c) a description sufficient to identify the goods or services supplied,
>
> (d) the total amount payable including VAT, and
>
> (e) for each rate of VAT chargeable, the gross amount payable including VAT, and the VAT rate applicable.
>
> (2) Where a registered person provides an invoice in accordance with this regulation, the invoice shall not contain any reference to any exempt supply."

22. Regulation 29, in summary, gives HMRC discretion in relation to evidence which may be provided in the absence of a valid VAT invoice. So far as is relevant, regulation 29 provides:

> "(1) Subject to paragraphs (1A) and (2) below, and save as the
>
> Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable.
>
> (…)
>
> (2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of—
>
> (a) a supply from another taxable person, hold the document which is required to be provided under regulation 13;
>
> (…)
>
> (c) an importation of goods, hold a document authenticated or issued by the proper officer, showing the claimant as importer, consignee or owner and showing the amount of VAT charged on the goods;
>
> provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold, or provide, such other evidence of the charge to VAT as the Commissioners may direct."

Council Directive 2006/112: "The Directive"

23. The above provisions were intended to implement, and are to be interpreted consistently with, the Directive and in particular, Articles 2, 5(1), 17(1), (2)(a), 18(1)(a), 22(3)(a) and 22(3)(b) thereof. So far as is material, these Articles provide as set out in the following paragraphs.

24. Article 2 of the Directive provides, so far as material:

> "The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such…"

25. Article 14(1) of the Directive provides:

"'Supply of goods' shall mean the transfer of the right to dispose of tangible property as owner."

26. Article 62 of the Directive provides:

"For the purposes of this Directive: (1) 'chargeable event' shall mean the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled; (2) VAT shall become 'chargeable' when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred."

27. Article 63 of the Directive provides:

"The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied."

28. Article 167 of the Directive provides (so far as material):

"1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

29. Article 168 of the Directive provides (so far as material):

"2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person; …."

30. Article 178 of the Directive provides (so far as material):

"In order to exercise the right of deduction, a taxable person must meet the following conditions:

(a) for the purposes of deductions pursuant to Article 168(a), in respect of the supply of goods or services, he must hold an invoice drawn up in accordance with Articles 220 to 236 and Articles 238, 239 and 240…"

31. Article 179 of the Directive provides:

"The taxable person shall make the deduction by subtracting from the total amount of VAT due for a given tax period the total amount of VAT in respect of which, during the same period, the right of deduction has arisen and is exercised in accordance with Article 178."

5. Member States shall determine the conditions and procedures whereby a taxable person may be authorized to make a deduction which he has not made in accordance with the provisions of paragraphs 1 and 2."

32. Article 180 of the Directive provides (so far as material):

"Member States may authorise a taxable person to make a deduction which he has not made in accordance with Articles 178 and 179."

> "3 (a) Every taxable person shall issue an invoice, or other document serving as an invoice respect of all goods or services supplied by him to another taxable person, and shall keep a copy thereof….
>
> (c) The Member States shall determine the criteria for considering whether a document serves as an invoice."

33. Article 22(8) of the Sixth Directive provides:

> "Without prejudice to the provisions to be adopted pursuant to Article 17(4), Member States may impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud."

Summary of relevant case-law

34. The relevant case-law was not, save as set out later in this decision, in dispute.

35. For simplicity, we shall refer to both the Court of Justice of the European Union (as it has been called since the entry into force of the Treaty of Lisbon on 1 December 2009) and to the Court of Justice of the European Communities (as it was previously known) as the "CJEU".

The need for a supply to have taken place

36. The right to deduct under Article 167 is dependent upon satisfaction of Article 178. In other words, the taxable person seeking to exercise the right to deduct input tax must satisfy the documentary or evidentiary requirements provided for in Article 178. It is also clear from the wording of Articles 168 that the right to deduct is contingent upon the goods and services actually having been supplied.

37. The case-law of the CJEU makes this latter requirement clear. The supply of goods or services must have taken place. As the CJEU said in *Baubedarf-Handel GmbH v Finanzamt Osterhok- Scharmbeck* Case C - 152/02 [2005] STC 525 at [38]:

> "…for the deduction referred to in Article 17(2)(a) of the Sixth Directive the first subparagraph of Article 18(2) of the Sixth Directive must be interpreted as meaning that the right to deduct must be exercised in respect of the tax period in which the two conditions required by that provision are satisfied, namely *that the goods have been delivered or the services performed* and that the taxable person holds the invoice or the document which, under the criteria determined by the Member State in question, may be considered to serve as an invoice." [emphasis added]

38. Furthermore, in *António Jorge* [2005] ECR I-4463, Case C-536/03 the CJEU held:

> 24 Article 17(1) of the Sixth Directive provides that the right to deduct arises at the time when the deductible tax becomes chargeable. Article 10(2) of that directive provides that such is the case as soon as the goods are delivered or the services performed (Case C-400/98 *Breitsohl* [2000] ECR I-4321, paragraph 36). It must be borne in mind that under Article 10(1)(b) of the Sixth Directive the tax is chargeable 'when the tax authority becomes entitled under the law at a given moment to claim the tax from the person liable to pay'.
>
> 25 *It follows that, in the system of the Sixth Directive, the event giving rise to the tax, its chargeability and the possibility of deduction*

> *are linked to the actual performance of the delivery of goods or of the provision of services*, except in the case of payments on account, where the tax becomes chargeable on receipt of payment." [emphasis added]

39. In addition, the right to deduct may be exercised only in respect of taxes actually due, that is to say, taxes which correspond to a transaction subject to VAT. See *Genius Holdings BV v Staatssecretaris van Financien* Case C-342/87.

40. We should also refer to the decision of the CJEU in *LVK-56 EOOD* Case C-643/11, where, having referred, at para 34, to the general rule that the right to deduct VAT invoiced is linked to actual performance of a taxable transaction (citing Case C-536/03 *António Jorge* [2005] ECR I-4463 and Case C-342/87, *Genius Holding BV v Staatssecretaris van Financiën* [1991] STC 239), the Court then stated as follows:

> "... if, in the light of fraud or irregularities, committed by the issuer of the invoice or upstream of the transaction relied upon as the basis for the right of deduction, that transaction is considered not to have been actually carried out, it must be established, on the basis of objective factors and without requiring of the recipient of the invoice checks which are not his responsibility, that he knew or should have known that that transaction was connected with value added tax fraud, a matter which it is for the referring court to determine."

41. This decision of the CJEU was not referred to by the parties at the hearing or in their subsequent written closing submissions. It seemed to us, however, to be particularly relevant to the issues relating to the wholesale supplies in period 02/11. Accordingly, on 17 September 2014 the Tribunal asked the parties for written submissions on the relevance and effect of this decision of the CJEU in relation to this appeal. We shall discuss these submissions and our conclusions later in this decision.

Relationship between the supply and the VAT invoice

42. In *Lea Jorion (née Jeunehomme v Belgian State)* C – 123/97 a car dealer was denied a deduction in respect of invoices which contained numerous irregularities, including false addresses and inaccurate description of the vehicles concerned. The invoices did not comply with the national law of Belgium as to the minimum information that a valid tax invoice should contain in order to enable the taxpayer to exercise its right to deduct input tax. The CJEU said:

> "14. In order to be entitled to deduct the value-added tax payable or paid in respect of goods delivered or to be delivered or services supplied or to be supplied by another taxable person, a taxable person must hold an invoice drawn up in accordance with Article 22 (3) of the Sixth Directive (Article 18 (1) (a)). Under that provision, the invoice must state clearly the price exclusive of tax and the corresponding tax at each rate as well as any exemptions (subparagraph (b)) and the Member States are to determine the criteria for considering whether a document serves as an invoice (subparagraph (c)).
>
> 15. Furthermore, Article 22 (8) of the Sixth Directive provides that "… Member States may impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud ". In doing so, Member States are not required to use the procedure laid down in Article 27 of the Directive. Article 22 (8) is a special provision limited to the specific area of taxpayers' obligations and only relates to the right of Member States to lay down obligations other than those provided for in the Directive.

> 16. It follows from the foregoing that as regards the exercise of the right to deduction in the circumstances set out above, which are those of this case, the Sixth Directive does no more than require an invoice containing certain information. Member States may provide for the inclusion of additional information to ensure the correct levying of value-added tax and permit supervision by the tax authorities.
>
> 17. However, the requirement on the invoice of particulars other than those set out in Article 22 (3) (b) of the Sixth Directive, as a condition for the exercise of the right to deduction, must be limited to what is necessary to ensure the correct levying of value-added tax and permit supervision by the tax authorities. Moreover, such particulars must not, by reason of their number or technical nature, render the exercise of the right to deduction practically impossible or excessively difficult."

43. Also in *Jeunehomme* Advocate General Slynn (ECJ 31.05.1988 C-123/87) explained, in a well-known passage, that the burden of proof in the case of an invalid invoice fell on the taxpayer:

> "An invoice which complies with the rules is the "ticket of admission" to the right to deduct, subject to its subsequently being shown by the tax authorities to be false; if the invoice does not comply, it may be that the taxpayer can prove the genuineness of the transaction and that his supplier accounted for the VAT which he has paid as "input tax", but if the invoice is incomplete in a material respect the onus is on him to establish his right to deduct."

44. The invoice must accurately identify the nature of the supply. As the Advocate General said in *Finanzamt Gummersbach v Bockemuhl* Case C-90/002, [2005] STC 934 at paragraphs [73 – 75] in relation to the importance of the correct identification of the supply was noted:

> "Identification of the taxable transaction is clearly of great practical importance for determining what provisions are applicable. It is evident that, when mentioned, the taxable transaction must be defined correctly in accordance with the categories in the directive, since a different qualification may trigger the application of different provisions of the directive and possibly different tax rates. Definitions which are not accurate in that regard may prejudice the application of the directive and distort competition.
>
> …
>
> My view is… that the applicable version of the Sixth Directive allows Member States to require suppliers to indicate their name and address and to identify accurately the nature of the supply, on any invoice used for VAT purposes, and thus to refuse the recipient a right to deduct if those particulars are absent or materially incorrect."

45. This Tribunal has held that a supply which appears to involve goods which were not those described on the invoice cannot be the basis of a valid claim for input tax. To meet the requirements, the description of the goods in the invoice must accord with the nature of the goods actually supplied (see, for example, *Premier Joint Ventures v Revenue & Customs Commissioners* [2010] UKFTT 135 (TC) at [28]). The Tribunal (Judge Nowlan and Ms Cheesman) said at [29]:

> "… [W]e agree with counsel for the Respondents that:
>
> - the test is a factual and objective test;

> - it is for the Respondents to cast *prima facie* doubt on the normal reasonable assumption that the goods and their description in the invoice will correspond; and
>
> - once such doubt has been cast, it is for the Appellant to demonstrate that the doubt is misplaced, and that, whatever might have been supposed by HMRC, the goods and their description do in fact correspond."

The burden of proof

46. In the hearing of an appeal against an assessment to VAT, the burden of proof is on the taxpayer to show, on the balance of probabilities, that the assessment was wrong; the burden is not on HMRC to show that it was correct (*Grunwick Processing Laboratories v C & E Commrs* (CA) [1987] STC 357). This is so even if an allegation of dishonesty is implicit in the assessment (*Khan v HMRC* [2006] STC 1167 per Carnwath LJ at [69] and *Halil v C & E Commrs* (1992) VTD 9590).

47. As Mr Brown accepted, the burden of proof was therefore on GCL to demonstrate to the Tribunal that it received:

- a supply of goods or services;

- which took place in the UK;

- which was made by a taxable person (i.e. someone who is or was required to be registered for VAT); and

- which was made in the course or furtherance of a business carried on by that person.

48. In fact, it was the issue in the first bullet point above that was in dispute in these appeals.

49. As we have explained above, in relation to the wholesale supplies in 02/11, we discussed the application of the CJEU's decision in *LVK* which appears to apply the *Kittel* test in circumstances where input tax has been denied on the basis of fraud or irregularities relating to the supplier. Where *LVK* applies, it seems to us that the legal burden of proof must lie upon HMRC.

Jurisdiction of the Tribunal

50. The issue whether GCL received the supplies which it claims were made to it in the disputed periods is a question of fact over which the Tribunal has a full appellate jurisdiction. The Tribunal must consider all of the evidence before it whether or not that evidence was also available to the Commissioners at the time of making their decision.

Exercise of the Regulation 29(2) discretion

51. Where no valid VAT invoice is held, it falls to HMRC to determine, in exercising the discretion given to them by Regulation 29 (2) of the VAT Regulations 1995, whether to allow an input tax deduction in the absence of a valid VAT invoice. On an appeal the Tribunal has a supervisory jurisdiction in relation to that discretion (per Schiemann J in *Kohanzad v CCE* [1994] STC 967 on substantially similar earlier

provisions) and it is for the appellant to show that the decision of HMRC was one that they could not reasonably have made (at [969]). The Tribunal must consider only the material available to the Commissioners at the time that they made the decision.

52. It is well-established that if no supply took place, there is no supply in relation to which HMRC can exercise their discretion under regulation 29 (2). For example, in *John Reisdorf v Finanzamt Koln-West* [1996] EUECJ C-85/95 the CJEU held:

> 31. The answer to the national court's questions must therefore be that Article 18(1)(a) and Article 22(3) of the Sixth Directive permit the Member States to regard as an invoice not only the original but also any other document serving as an invoice that fulfils the criteria determined by the Member States themselves, and confer on them the power to require production of the original invoice in order to establish the right to deduct input tax, as well as the power, where a taxable person no longer holds the original, to admit other evidence *that the transaction in respect of which the deduction is claimed actually took place*." (Emphasis added)

53. This analysis (that the Regulation 29 (2) discretion was limited to cases where the supply actually occurred) was also accepted by the VAT Tribunal in *Pexum Ltd v Revenue & Customs* [2007] UKVAT V20083. Furthermore, this view was endorsed in a decision of this Tribunal (Judge Hellier and Judge Raghavan) in *Future Phonic Ltd v Revenue & Customs* [2013] UKFTT 169 (TC) where the Tribunal, in a passage with which we respectfully concur, held:

> "226. The Respondents referring to Article 17(2)(a) of the Sixth Directive and section 24(1) of VATA say the appellant has no right to deduct input tax because the goods in respect of which it seeks to exercise that right were not supplied to it. They say there is no scope for them to exercise their discretion to accept "such other…evidence" of the "charge to VAT" as the appellant had failed to prove the supplies as described on the invoices from Elite and Synergy took place which meant that no "charge to VAT" arose in the first place.
>
> 227. The analysis is accepted in other Tribunal decisions for instance the First-tier Tribunal decision of *Plazadome* [27]. At [28] the Tribunal stated:
>
> "…The invoice does not itself create an entitlement to input tax but it evidences such an entitlement…"
>
> 228. In our view the Respondents' contention and the view of the Tribunal in *Plazadome* must be right. The reference to "*other evidence*" [emphasis added] in Regulation 29 of the VAT Regulations is consistent with this analysis. In the provisions of Article 18 of the Sixth Directive which the regulations transpose, the discretion of the Member State is clearly limited to the requirements set out in the preceding paragraphs of Article 18 which amongst other requirements set out a requirement to hold an invoice drawn up in specified way. The proviso in Article 18(3) only refers to deduction which the taxable person "has not made in accordance with paragraphs 1 and 2". It does not extend to dispensing with requirements in Article 17 which deal with the origin and scope of the right to deduct. It cannot be within the Commissioners' gift to allow a deduction for input tax even though as a matter of fact no supplies were made. Based on our conclusions above on this issue of fact any issue around exercise of the Commissioners' discretion does not arise if no supplies were made."

54. Finally, HMRC's policy in relation to the exercise of their discretion is set out in their publication 'Input tax deduction without a valid VAT invoice – Statement of Practice March 2007'. As set out therein, the policy is stricter in relation to goods subject to widespread fraud and abuse, which include mobile telephones. Where an invalid VAT invoice is held and the supply is of specified goods, in addition to providing alternative evidence of the taxable supply, the Statement of Practice sets out the further requirement for taxable persons to also demonstrate that they took reasonable commercial steps to ensure that their supply and supplier were *bona fide*.

The issues in dispute

55. In respect of all the alleged supplies in all the disputed VAT periods, the initial question in dispute is whether taxable supplies of goods were made to GCL in accordance with the invoices/receipts provided by GCL.

56. In particular, in respect of:

(1) the alleged retail supplies of £250 or less in value claimed in the 09/10 to 01/11 VAT periods (where sufficient particulars were provided to satisfy the requirements of a simplified VAT invoice pursuant to regulation 16), and

(2) the alleged wholesale supplies relating to the VAT period 02/11

the only question is whether GCL could show that a supply was made in accordance with the invoices/receipts provided by it.

57. However, in respect of:

(1) the alleged retail supplies of £250 or less in value claimed in the 09/10 to 01/11 VAT periods where insufficient particulars were provided to satisfy the requirements of a simplified VAT invoice, and

(2) all of the alleged retail supplies over £250 in value claimed in the VAT periods 09/10 to 01/11 where no valid VAT invoice exists

this Tribunal must first decide whether GCL could prove that the supplies of goods were made to it and, if so, it must then decide whether the decision of HMRC not to exercise their discretion in favour of GCL under regulation 29 (2) was reasonable in the *Wednesbury* sense.

The facts

Background in relation to GCL

58. GCL was incorporated on 9 July 2002 and was registered for VAT on 30 September 2003. Mr Amber was appointed a director on 9 July 2002 and was a director at all times material to this appeal. The share capital of GCL was at all material times wholly-owned by Mr Amber. The principal place of business of GCL was in North London.

59. In its application for registration for VAT, GCL stated that its business was to be the "wholesale, import and export of mobile phones second-hand."

60. In addition, GCL engaged in what is known as "box breaking" and "box consolidation." In short, box breaking involves the purchase of mobile phone handsets which are "locked" into a particular network (e.g. Vodafone or O2) from retail outlets.

The phones are then "unlocked" and reconfigured so that they can be used on any network. Box consolidation involves a taxable person who purchases ‘sim free’ mobile phones or other goods from either retail outlets or from other box consolidators or box breakers and consolidates these purchases into a single onward order. There has been no suggestion that box breaking and box consolidation were in any way illegal.

61. The turnover of GCL, derived from its VAT returns, was as follows:

2004	383,387
2005	3,393,837
2006	6,878,795
2007	698,340
2008	897,255
2009	2,180,973
2010	8,713,280
2011	1,747,224
2012	156,704

62. It will be observed that in 2010, a period which covers four of the six VAT periods under appeal, GCL's turnover was approximately £8.7 million. The only other year in which GCL came close to such a turnover was in 2006.

63. The above table also indicates a decline in trading activity of GCL since HMRC commenced their extended verification process from the first period ending 09/10.

64. On 6 October 2006 HMRC wrote to GCL stating that it was HMRC's view, based on information obtained from the Luxembourg tax authorities, that certain Luxembourg transaction chains which passed through GCL formed an integral part of a scheme to defraud the revenue. The letter stated that 29 UK traders were despatching mobile phones to a Luxembourg company called 3G Trading which then on-sold to an Italian company, which in turn consigned the goods straight back to the UK. The letter noted that considerable amounts of VAT had been lost to HMRC as a result of the transaction chains which passed through GCL because taxable persons in the supply chains had defaulted on their VAT payments. The letter invited GCL to review its trading pattern.

65. A trader called Bulk GSM, about which we shall hear more later, was also a supplier to 3G Trading during this period.

66. Originally, GCL's business consisted predominantly of buying and selling used, ex-stock, returned and faulty mobile phones. These phones were then repaired, repackaged and exported to countries such as South Africa, Israel and Dubai. Over time, however, Mr Amber’s evidence was that GCL's business developed so that it moved from purchasing mainly from wholesale suppliers to purchasing from retailers

who provided GCL with retail receipts. This was particularly so when, in 2010, the new Apple iPhone 4 came on the market. During the periods under appeal, GCL continued to buy mobile phones from wholesalers. However, in the period 09/10 to 01/11, according to Mr Amber, GCL predominantly bought mobile phones from retailers such as Apple and Carphone Warehouse.

67. GCL employed individuals to go out to these stores to buy mobile phones with cash provided by GCL. He said that the individuals ("the runners") handed the mobile phones to him either the same day or in parcels after several days of buying. He said that all the goods were re-packed and supplied to customers overseas.

68. Mr Amber described the process as follows. He said that large quantities of cash were delivered daily to him by two currency exchange bureaus: by Freedex in August 2010 and by the Gelt Centre from 2009 (see further below). Mr Amber said that he obtained funds for his retail purchases from these two currency exchange bureaus rather than from banks. GCL would write out a cheque at the time of delivery of the cash. The retail purchases, he said, were made in cash by the runners because if the runners had used credit or debit cards to make purchases their names would been flagged up on the stores' databases as having exceeded the allowed quota of two mobile phones per customer. Mr McDougall of Apple confirmed that Apple stores operated a policy of not supplying more than two iPhone 4s per customer.

69. Mr Amber's evidence was that the cash (and occasionally Apple gift cards) were handed to the runners who travelled to various retail stores to purchase mobile phones. He said the travel expenses would be paid for out of the cash handed over by GCL to the runners, but in fact he gave conflicting accounts of how expenses were handled. We will come back to the question of expenses later in this decision.

70. Mr Amber said that upon purchasing the phones, the retail store supplied a printed receipt. Because the retail stores had a policy of not supplying more than two mobile phones per customer, GCL's runners had to travel to several different stores in one day. Mr Amber said that some retail shops insisted on the runner providing a name, as they had systems in place to identify multiple purchases in different shops. Mr Amber said that for this reason the runners were instructed by the store either to provide a made-up name or provide the name of someone they knew. Most retail shops could see the same person coming in time and time again and, according to Mr Amber, would encourage runners to use fictitious names or would provide the names themselves in order to make the sale.

71. Mr McDougall's evidence was that although employees in Apple Stores were instructed to ask for a potential purchaser's name, they would nonetheless sell the phones to the customer if they refused to give one.

72. Mr Amber said that the runner would return to GCL's office, usually the same day, hand in the purchased mobile phones and receipts and collect more cash to purchase more phones. One exception to this was the Bhaiyats, who lived in northern England. Mr Amber said that he would transfer funds to them or provide them with funds at meetings on the A1 (normally at a service station at junction 17). We shall return to the Bhaiyats later in this decision.

73. Mr Amber accepted that during the period after the launch of the iPhone 4, GCL was so busy and short-staffed that it did not keep detailed records. He said that, however, any "significant shortfall" – whatever that meant – would have been picked up by him or later by his office manager (Ms Wagenheim).

74. Mr Amber said that he had discussions with his runners throughout the day regarding what stock customers needed, what stores had the models in stock and what "specials" (i.e. special deals) there were on the market. The runners bought as many handsets as they could with the funds provided. Mr Amber said that he did not set a daily quota.

75. Mr Amber was asked how he kept a record of the cash handed to runners and the phones which they had acquired and handed over to GCL. Mr Amber said that during the periods in question the business had rapidly become unmanageable and GCL simply could not maintain the records that it should have done. For this reason, Mr Amber said he did not keep records of the funds given to each runner at any one time, as long as at the end of each day he was happy that the goods and money tallied up. Mr Amber said that he was, at that time, aware of all the money was going in and out of GCL: it was simply that he did not retain good records. In short, therefore, Mr Amber did not retain records of the cash paid to the runners. He said he kept the figures in his head or on jotted notes. Moreover, it was clear from Mr Amber's evidence that he did not keep a record of which phones had been purchased by each individual runner.

76. As we shall see, these were significant failings in GCL's record-keeping. According to Mr Amber's evidence GCL operated a largely cash business (although cheques were made out to the currency bureaus). In other words, large amounts of cash were used to purchase mobile telephones. No records, however, appear to have been kept as to the amounts of cash given to the runners in order to purchase mobile telephones and no records were kept of the type, quantity and cost of mobile phones purchased by each individual runner. Thus, large quantities of cash flowed out of the business and, it was claimed, large quantities of goods flowed into the business but there was no clear record of how the cash paid out related to the goods coming in.

77. Mr Amber said that during the period in question he worked very long hours – usually 7 am to 10 pm seven days a week.

78. Mr Amber also said that, wherever possible, he sourced handsets requested by his customers. GCL held some popular handsets in stock at its warehouse in North London.

79. In the course of dealing with HMRC in respect of GCL's repayment claims for the VAT periods 03/07 to 05/07, HMRC (Officer Baxter) sent Mr Amber an e-mail dated 7 November 2007 requesting receipts for any and all cash that GCL had received from customers or had paid to suppliers. Ms Baxter reminded Mr Amber that these were primary business records required to support GCL's repayment claims.

Extended verification of GCL's VAT returns

80. GCL had already been subject to extended verification of its returns for the periods 11/06, 12/06 and 01/07. However, it was not clear from the papers provided to us what the outcome of that extended verification was.

81. We set out below a summary of the enquiry process into the return periods under appeal (and into one period (08/10) immediately before the periods under appeal). We do this in some detail because part of the Appellant's complaint is based on the way in which the enquiry was conducted and alleges that HMRC's requirements were not made clear to the Appellant until a late stage. We have not

attempted to summarise every letter or telephone call, but merely the main points arising from the discussions between the parties.

(a) VAT Period 08/10

82. On 1 October 2010 Mr Eraclides informed Mr Amber that HMRC would be carrying out extended verification of GCL's 08/10 repayment claim. At a meeting on 5 October 2010, Mr Amber explained to Mr Eraclides that the reason GCL's repayment claim for the period was relatively high was due to the purchase and onwards sale of iPhone 4s and iPads. Mr Amber said that these commodities were in high demand in mainland Europe and in countries such as Dubai and Hong Kong, as they had been released first by Apple only in the UK and USA and were difficult to obtain in those other countries.

83. Mr Eraclides examined the documents provided by Mr Amber and he noted the high value of cheque payments made to Freedex and the Gelt Centre.

84. At a subsequent meeting on 13 October 2010, Mr Amber explained that when his employees purchased stock the receipts would be totalled on a daily basis and the stock accounted for. At the end of the period the accountant would total all the receipts from the respective stores and it was from these figures that the VAT return was built up as regards input tax. He also stated that he would keep track of how much was given to each member of staff and reconciled that with what was purchased. As we have seen, however, Mr Amber did not keep any permanent record of the cash payments made to the runners or the purchases made by each individual runner.

85. Mr Amber told Mr Eraclides that he had a team of five to six people working on behalf of GCL who travelled throughout the UK purchasing the required stock. These individuals were paid a commission of between £2 and £5 depending on the value of the mobile phones purchased. He added that in the process of trying to purchase iPhone 4s he had taken on a few more people that he had paid in cash because they did not want "to go through the books".

86. Mr Amber was asked at that meeting why there were so many different names on the Carphone Warehouse receipts which GCL had submitted. Mr Amber explained that due to the strict “two phones per person” purchasing policy of Carphone Warehouse, his employees had to give a false names and addresses on the receipts to enable them to buy so many phones. Mr Amber also claimed that Carphone Warehouse and other large retailers had systems which could recognise the use of debit/credit cards for multiple purchases and this explained why cash was used.

87. In the course of enquiring into GCL's 08/10 return, Mr Eraclides noticed that the total gross purchases amount was incorrectly stated as a net amount, with VAT being added to it, thus resulting in an incorrect gross total. In addition, amounts in respect of airtime were being included in the total breakdown of purchases from the various retailers at the standard rate, whereas airtime should have been zero-rated.

88. The result of these errors was that GCL's net VAT claim for 08/10 was reduced from £104,930.36 to £86,946.69.

89. Mr Eraclides was concerned whether these mistakes had been duplicated in other periods. At a meeting on 10 November 2010, Mr Amber confirmed to Mr Eraclides that there had been an error in GCL's method of accounting for the purchase

totals. Mr Amber also provided Mr Eraclides with a payment summary for GCL which stated each employee's name, wages, NI and PAYE contributions. The employees listed were: Mr Amber, Mr Y Ebrahim, RG Duthy-James, Miss B Wagenheim, Mr Y Bhaiyat, Mr AS Bhaiyat, BS Chopra, JS Chopra, A Bhaiyat, L Omsky, MH Patel and M Farooq.

90. At the meeting, Mr Amber informed Mr Eraclides that HSBC had notified GCL that they would be closing his business account. He also stated that Barclays had closed his account the previous year.

91. Mr Eraclides asked Mr Amber whether GCL kept a record of IMEI numbers for stock bought and sold. Mr Amber said that GCL did not record IMEI numbers because of the considerable time and effort that this would involve. If required, however, he would be happy to assist in future. Mr Eraclides told Mr Amber that it was in his interests to carry out as many checks as possible and keeping a record of IMEI numbers would assist GCL in ensuring it was not inadvertently caught up in MTIC fraud. He made it clear to Mr Amber that at some point HMRC may wish him to keep a record of IMEI numbers as part of his record-keeping.

92. Mr Eraclides and Mr Amber discussed various invoices in respect of sales made to traders in South Africa and Israel. Mr Amber said that he had received cash from these traders while he was in those countries. Mr Amber said that the payments were not documented. At this point, Mr Eraclides told Mr Amber that this type of loose accounting was not acceptable and that a clear, documented audit trail was required for such payments. Mr Eraclides warned Mr Amber that in future it would not be accepted that he had received cash payments without a documented audit trail or accounting method.

93. Although Mr Eraclides had reduced GCL's VAT claim to £86,946.69 (as noted in paragraph 88 above), he had observed that the Carphone Warehouse retail receipts submitted by GCL in 08/10 contained a number of unknown names, addresses and contact details. He considered that the recipients of the goods could not be confirmed as being employees of GCL. He therefore decided not to release the VAT amount in relation to these receipts (£12,955.43) until further checks were undertaken. Mr Eraclides also had other concerns about the validity of the receipts being claimed and the audit trail supporting those receipt claims. He said that GCL's records did not allow reconciliation of individual purchases to the funding being used. Essentially, there was, in his view, no proper audit trail to enable a reconciliation of the purchases with the retail receipts provided in order to confirm that GCL was the actual purchaser of these mobile phones.

94. Furthermore, from an analysis of GCL's bank statements, Mr Eraclides was not able to reconcile the payments made in the period (whether cheques drawn on GCL’s bank account to be cashed by the currency exchange bureaus or transfers to employees) with the retail receipts purchases.

95. In the event, however, Mr Eraclides was unable to devote the required time to investigating these issues relating to the retail receipts because of other workload demands and operational pressures, including limited resourcing in his team at the time. Therefore, on 23 December 2010 Mr Eraclides authorised a repayment to GCL of £73,991.00 i.e. the repayment claim in respect of the retail receipts for the period 08/10, excluding VAT claimed relating to Carphone Warehouse receipts.

(b) VAT Periods 09/10, 10/10, 12/10, 01/11 and 02/11

96. GCL submitted its VAT returns for periods 09/10 and 10/10 on 4 November 2010 and 2 December 2010 respectively. These returns were dealt with by Mr Eraclides. The returns for periods 11/10, 12/10, 01/11 and 20/11, which were dealt with by Mr Mandalia, were received by HMRC on, respectively, 9 December 2010, 1 February, 1 April 2011 and 1 April 2011. HMRC informed GCL by letter that its returns for the periods 09/10, 10/10 and 11/10 were being selected for extended verification.

97. Having uplifted the relevant records for those periods on 15 December 2010 at a visit to GCL's premises, Mr Eraclides then examined the material.

98. Mr Eraclides and Mr Mandalia then met Mr Amber on 18 January 2011 to discuss outstanding matters. During that meeting Mr Amber informed them that company and personal credit cards, personal and external loans and cash were used to purchase stock. He confirmed that only employees of GCL purchased stock and further confirmed that the company had nine employees in total. As regards the confirmation that only employees bought stock, this was not correct because, as we shall see, a Mr Waqas Mann, who was not an employee of GCL, was shown in GCL's records as purchasing stock for the company. Each runner was, according to Mr Amber, given a float of around £5,000 – £10,000 for the purchase of stock. He said he also transferred money into the accounts of some of his employees for the same purpose. The cash was kept on the premises but was taken home by Mr Amber overnight.

99. Mr Eraclides explained to Mr Amber why the records which GCL had provided were insufficient, in his view, to enable HMRC to examine and verify the validity of GCL's input tax claims i.e. GCL's "audit trail" did not satisfy the requirements in order to deduct input tax on their purchases over £250 and did not allow HMRC to reconcile the company's purchases with its bank statements. Mr Eraclides again explained the requirements to Mr Amber and it was made clear to him that until a complete reconciliation was carried out for the 09/10, 10/10 and 11/10 periods GCL's repayment claims would not be released. Mr Eraclides noted that Mr Amber appeared rather bemused by what he was being told. Mr Amber felt that HMRC's policy was unfair and that what was expected would be too labour-intensive.

100. Mr Eraclides wrote to Mr Amber on 18 January 2011 setting out his concerns in relation to the 09/10 period. First, he noted that a number of the retail receipts provided to support GCL's VAT repayment claim dated from periods that were outside the 09/10 return period, some going back as far as March 2010. Secondly, a large number of receipts (e.g. some of the Carphone Warehouse and Apple receipts) specified unknown names, addresses and contact details as being the recipient of the goods. In addition, many of the receipts did not contain any identifying recipient for the goods sold. Thirdly, the submitted purchase summary and associated retailer stock listings did not provide enough information to be able to trace GCL's purchases through to each individual relevant receipt. Mr Eraclides explained that the listings provided by GCL: "simply record of the number of mobile phones of each model purchased and the respective totals, with no information regarding the number of phones purchased on specific dates, locations and what funds were used to purchase them and from where they came from." Mr Eraclides concluded that there was no proper audit trail which enabled him to reconcile GCL's purchases with the retail receipts provided in order to ascertain whether GCL was the actual purchaser of these mobile phones.

101. Further, on the subject of reconciliation of payments, Mr Eraclides noted that he was not able to reconcile the payments made by GCL in the period (whether they were cheques drawn in favour of the currency exchange bureaus or transfers to the Bhaiyats) with the retailer receipt purchases. Mr Eraclides also asked Mr Amber to reconcile each purchase with the individual payments made. He asked: "how are the funds given to your employees traced to each purchase they make on specific dates?"

102. In relation to receipts for amounts in excess of £250, Mr Eraclides noted that these were not valid VAT invoices. In order to admit GCL's claim for input tax, Mr Eraclides asked for:

> (1) evidence supporting payment and illustrating where the cash originated from;
>
> (2) where cheques were issued and cashed by exchange bureaus, a full breakdown of how much was given on each day to each person, including the money left over at the end of the day and carried forward to the next day of purchases;
>
> (3) names of all individuals working on each day; and
>
> (4) where phones were acquired outside the M25, supporting evidence of train tickets, fuel receipts or subsistence receipts proving the relevant employees visited the relevant retail store on the appropriate day.

103. As regards retail receipts for less than £250, Mr Eraclides informed Mr Amber of the requirements for less detailed VAT invoices contained in regulation 16 of the Regulations 1995. However, he noted that there was still no proper audit trail in place to enable him to reconcile GCL's purchase listings to the retail receipts and then to each applicable payment. In addition, a large number of phones, according to the receipts, were purchased outside the 09/10 period, leading Mr Eraclides to express a concern that input tax on those mobile phones may have been claimed another periods. Mr Eraclides then set out in detail the documentation and records that he would require to satisfy himself in order to allow the VAT repayment claim.

104. Mr Amber replied on the following day i.e. 19 January 2011. In the course of the letter he stated:

> "In this letter I have also included the IMEI numbers for many of our sales. Going forward we will keep our records in the manner you have stated.
>
> …
>
> Although I am not obliged/contractually bound my intention is to reward my staff once profits/losses have been assessed at the end of the year.
>
> Expenses are accounted by Global Cellular Ltd and are worked out at year-end."

105. Mr Eraclides wrote to GCL on 9 February 2011 reiterating that he required "a comprehensive reconciliation of GCL's purchases with the relevant payments before the validity of GCL's input tax claims can be assessed." He referred Mr Amber to his previous letter for guidance.

106. In a letter dated 14 February 2011, Mr Amber wrote to Mr Eraclides on a number of subjects. As regards employee expenses he noted:

> "We do not claim any VAT on petrol, VAT fuel scale charges are not applied. Employee expenses are reimbursed on cash bases [sic] on actual cost incurred as agreed by me and the employees. We have employees based in and around London, West Midlands and Lancashire."

107. On 24 February 2011, Ms Wagenheim sent Mr Eraclides reworked spreadsheets for the retailer purchase receipt summary totals/listings for the VAT periods 09/10, 10/10 and 11/10. However, the revised spreadsheets did not itemise each purchase and did not reconcile these purchases with the funds used. Therefore, in Mr Eraclides' view, and adequate audit trail was not present.

108. The correspondence between the parties continued and in a letter from Mr Eraclides to Mr Amber dated 3 March 2011 (the second letter of that date), Mr Eraclides repeated many of the points made in his letter of 18 January 2011 (referring back to that letter). Mr Brown placed considerable emphasis on this letter and, therefore, we record its contents in some detail.

109. In this 3 March 2011 letter, Mr Eraclides again noted that many of the retail receipts provided by GCL to support its VAT claim were outside the 09/10 return period. Furthermore, the majority of the receipts specified either unknown names as being the recipient of the goods (with unknown addresses and contact details) who were either not employees of GCL or related to GCL or did not contain any identified recipient for the goods sold.

110. Mr Eraclides also observed that GCL's submitted purchase summary and associated retailer stock listings did not provide enough information to be able to trace GCL's purchases through to each individual relevant receipt. Mr Eraclides noted that the listings provided by GCL simply recorded the number of mobile phones of each model purchased from each retailer and the respective totals, with no information regarding the number of phones purchased on specific dates, locations and what funds were used to purchase them and where the funds came from. Therefore, Mr Eraclides considered that there was no audit trail which enabled him to reconcile GCL's purchases with the retail receipts provided and to ascertain whether GCL was the actual purchaser of these mobile phones. In addition, Mr Eraclides was unable to reconcile the payments made in the 9/10 period with the retailer receipt purchases. Mr Eraclides made it clear that a comprehensive reconciliation of GCL's purchases with the relevant payments made was required before GCL's input tax claim could be assessed.

111. Mr Eraclides explained that these issues had been outlined at the meeting on 18 January 2011. Mr Eraclides noted that Mr Amber had made it clear that the level of information that was being requested would be too labour-intensive, and that due to GCL's accounting procedures it would not be possible to trace individual purchases to large bulk amounts or payments in GCL's bank statements.

112. Mr Eraclides' letter continued:

> "Therefore in the bid to try to find a solution and to assist you in this matter, we discussed and considered alternative means of obtaining information we needed from you to fulfil the requirements.
>
> As a concession and after special consideration was given it was agreed that on this occasion, if you carried out a complete reconciliation of your purchases and bankings the information this

> provided **may** be sufficient to allow us to verify your repayment claim and address the outstanding queries we have.
>
> The importance of providing as much secondary evidence as possible which in this instance will predominately be proof of payment through reconciliation of your bank statements as to your purchases was made clear to you."

113. Thus, in this letter, Mr Eraclides suggested an alternative method of reconciliation of purchases and bankings as a possible means of satisfying HMRC.

114. Later in the 3 March 2011 letter, Mr Eraclides set out what GCL needed to do as regards the future. Mr Eraclides stated that GCL, as regards purchases from retailers, needed to ensure that a detailed audit trail was kept:

> "This will require you to keep comprehensive schedules which list each receipt individually, detailing the specific retailers name, address and geographical location, the date of purchase, model and type of commodity, quantity, the price, and the method of payment used.
>
> To substantiate that Global Cellular or employees working on behalf of the Company were the true purchasers of the stock, you will be expected to be able to fully reconcile each retail receipt of purchase with the relevant payment made through your bank statements whatever method of payment is used.
>
> Therefore you will need to keep a record and breakdown of the funds given/transferred etc. to each of your respective employees on any given day including money left over at the end of the day and carried forward to the next day for the procurement of stock.
>
> Where purchases are made using a credit or debit cards please ensure that the corresponding bank statements are kept to confirm the identity of the account holders.
>
> Any other associated supporting evidence such as fuel subsistence receipts should also be kept."

115. On 29 March 2011, Ms Wagenheim sent reworked spreadsheets to Mr Eraclides covering the periods 09/10, 10/10 and 11/10. These spreadsheets did not itemise each purchase and did not reconcile these purchases with the funds used. Therefore, in Mr Eraclides' view an adequate audit trail was still not present.

116. A further e-mail was received by Mr Mandalia on 29 March 2011 from Ms Wagenheim containing reworked spreadsheets for periods 11/10 and 12/10.

117. Mr Eraclides noted calculation errors for some of the totals specified in the spreadsheets submitted on 29 March 2011. Therefore, as well as the inadequacies of the spreadsheets in terms of providing an audit trail, Mr Eraclides concluded that the figures themselves could not be relied upon. He raised the errors with Ms Wagenheim.

118. Further reworked spreadsheets were received by Mr Eraclides from Ms Wagenheim on 1 April 2011 for the periods 09/10, 10/10 and 11/10. Once again, the revised spreadsheets did not itemise each purchase and did not reconcile the purchases with the funds used. Again, Mr Eraclides concluded that the spreadsheets did not represent an adequate audit trail.

119. On 5 April 2011 HMRC sent GCL a letter explaining that GCL's VAT returns for 01/11 and 02/11 would be the subject of extended verification.

120. Further reworked spreadsheets were sent to HMRC by Ms Wagenheim on 8 April 2011 for the VAT period 08/10.

121. Mr Amber sent reworked spreadsheets to Mr Eraclides on 11 April 2011 covering VAT periods 09/10, 10/10, 11/10 and 12/10. Again, Mr Eraclides concluded that these spreadsheets did not itemise each purchase and did not reconcile these purchases with the funds used. He concluded, once again, that an adequate audit trail was still not present. In addition, Mr Eraclides received an e-mail from Mr Amber on 11 April 2011 containing details of a bank funds breakdown covering January to December 2010 (in response to a request made by Mr Eraclides on 6 April 2011). Each month listed the funds used (transferred, cashed etc.) by GCL from the various bank accounts and credit/debit cards for the purchase of stock in 2010.

122. In a letter from Mr Amber dated 14 April 2011 Mr Amber stated:

> "Global Cellular accounts for the expenses incurred by employees. Our calculation is done on a unit basis. We do not submit and make input VAT on these expenses [sic]. Calculations are made on receipts. We do not apply VAT fuel scale charges to petrol expenses. Our staff are based around the UK. Travel etc. is funded from the float that we give our staff. As mentioned, I will reward my staff according to their performance on the personal evaluation."

123. On 13 May 2011, Mr Eraclides and Mr Mandalia met Mr Levine (GCL's accountant) and Ms Wagenheim. It appeared from that meeting that there had been a misunderstanding as to what Mr Amber had thought had been required of GCL in respect of the information required by HMRC. Mr Mandalia explained to Mr Levine the central issues concerning the lack of an audit trail and the funds reconciliation that would enable HMRC to link a purchase receipt to its relevant payment through the bank accounts or otherwise. Without this, Mr Eraclides said that HMRC could not verify whether GCL was the true purchaser of the goods. In addition, because of the problem of matching up funds to the purchases and the fact that a large number of receipts had been claimed outside the periods in which the supply took place, the possibility of duplication of claims was also present. Furthermore, when examining the bank statements there were large transfers of funds from various sources that could not be reconciled or identified. Moreover, large amounts cashed at various exchange bureaus could not be reconciled with the purchases made by GCL.

124. On 31 May 2011 Mr Levine sent an e-mail to HMRC attaching GCL's completed funding analysis with regard to the period 09/10. However, in Mr Eraclides' view it did not address the outstanding issues e.g. reconciliation of funds used to make purchases from retailers.

125. Mr Eraclides and Mr Levine spoke by telephone on 31 May 2011. Mr Eraclides told him that the spreadsheet analysis provided by Mr Levine did not help in reconciling the retail purchases with the bulk cash amounts. Mr Levine said he was frustrated as he believed that to achieve what HMRC was looking for would mean analysing every receipt.

126. Mr Levine followed this conversation with an e-mail on 6 June 2011 saying that at the meeting on 13 May 2011 he had understood HMRC to say that they did not want the phone purchase invoices analysed day-by-day, but from his conversation with Mr Eraclides this now appeared to be what HMRC now wanted. Mr Eraclides' evidence was that he did not accept that the contents of Mr Levine's e-mail were correct.

127. In the period 20 – 29 June 2011 HMRC undertook an analysis of the 09/10 receipts and spreadsheets. Mr Eraclides also attempted to compare the retail purchase receipt summary totals for the VAT period 09/10 with the physical receipt batches.

128. On 1 July 2011 Mr Eraclides and Mr Mandalia sent a five-page letter to GCL setting out why HMRC considered GCL was not entitled to a repayment of input tax. In summary, the letter traversed old ground and noted that many of the retail receipts in respect of periods 09/10, 11/10 and 12/10 were outside the relevant return period, some going back as far as March 2010. In period 09/10 in the 75% of the receipts were dated outside the 9/10 period. Secondly, a large number of retail receipts (e.g. Carphone Warehouse, Apple and O2) specified unknown names, addresses and contact details as being the recipient of the goods i.e. the receipts were not made out to employees of GCL. Moreover, many of the receipts did not contain an identifying recipient for the goods sold. In the period 09/10 nearly 50% of the Apple receipts gave unknown names and contact details for the recipient of the goods and 99% of the Carphone Warehouse receipts had unknown customer details included on them. Thirdly, all the receipts where the total purchase price was greater than £250 did not meet the requirements of a valid VAT invoice. The letter continued:

> "Global Cellular's submitted purchase summary listings and spreadsheet data do not provide enough information to be able to trace your purchases through to each individual relevant receipt. Your listings simply records [sic] the number of phones and make of handset purchased and the respective totals, with minimal information regarding the number of phones purchased on specific dates, locations and what funds were used to purchase them and from where they came from. This means that there is not a proper audit trail in place to enable us to reconcile and trace your purchase listings to the retail receipts and then to each applicable payment, and therefore ascertain whether Global Cellular Ltd were [sic] the actual purchasers of these phones….
>
> In a 'normal' business scenario if you were seeking to claim input tax on a purchase invoice from a supply received, you would be expected to be able to provide proof of payment as part of your supporting or secondary evidence to enable an examining officer to reconcile the specific invoice with the relevant payment details for that supply."

129. HMRC's letter then set out a number of issues which were a concern to Mr Eraclides and Mr Mandalia. These were as follows:

(1) a funds reconciliation had been carried out for the whole of 2010 which compared the total funds used for the purchase of stock and the totals declared on GCL's retail purchase summary spreadsheets. The total funds used by GCL to purchase retail stock from January – December 2010 amounted to £7,006,521. The total retail purchases made in the same period as per the summary listings were £8,414,510.02 (voucher and airtime inclusive figure). The letter noted that the difference was £1,407,989.02. This large discrepancy appeared to HMRC to show a funds shortage compared to the total purchases declared.

(2) An analysis of GCL's bank statements in 2010 indicated that GCL issued a large number of high-value cheques. Mr Amber had told HMRC that the majority of these cheques had been issued to several money exchange bureaus and the cash funds were to be used to purchase stock from various retailers. HMRC were, however, concerned that there was no paperwork to evidence

these transactions even though the transactions ran into many millions of pounds.

(3) HMRC were concerned that GCL did not keep a record of funds given/transferred to its employees on any given day including money left over at the end of the day and carried forward to the next day for procurement of stock. In HMRC's view this left GCL unable to reconcile the money given out to each employee with their respective purchases.

(4) As regards employee travel expenses, it was evident that GCL's employees travelled large distances (including Scotland) to purchase stock from various retailers and travelled back and forth to GCL's offices to deliver stock and collect funding. Despite the large costs said to be incurred, GCL did not appear to record, account or claim for any of these expenses.

(5) HMRC raised a point in relation to the use of a Mr Waqas Mann to purchase stock. Mr Mann was not an employee of GCL.

(6) Finally, the letter noted various accounting errors.

130. Mr Amber requested that the receipts for 09/10, 11/10 and 12/10 be returned and these were duly collected by Ms Wagenheim. There were approximately 30,000 receipts. The receipts for 10/10 were collected a few days later on 12 July 2011 (approximately 13,000 receipts).

131. On 13 July 2011 Ms Wagenheim sent Mr Mandalia a spreadsheet containing information relating to retail purchase receipt summary totals for the period 01/11.

132. During the rest of July, August and September there was contact between GCL and Mr Eraclides. Mr Amber indicated that he was preparing an audit trail reconciliation. On 9 September he e-mailed HMRC confirming his belief that the reconciliation would be completed within two weeks.

133. On 26 September 2011, Mr Mandalia and Mr Eraclides wrote to GCL informing GCL of HMRC's decision to deny input tax for the periods 09/10, 10/10, 11/10, 12/10 and 01/11. On 7 September 2011 Mr Mandalia issued GCL a letter notifying it that HMRC had also decided to disallow its claim to input tax for the period 02/11.

134. At some stage in late October 2011 GCL requested a review of HMRC's decisions denying input tax for the above periods.

135. On 8 December 2011 CTM, acting for GCL, sent the reviewing officer, Mr Bradshaw, an e-mail together with various attachments. The e-mail also noted that various hardcopy documents would be sent to HMRC in due course and those were duly received by HMRC on 12 December 2011.

136. The attachments to CTM's e-mail included a letter to GCL from a London-based Apple retail store ("the Apple letter") and five spreadsheets for the periods September 2010 – January 2011. In addition, CTM provided hard copy files. Two folders contained, in relation to September 2010 to January 2011, individual retail receipt listing purchase summaries for each month. These listings contained details of each individual purchase specifying, *inter alia*, the date of the invoice, retailer name, model of phone IMEI and invoice numbers, unit cost and totals. The folders also contained listings which specified the quantity and type of model of each phone purchased on a given date by GCL.

137. The third folder contained various ledger accounts and other supporting documentation, including:

(1) copies of cash receipts allegedly provided by the Gelt Centre and Freedex;

(2) ledger accounts consisting of the Apple Store account, Apple gift card control account, Gelt Centre control account, Rational Foreign Exchange Ltd, Argos, Freedex control account and Tesco control account;

(3) A cashbook (1 September 2010 – 28 February 2011); bank account ledgers: Lloyds TSB (September 2010 – February 2011) and HSBC Euro and US dollar accounts (September 2010 – February 2011);

(4) a revised purchase register listing (September 2010 – February 2011);

(5) a revised sales listing (September 2010 – February 2011);

(6) a ledger account signed by suppliers, Freeway, CIF and NZ Electronics;

(7) freight forwarder ledgers;

(8) freight forwarder invoices and exporter evidence; and

(9) a credit note ledger.

138. Mr Bradshaw asked Mr Eraclides and Mr Mandalia to examine the new information produced by GCL for the review and his decision was based on their analysis.

139. Mr Bradshaw wrote to GCL on 24 February 2012 upholding the decisions of Mr Eraclides and Mr Mandalia on 26 September 2011 to deny GCL input tax in respect of the relevant periods.

140. The first point made by Mr Bradshaw in his review letter was that a large number of receipts contained in the retail receipt listing for the periods under appeal were dated in periods that preceded the relevant return periods, some dating back as far as November 2009. In addition, many receipts were claimed in the wrong periods e.g. October receipts were being claimed in the September period and vice-versa.

141. Mr Bradshaw noted that in 09/10 receipts valued at £1,094,523.28 (73% of the total amount) related to purchases made before the start of the period.

142. As regards the 10/10 return, nearly 40% of the receipts related to purchases made before the beginning of 09/10 period. Of the remaining receipts, nearly 20% were purchased in the previous return period i.e. 09/10 and a small number related to purchases in the 11/10 and 12/10 periods. In relation to the 11/10 return, approximately 15% of the receipts were purchased outside the November period a small number were outside any of the periods under appeal. In the 12/10 return approximately 52% of the receipts claimed were from the previous return periods 09/10, 10/10 and 11/10. We should add that none of this was disputed by GCL.

143. Mr Bradshaw also noted that those receipts which were dated prior to 09/10 did not feature in the audit trail reconciliations provided. Again, this was not disputed.

144. Secondly, Mr Bradshaw examined the various ledgers such as the retail purchase ledger, cashbook ledger and the money exchange ledgers. He concluded that, overall, it was not possible sufficiently to reconcile the purchases made to the applicable cash/funding. In his view, it was not clear whether the cash amount entries according to the cash ledger on a given day had been used for purchases on that

particular day and/or whether there were any residual amounts carried over for purchases on other days.

145. In addition, Mr Bradshaw concluded that the retail purchase register totals in the periods 09/10 to 01/11 did not reconcile with the cashbook ledger.

146. Mr Bradshaw pointed out that the Gelt Centre and Freedex ledgers did not reconcile closely to the total cash ledger or retail purchase ledgers. In the periods 09/10 – 01/11 there was a difference of £295,599.33.

147. Mr Bradshaw gave a number of examples of ways in which he considered that the various ledgers did not reconcile with each other. As we shall see later, HMRC now accept that the ledgers provided on review did to some extent reconcile with each other, as explained below. Evidently, in this regard, Mr Bradshaw was mistaken.

148. Thirdly, Mr Bradshaw considered new evidence submitted by GCL, in the cashbook ledger and retail purchase ledger, in relation to travel and other staff expenses. Mr Bradshaw noted, however, that there was no indication of how those figures were calculated, where the figures derived from and that there was no supporting documentation to substantiate them.

149. Fourthly, Mr Bradshaw considered the question of mobile phone purchases by non-employees. Mr Bradshaw noted that GCL had used Mr Waqas Mann to purchase telephones. Mr Bradshaw recalled that Mr Amber had accepted that Mr Mann had purchased 14 telephones at a cost of £499 each, resulting in a total of £6,986. However, Mr Bradshaw observed that GCL's HSBC account showed that a total of £20,620 had been transferred to Mr Mann in 09/10, 11/10 and 12/10. In addition there were receipts in Mr Mann's name in those three periods and also in 01/11. Mr Bradshaw considered that this contradicted Mr Amber's claim that Mr Mann had been brought in on a trial basis and that he had only purchased 14 mobile phones for GCL.

150. Mr Bradshaw also highlighted the fact that other purchase receipts displayed recurring names, including the names of individuals who were employees of three companies with which GCL had had dealings. In addition, many receipts featured unknown names and that GCL had not provided an audit trail to support its contention that these purchases were made by these individuals on behalf of GCL.

151. Fifthly, Mr Bradshaw noted that there were three missing fund transfers (each of £10,000) in the 11/11 period which had not been included on the Gelt Centre ledger.

152. Furthermore, the comparison between the Freedex ledger and GCL's bank accounts indicated that transfers of £550,000 had been omitted.

153. Sixthly, GCL had provided Apple Gift Card, Tesco and Argos ledgers which indicated purchases being made using credit/debit cards for the stock directly or of Apple gift cards, which were then subsequently used for the purchase of mobile phones. However, Mr Bradshaw noted that these purchases could not be linked to the respective receipts and that the original documentation relating to the debit/credit cards (e.g. statements) had not been provided.

154. Finally, in relation to the period 02/11, no audit trails, according to Mr Bradshaw, could be established for the cash or gift cards purportedly given by GCL to its three wholesale suppliers (NZ Electronics, CIF and Freeway).

155. In conclusion, Mr Bradshaw considered that there was no evidence which demonstrated that the pre-September 2010 input tax claims had not been claimed in earlier periods. This, in his view, showed a significant failure within the audit trail.

156. Moreover, Mr Bradshaw considered that GCL had not produced any properly maintained financial records or stock controls. In his view, the analysis of GCL's figures indicated cash deficiencies as well as an absence of an auditable trail of cash from GCL to its employees and, in turn, to purchases of mobile telephones. The evidence produced by GCL failed to demonstrate whether a GCL employee, rather than an unknown individual or an employee of another company, made a particular cash purchase using funds from GCL. There were also inconsistencies in relation to how GCL incurred, recorded and accounted for expenses in the course of these purchases.

157. Accordingly, Mr Bradshaw upheld the decision of Mr Mandalia and Mr Eraclides of 26 September 2011.

The receipts

158. We were told that GCL had submitted approximately 30,000 receipts to HMRC.

159. As we have seen, and we find, many of the retail receipts were dated in periods which preceded the relevant return periods, some dating as far back as November 2009. Many receipts were claimed in the wrong period. For example, October receipts were being claimed in September. As regards the 09/10 period, nearly 73% of the receipts claimed by GCL related to purchases made before this period. As regards the 10/10 period, nearly 40% of the receipts claimed related to purchases before September 2010. In relation to the remaining receipts for that period, nearly 26% were purchased in September 2010 with a small number purchased in November and December 2010. Some receipts had no dates or serial numbers included on them. In the 11/10 period approximately 15% of the receipts related to purchases outside the period, of which 1 – 2% were outside the periods under appeal. As regards the 12/10 period, 52% of the receipts claimed were for the 09/10 – 11/10 periods.

160. The fact that so many receipts pre-dated the periods which were the subject of extended verification by HMRC caused particular difficulties because the funds reconciliation exercise carried out by GCL started from September 2010.

161. We were provided with and examined a folder of sample receipts. Many of the receipts did not identify the purchaser. Many receipts identified individuals who, on the evidence we have heard, were apparently not employees of GCL.

The Gelt Centre and Freedex – the currency exchange bureaus

162. Mr Amber told us that originally he had obtained cash from his bank in order to provide the necessary cash to the runners to purchase mobile telephones. He was, however, concerned about the security of this arrangement. He was particularly bothered about the risk of being followed back from the bank carrying large quantities of cash and being robbed. He felt more secure obtaining cash from the Gelt Centre and Freedex. The only people who knew about this arrangement were his employees, as well as the Gelt Centre and Freedex.

163. Nonetheless, in cross-examination, Mr Amber admitted that he took large quantities of surplus cash from his office to his home on many nights and this seemed

to us, at least to some extent, to undermine his assertion that his use of the currency exchange bureaus was dictated by security concerns. He seemed relaxed about going home on many occasions in the evening carrying quantities of cash.

164. Mr Amber said that he had been introduced to the Gelt Centre by a French customer of GCL, called Mr Perez, at some time in 2009 or 2010. Mr Perez had asked Mr Amber to take him to the Gelt Centre so that he could obtain cash. In fact, it transpired in cross-examination that Mr Amber had not met Mr Ball (who ran the Gelt Centre) on this occasion and had waited outside in the car while Mr Perez transacted business inside. Mr Amber said that he had met Mr Ball later either at the Brent Cross shopping centre or on Golders Green High Street.

165. We did not find Mr Amber's account of how he had met Mr Ball and started dealing with the Gelt Centre convincing. It seemed to us that he changed his story halfway through whilst under cross-examination.

166. According to Mr Amber, Mr Ball would deliver the cash to Mr Amber's office in a satchel. Mr Amber would write out a cheque and Mr Ball would leave the money with Mr Amber, less an amount in respect of commission. Typically, Mr Ball would leave approximately £20,000 of cash with Mr Amber, but on some occasions the cheque drawn in favour of the Gelt Centre could be over £100,000.

167. In other words, the Gelt Centre paid cash to GCL in advance of GCL's cheque being cleared. For example, on 13 September 2010 three cheques were issued by GCL to the Gelt Centre. The Gelt Centre appeared to cash the cheques on the same day and the cheques then cleared through GCL's bank account on 16 September 2010. In some cases, a week could pass from the time when the Gelt Centre and Freedex supplied the cash to GCL until GCL's cheque was cleared through its bank account.

168. Mr Amber could not recall whether the Gelt Centre carried out a check on GCL's financial status, but Mr Amber said that Mr Ball was aware of the way in which GCL operated.

169. Three fund transfers from GCL to the Gelt Centre were omitted from GCL's Gelt Centre ledger. GCL's bank statement for November 2010 recorded three transfers of £10,000 each on 18, 20 and 21 November 2010, but these amounts were missing from the Gelt Centre ledger submitted to HMRC (as noted by Mr Bradshaw).

170. Mr Amber said that Mr Ball introduced him to Freedex. Mr Amber could not recollect details but thought that this was during a period when Mr Ball was going on holiday over the summer and that Mr Ball had, therefore, introduced him to Mr Fried of Freedex.

171. Between 1 January 2010 and 22 November 2010, GCL also used Freedex to cash cheques. Between 23 November 2010 and 9 December 2010 Freedex received payments of £1,290,000 from GCL's HSBC bank account. However, when the Freedex ledger supplied by GCL was compared with GCL's HSBC bank accounts, GCL's transfers to Freedex in the same period totalled £1,550,000 – a difference of £260,000.The Freedex ledger provided by GCL contained an entry on 30 November 2010 but the next entry was on 9 December 2010. Therefore, the Freedex ledger did not record the following bank transfers from GCL: £110,000 on 7 December 2010 and £150,000 on 8 December 2010. Furthermore, the ledger did not include two transfers of funds from GCL to Freedex of £170,000 on 10 December 2010 and £120,000 on

13 December 2010. Thus, when added to the missing £260,000, a total of £550,000 was unaccounted for (and was not included in the Cash Book ledger).

172. We concluded that Mr Amber used both the Gelt Centre and Freedex in tandem and that Freedex was not merely used while Mr Ball was away on holiday.

173. The due diligence checks carried out by Freedex on GCL were carried out retrospectively i.e. after the transactions between GCL and Freedex took place, indicating, in our view, that these checks were not material to the decision by Freedex to do business with GCL. In any event, the due diligence material provided by Mr Fried included a credit report in relation to GCL which advised a credit limit of £500.

174. There were three companies registered in the Companies Register using the name "Freedex". All three companies shared the same registered address as the Gelt Centre.

175. At the review stage, GCL provided copies of receipts (no original receipts have been provided) which it said came from Freedex and the Gelt Centre. These receipts did not contain signatures and did not confirm the times when the amounts of cash were received. The copies of the Gelt Centre and Freedex receipts related only to transactions between GCL and Freedex from 12 August 2010 to 22 September 2010.

176. Mr Eraclides' evidence was that the commission of 1.3% charged by both the Gelt Centre and Freedex was unusually low when compared with other well-established companies. Mr Eraclides suggested that a more typical commission charged by established cheque cashing companies was between 4 – 7% However, in the absence of independent expert evidence to this effect, we have attached little or no weight to this evidence.

177. Freedex stopped trading due to losses incurred in its cheque cashing business.

Ms Wagenheim's evidence

178. Ms Wagenheim worked for GCL as its office manager, commencing employment in March 2009, until she was made redundant in October 2011.

179. Ms Wagenheim separated and sorted the receipts in respect of mobile phones and input the relevant data onto the company database. The receipts would then be sorted by make or model and date. She said that this took a large amount of time every day. She also spent part of her day in the warehouse which was attached to GCL's office.

180. After the receipts were sorted and the data entered into GCL’s computer system, the physical receipts would be bundled up and stored in boxes in GCL's office.

181. When one of the runners came into the office with phones and receipts, the phones and receipts would be separated. However, Ms Wagenheim would not necessarily process the receipts on the computer immediately. Often the receipts were placed in a drawer in bundles and she would process them at a later stage. Before placing them in the draw she would sort the receipts according to the stores from which they came. Later (how much later was unclear), she would divide them further, not just by shop, but also by the type of mobile phone involved.

182. The date on some of the earlier spreadsheets she produced was the date on which she had processed the receipts. Sometimes the lower value phones were grouped together rather than entered individually. Once she had input the receipts onto the computer, she said that they would go into a separate box and the bundle of receipts would have a sticky note placed on it, recording the date the bundle had been processed.

183. Ms Wagenheim said she tried to process the receipts on a weekly basis but at busy times it could take a few days, a week or two weeks. However, she said that she tried to sort everything out by the end of the month, although sometimes some receipts were not processed until the following month. As Ms Wagenheim put it: "I would just do them as I could get through them." Ms Wagenheim accepted that pressure of work would mean that often she did not process receipts in the month that they were obtained.

184. Moreover, Ms Wagenheim was not necessarily aware of the exact number of receipts coming in because Mr Amber also put receipts in the drawer. Mr Amber and Ms Wagenheim both received receipts from runners.

185. Ms Wagenheim said that she and Mr Amber checked IMEI numbers in respect of wholesale supplies against the IMEI numbers on the individual mobile phone boxes.

186. Ms Wagenheim was aware of GCL receiving supplies of mobile phones from wholesalers but was not able to confirm whether wholesale supplies took place in the periods under appeal.

187. Finally, Ms Wagenheim had helped prepare the initial spreadsheets and ledgers for HMRC but had not, as we understood it, prepared the ledgers submitted at the review stage for Mr Bradshaw's consideration.

Mr Waqas Mann and receipts where recipient unidentified

188. Mr Eraclides wrote to Mr Amber on 9 February 2011 asking for "details of the exact stock (quantity, model, price etc.)" that was purchased by Mr Waqas Mann on behalf of GCL.

189. Mr Amber replied on 14 February 2011 as follows:

> "Mr Mann was brought in to purchase stock. He did not want to go on the payroll and we were not sure of his performance and gave him a trial period. He invested his money and I returned the capital for 14 units of iPhone4 16 GB at £499.00 + his commission."

190. However, GCL's HSBC bank statements show that GCL paid a total of £20,620 to Mr Mann during the period September to December 2010. In addition, there were numerous receipts containing Mr Mann's name relating to periods 09/10, 11/10, 12/10 and 01/11.

191. In cross-examination, Mr Amber sought to explain the inaccuracy of his reply on this point in his letter of 14 February 2011 as being due to the recent birth of his child which left him "pretty exhausted". He confirmed that Mr Mann had worked for GCL for more than one period. As regards Mr Mann's name appearing on receipts in respect of the above-mentioned periods, Mr Amber sought to explain this as a "coincidence". We found Mr Amber's explanation lacking in credibility and find that

Mr Mann was engaged by GCL in the period September to January 2011 and that Mr Mann was not an employee of GCL.

192. A large number of receipts provided by GCL specified names of purchasers who were either not employees of GCL or who were unknown and many receipts contained no name at all. As we have seen, Mr Amber claimed that this was because of the policy of Carphone Warehouse and Apple refusing to supply more than two mobile telephones per customer with the result that his employees made up names and details to avoid being restricted in the amount of their purchases.

193. In addition, however, many receipts featured names of individuals who were not employees of GCL but were, in fact, employed by other companies. For example, Mr M Iqbal was an employee of CIF but his name appeared on two of GCL's receipts dated 20/09/2010. In another example, the name of Mr Bilal Khan, an employee of Alpha Dane Ltd, appeared on several receipts claimed by GCL: 03/08/2010 (twice), 05/08/2010, 12/08/2010, 21/11/2010, 24/11/2010, 29/11/2010 and 30/11/2010. Mr Eraclides' unchallenged evidence was that these names and seven other names belonged to employees of other companies.

194. These and other examples were put to Mr Amber in cross-examination. Mr Amber said he had no idea how this could have happened and he could only attributed to coincidence and to the individuals having common names. Again, we did not regard Mr Amber's response as being credible.

Expense claims

195. Mr Amber asserted that his runners travelled considerable distances in order to buy mobile phones from different retail outlets.

196. In a letter dated 19 January 2011 Mr Amber addressed the issue of expenses:

> "Expenses are accounted by Global Cellular Ltd and are worked out at year-end."

197. In a letter dated 9 February 2011, HMRC queried Mr Amber's account and referred to their PAYE records. They could not understand how GCL's employees were able to make a living from their wages considering the level of their expenses.

198. Mr Amber stated in a letter dated 14 April 2011:

> "[W]e do not claim VAT on small expenses – we only put through the following: sales, purchases rent, phones and shipping. Global Cellular accounts for the expenses incurred by employees. Our calculation is done on a unit basis. We do not submit and make input VAT [sic] on these expenses. Calculations are made on receipts. We do not apply VAT fuel scale charges to petrol expenses. Our staff are based around the UK. Travel etc. is funded from the float that we give our staff."

199. The cash book ledger and retail purchase ledger submitted by GCL at the review stage contain specific entries in respect of travel and other staff expenses. However, the ledgers contained no indication of how these figures were calculated. The figures shown in respect of expenses were not proportionate to the value of purchases said to have been made. For example, on 25 November 2010 the cashbook ledger indicated that purchases totalling £220,886.24 had been made and £270 expenses associated with those purchases were claimed to have been incurred. However on 24 November

2010 purchases totalled £109,216.31 and expenses were incurred of 325. We therefore concluded that expenses were not paid on a per unit basis as Mr Amber claimed.

200. We further note that GCL has not supplied any receipts or employee claims in respect of expenses incurred. If GCL's employees claimed expenses from the cash float given to them by Mr Amber we would have expected receipts to have been provided to evidence their claims.

201. Mr Amber's evidence on the question whether his employees actually handed him receipts for their expenses was vague and contradictory. He said in relation to expenses receipts:

> "If they had something to pass on to me I took it, otherwise I wasn't pushing for it."

202. However, when pressed by Mr Foulkes, Mr Amber said he could not recall whether his employees ever gave him receipts.

203. In cross-examination Mr. Amber said that he did a quick mental calculation when a runner came in with handsets. If the difference between the stock purchased by the runner and the cash given was reasonable, he would treat it as expenses. He seemed unable to explain why he had told HMRC that expenses were calculated on a unit basis.

204. Overall, we found Mr Amber's account of how he dealt with expenses of his runners, a fairly basic matter in relation to the running of GCL's business, to be contradictory and lacking in credibility.

The number of runners employed by GCL

205. The number of runners employed by GCL was unclear and Mr Amber's evidence on this topic was vague.

206. In a note of a meeting with HMRC on 13 October 2010, Mr Eraclides recorded the following:

> "Mr Amber explained that he had a team of 5 – 6 people working on behalf of Global Cellular who travelled throughout the UK purchasing the required stock. These individuals are paid a commission of between £2 – £5 depending on the value of phones purchased. He added that in the process of trying to purchase Apple iPhone 4s he had taken on a few more people that he had paid in cash as they didn't want to go through the books."

207. Mr Eraclides' note of the meeting was made on 14 October 2010.

208. A list of employees was provided by GCL on 14 February 2011 and showed 12 employees, including Mr Amber and Ms Wagenheim.

209. In addition, as we have seen, Mr Waqas Mann appears to have been buying mobile phones on behalf of GCL in the period September to December 2010.

210. Mr Amber was cross-examined about Mr Eraclides' note of the meeting of 13 October and particularly as regards the reference to Mr Amber having recruited "a few more people that he had paid in cash as they didn't want to go through the books." Mr Amber said that he could not recall the statement and thought it may have been a

misunderstanding. Later, Mr Amber claimed that he could not remember whether he took on more people.

211. We did not find Mr Amber's evidence convincing. We considered that his replies were deliberately vague. Mr Amber claimed to have been able to deal with the cash outflows of his business in his head, without keeping records, yet he could not confirm to us how many people he actually employed. On his own account, these were people to whom he entrusted tens of thousands of pounds and whom he trusted, yet he could not remember whether he recruited these extra people. We did not find this credible.

Commissions paid to GCL's runners

212. As we have just seen, in HMRC's note of meeting on 11 October 2010 Mr Amber is recorded as explaining that his employees: "…are paid a commission of between £2 – £5 depending on the value of the phones purchased."

213. In his oral evidence, Mr Amber said that he had never paid commissions to staff. Instead, his employees were paid a basic salary and he had intended to pay them a bonus depending on performance at the end of each year, although, in the event, he was unable to do so.

214. Mr Amber suggested that the reference to commissions in HMRC's note of the meeting on 11 October 2010 must have been a mistake. Again, we did not consider Mr Amber's explanation satisfactory or credible.

The Bhaiyats

215. In his witness statement Mr Amber said that two of his employees, Yusuf and Ahmed Bhaiyat ("the Bhaiyats"), lived in the north of England. Mr Amber was, therefore, not always able to meet them to give funds and, instead, he made some bank transfers to them. We should add that a third member of the Bhaiyat family ("A Bhaiyat") was recorded in the list of employees provided by GCL to HMRC on 14 February 2011.

216. During the period September 2010 – February 2011, approximately £400,000 was transferred to the Bhaiyats, according to the retail purchases ledger. A total of approximately £1 million was paid to the Bhaiyats in 2010.

217. In November 2010, the Bhaiyats set up their own business, North End (Lancs) Ltd ("North End"). In common with GCL, North End purchased stock from retailers and other wholesalers and then sold the stock in wholesale quantities to other UK and non-UK companies. North End dealt with a number of suppliers and customers who are also suppliers and customers of GCL.

218. In January and February 2011, GCL purchased stock from North End whilst the Bhaiyats were apparently employed by GCL and receiving funds to purchase stock for GCL.

219. We recognise that this was an unusual arrangement and that there were potential conflicts of interest. However, we accept Mr Amber's evidence that he could still make a profit by dealing with the Bhaiyats and there was no reason for him not to do so. Accordingly, we did not consider that GCL's relationship with the Bhaiyats shed much light on the questions in issue in this appeal.

Cash payments to the runners

220. In his witness statement Mr Amber said that he took note of the amount of cash given to each employee in order that it could be reconciled with purchases at the end of each day when all of the receipts the employees handed over had been added up and the stock accounted for. Later in his witness statement, Mr Amber seemed to contradict himself. He stated as follows:

> "the business had rapidly become unmanageable and, during the periods in question, we simply could not maintain the records that we should have done, and would have done when additional office-based members of staff were brought in. For this reason, I did not keep firm records of the funds given to each member of staff at any one time, as long as the end of the day I was happy that the goods and money tallied up. I was, at that time, aware of all the money that was going in and out of the Company, I simply did not retain good records."

221. In cross-examination, however, Mr Amber denied having taken notes reconciling how much cash he had given his employees with the phones that they had purchased in the cash left over. Mr Amber accepted that he did it all in his head:

> Q. You told us in your evidence that as far as the cash that you gave to your employees was concerned, you reconciled it in your head, you knew how much you had given them, they came back with phones, it looked about right and that was that. You didn't take any notes that might assist us --
>
> A. No.
>
> Q. -- in order to demonstrate what you had handed over to which employee?
>
> A. No.
>
> Q. That's the case, is it, in respect of your employees?
>
> A. Yes, I don't have those records.
>
> Q. They don't exist. You never took them, you say?
>
> A. No.
>
> Q. It was all done in your head?
>
> A. I was in the business on a day to day basis. I knew what was going on."

222. When asked to explain this inconsistency about whether he had taken notes of the cash he had given to his employees, Mr Amber said:

> "A.What I meant by that [the statement in his witness statement referred to above] was I would have a Post-it note or I'd write on the back of a piece of paper, 10,000 and as soon as it came back I'd tear it up and throw it away, if it wasn't in my mind.
>
> Q. Mr Amber, I have just taken some time to confirm with you that there was no record, no written record. It was all done in your head?
>
> A. In my head or, as I have just said to you, if I would have written something it would have been on a little piece of paper just because I was rushing to do something.
>
> Q. Is this just another example of your account shifting in response to the questions that you're being asked?

A. No."

223. Certainly, no contemporaneous records of cash payments or floats given to the runners were produced in evidence by GCL. We concluded that no permanent record was kept by Mr Amber of these cash payments.

The financial analysis

224. Throughout the course of HMRC's extended verification and in the review process, GCL produced a large number of computer-based ledgers and spreadsheets seeking to demonstrate that it had made the purchases of mobile phones which it claimed in respect of the disputed periods.

225. A significant part of Mr Bradshaw's review letter concerned the inconsistencies and difficulties in carrying out a reconciliation of all the figures contained in the information supplied. Similarly, Mr Eraclides' witness statement examined in considerable detail the same issues in relation to the financial information.

226. During the course of the hearing, much attention was focused on the bulk funds reconciliation for the whole of 2010. This was the alternative method of reconciliation suggested in Mr Eraclides' letter of 3 March 2011 (see paragraphs 112-113 above). This compared the total funds used solely for the purchase of stock from various retailers with the totals declared on GCL's Retailer Purchase summary spreadsheets for the whole of 2010.

227. According to information supplied by Mr Amber the total of funds used by GCL to purchase retail stock from January – December 2010 was £7,006,521. The total of the gross retail purchases made in the same period, as subsequently adjusted, was £8,408,515.76. There was, therefore, a difference of £1,401,994.76.

228. In the course of giving evidence, Mr Eraclides accepted that the total amount of approximately £400,000 paid to the Bhaiyats had not been taken into account in his calculations.

229. In Directions released on 17 September 2014, we asked for further written submissions, on, *inter alia*, the effect of payments to the Bhaiyats on the £1.4 million discrepancy.

230. In response to those Directions, GCL submitted a 12 page document ("Annex A") which purported to reconcile the £1.4 million discrepancy identified by Mr Eraclides in his witness statement. Essentially, Annex A (page 12) sought to explain the discrepancy by claiming that the £1.4 million "gap" between purchases compared with funding could be explained by cash produced by onwards sales of the relevant goods. The difficulty with this analysis was that, with the exception of three figures, none of the figures in Annex A (page 12) was in evidence.

231. In Annex A, GCL sought to explain the failure to produce a reconciliation of the £1.4 million figure by claiming that Mr Eraclides had only asked for payments made through the bank. However, it seems to us that it was abundantly clear that Mr Eraclides was seeking to reconcile the purchases of GCL with its overall funding the 2010 as an indirect means of verifying GCL's input tax claim for the disputed periods. That Mr Eraclides asked the banking information as a source of funding was understandable - in most businesses that would be the first place to look for that information. To argue, as GCL does, that Mr Eraclides was at fault for not asking

about other sources of cash receipts seemed to us to be simply obtuse. What GCL does not explain is why it waited for the second round of written submissions, and then only on the Directions of the Tribunal, to put forward an explanation for the £1.4 million discrepancy – a discrepancy noted in Mr Eraclides' witness statement served on GCL many months before the hearing (and, indeed, was referred to in Mr Bradshaw's decision letter). We also note that the reconciliation in Annex A (page 12) reconciled the amounts exactly and not, as we would have expected, approximately. Accordingly, we cannot accept that this was an acceptable explanation for the £1.4 million discrepancy referred to above.

232. We should add that it became clear from Annex A that the omission by Mr Eraclides to take account of the payments of approximately £400,000 to the Bhaiyats had no relevance to or impact on the £1.4 million discrepancy.

233. We should also record that Mr Eraclides' analysis was criticised by GCL for the fact that he failed to take account of credit card payments by GCL. However, Mr Eraclides' evidence, which we accept, was clearly that he had taken into account credit card payments.

234. Furthermore, GCL has been unable to explain the missing transfers to the Gelt Centre and to Freedex referred to in paragraphs 169 and 171 above respectively. In our view, this further confirms that the ledgers and spreadsheets put forward by GCL for the HMRC review were of suspect reliability.

235. HMRC have throughout the extended verification, the review process and in their submissions before the Tribunal drawn attention to the lax record-keeping of GCL. One of the key weaknesses was Mr Amber did not keep adequate records as regards the cash movements in his business. In particular, he did not keep a record of how much cash he paid to his runners. He said that he kept all of this in his head or, at best, made notes on scraps of paper or on Post-it notes. It seems to us wholly incredible that a business with a turnover of approximately £8.7 million could be run in this manner. We consider Mr Amber's evidence in this regard to be completely lacking in credibility. Furthermore, Mr Amber does not seem to have kept adequate records of how cash flowed into his business, as we have just discussed. In short, GCL's record-keeping seem to have been little short of chaotic.

The Apple letter

236. At the review stage, GCL submitted a letter which it claimed came from the Apple Store in Brent Cross, London. The Apple letter has no letter-head or date and reads as follows:

> "To whom it may concern,
>
> This letter serves as confirmation that Global Cellular Ltd has purchased Apple products from our stores during 2010/2011.
>
> The VAT invoices issued are in accordance with the requirements set out by HMRC. Global Cellular Ltd purchased goods and have [sic] been issued valid VAT invoices in accordance with our company policy."

237. At the bottom of the letter is the stamped address of the Apple Store in Brent Cross which is imprinted three times (once the correct way up, once upside down and once diagonally).

238. It was accepted by GCL that the references to VAT invoices in the letter were incorrect – the receipts were not valid VAT invoices.

239. Mr McDougall, a European Business Operations Manager employed by Apple, confirmed that the letter was not a genuine Apple document as would be issued by Apple to a customer on a request made to Apple. Mr McDougall also confirmed that when requests for documents of that nature were made, the Apple store teams were trained to refer requests to the tax and legal teams that support Apple's UK retail business and to take no further action themselves. Mr McDougall would not have expected an employee of Apple to have authenticated such a letter.

240. Mr McDougall noted that an internal investigation was carried out by Apple to ascertain whether the letter was in fact authenticated by an employee at the Apple store in Brent Cross, but the results were inconclusive.

241. Mr McDougall did, however, confirm that the stamp that had been applied to the letter was in the correct format for a stamp used by Apple. He believed that this stamp was available at the Apple store in Brent Cross on the date in question (although, in fact, the letter was undated), but he could not give a definite confirmation to this effect.

242. Mr McDougall also confirmed that all Apple staff members in a store wear legible name badges.

243. Mr Amber said that he had obtained a letter when he visited Apple's store at Brent Cross in or around August 2011. He said that HMRC had pressed him for proof that GCL had purchased mobile phones from Apple. He had tried to get the invoices reissued without success. He said that he had been in touch with the business team at the Brent Cross store and asked them to help. He said he had spoken to a lady at the store but he did not get her name. She refused to put a name on the document but typed it on one of the Apple computers in the store and she then obtained the company's stamp and stamped it.

244. Mr Amber said that he probably would have taken a few invoices to show the Apple lady, whom he did not know, but he could not remember whether he did so. Moreover, Mr Amber could not recollect whether he showed invoices from different Apple stores.

Bulk GSM

245. We have already encountered Bulk GSM as a supplier to a Luxembourg company called 3G Trading (see paragraph 65 above).

246. Bulk GSM had a business of buying and selling mobile phones. According to Mr Amber, Bulk GSM was one of the first companies he had dealt with after arriving in the UK. The relationship grew as GCL bought quantities of stock from Bulk GSM. Mr Amber said that he became "friends over and above business colleagues" with the owners of Bulk GSM.

247. On 23 December 2010 and 21 January 2011, Bulk GSM agreed to lend £50,000 and £25,000 respectively to GCL.

248. Bulk GSM had supplied GCL in two transactions (15 March 2010 and 18 November 2010) and GCL had supplied Bulk GSM in three transactions (18 August 2010, 24 August 2010 and 12 January 2011).

249. Bulk GSM's 07/06 VAT return was selected by HMRC for extended verification of its repayment claim of £389,378.72. HMRC subsequently issued a decision letter disallowing £344,000 on the basis that Bulk GSM should have known that its transactions were connected with fraudulent evasion of VAT. Although Bulk GSM appealed this decision, it withdrew its appeal shortly before it was due to be heard by this Tribunal.

250. In a letter dated 25 October 2010, HMRC wrote to Bulk GSM informing it that its purchases from a company called Meadowdown Ltd traced back to deal chains that included a defaulting missing trader.

251. HMRC argued in this appeal that the provision of loans totalling £75,000 from a company which was a trading partner and competitor was surprising. Mr Amber maintained that they were a long-standing trading partner and there was nothing odd about Bulk GSM having lent his company money. Mr Amber denied knowing anything about the fact Bulk GSM, with whom he had traded for years, had had input tax denied on the basis of its involvement in MTIC transaction chains.

252. In cross-examination, Mr Amber was asked about the extent that he shared information with Bulk GSM, particularly in relation to suppliers and customers. He denied doing so. This contradicted Mr Amber's witness statement:

> "GCL has traded with and worked alongside [Bulk] GSM since 2000 and we identified similar markets and customers. GCL shared information with GSM regarding customers, markets and trends and this also formed part of the due diligence measures undertaken. The friendship and trust between both companies grew and we became partly more business associates working together rather than in strict competition. GSM offered GCL a loan at a time when GCL needed additional funding to procure stocks it had identified through its business model. GSM entered into the agreement on the basis that, by that time, we knew each other well."

253. Mr Amber attempted to explain away the contradiction, but we found his explanation vague and unconvincing.

The wholesale purchases in 02/11

254. In respect of the 02/11 period HMRC denied GCL's input tax claims in relation to invoices in respect of purchases of iPhones from three wholesale entities: NZ Electronics Ltd, Ghulam Murtaza (trading as Call Inn First ("CIF")), and Freeway Telecom Ltd. HMRC accepted that the GCL had received some wholesale supplies in this period into its warehouse (and there was no dispute about the deductibility of input tax on those supplies). Ms Wagenheim's evidence was that she checked consignments of goods delivered from wholesalers. However, she could not say which wholesale supplies she had checked: some were checked by her and some by Mr Amber.

255. Mr Amber said that the three suppliers had supplied GCL with mobile phones as evidenced by the invoices with IMEI numbers attached. Cash receipts evidenced the fact that GCL had paid for the goods (GCL paid for the disputed supplies in cash). Mr

Amber said that he and Ms Wagenheim checked the goods against the IMEI numbers after they were delivered by Mr Zaigham.

256. There were VAT invoices in respect of the alleged wholesale supplies in 02/11 from the above three wholesale suppliers to GCL.

257. The three suppliers did not operate independently. The director of NZ Electronics, Mr Zaigham, is said to have collected cash from GCL in respect of alleged purchases from all three companies. Moreover, they produced invoices in virtually identical formats.

258. Each of the invoices from the three suppliers was less than £5,000 in amount, which was the threshold for the VAT reverse charge provisions introduced to combat MTIC fraud.

(a) Call Inn First ("CIF")

259. CIF was in fact a trading name for a Mr Ghulam Murtaza. Mr Murtaza carried on an unincorporated business.

260. As regards the VAT invoices issued by CIF, each invoice had a sheet listing IMEI numbers attached to it.

261. GCL produced cash receipts showing the amount of cash paid by GCL to CIF, the date it was paid and the cash receipt number. In addition, the receipt specified the number and type of phones supplied, the price per unit and contained the signature and printed name of the person receiving the money.

262. Officer Cordwell compared the IMEI numbers obtained from CIF with those obtained from GCL and found that only 21 iPhones out of 150 were on both CIF's and GCL's lists. A spreadsheet produced by Officer Cordwell, based on listings of IMEI numbers produced by the trader in relation to the mobile phones allegedly traded, showed that only 21 numbers corresponded to those on similar lists provided by the GCL. Of those 21 IMEI numbers, only 7 appeared on GCL's list as having been bought on the same invoice as recorded in CIF's records. Accordingly, the records of the sale and purchase of iPhones by reference to their IMEI numbers did not fully correspond.

263. Also, CIF relied upon a number of duplicate Apple receipts relating to evidence its purchase of iPhones in support of its input tax claim in the 04/11 quarterly period. In one case, Officer Cordwell identified the original Apple receipt in the CIF's records. Both the original and duplicate receipts had been relied upon by CIF as evidence of its purchase of an iPhone in respect of two separate onward supplies, one of which was to the GCL.

264. HMRC also examined CIF's bank statements and Apple gift card receipts in relation to transactions in the 02/11 period. The Apple gift card receipts indicated that they had been purchased by Freeway. Officer Cordwell was informed that the gift cards had been purchased by CIF from Freeway, but was provided with no evidence to support this claim. However, when the gift card receipt numbers were compared with those produced by Freeway to support its input tax claim, Officer Cordwell concluded that a number of gift cards had been used to support the same input tax claims both by Freeway and CIF.

265. Officer Cordwell also noted that an invoice dated 5 February 2011 issued by CIF to a company called World Tech Ltd had attached to it an Apple receipt which appeared to have been tampered with – the customer's name had been erased.

266. Mr Amber said that he had received the mobile phones in accordance with CIF's invoices. After Mr Mandalia had queried the fact that CIF's IMEI numbers on its invoices to GCL did not match those in CIF's records, Mr Amber said that he had spoken to his suppliers. Their explanation was that all three companies used the same accountant and that he had muddled up the invoices.

267. In our view, however, Mr Amber's report of the explanation given by his three suppliers concerning a mistake by their accountant, does not explain the difference in the IMEI numbers contained on the invoices to GCL from those in CIF's records. They were not records produced or supplied by their accountants.

(b) NZ Electronics

268. NZ Electronics was incorporated on 14 January 2011 and was run by its director Mr Naveed Zaigham. As we have seen, Mr Zaigham collected payments by GCL on behalf of NZ Electronics, CIF and Freeway. Mr Zaigham had no previous experience in the retail or mobile phone sector

269. In its application to register for VAT, the intended business activity of NZ Electronics was described as:

> "The retail of furniture, lighting equipment and other household articles …."

270. Mr Amber said that he met Mr Zaigham outside the Apple Store at Brent Cross. The meeting was a matter of chance and they struck up a conversation because Mr Amber had noticed Mr Zaigham had been buying phones in large quantities. Mr Zaigham introduced Mr Amber to Freeway and CIF. Mr Amber could not remember how the three suppliers had described their mutual links.

271. Mr Zaigham told Officer Coker that, as regards the transactions with GCL, he had purchased mobile phones from Apple retail stores, created the NZ Electronics invoices on his computer and delivered the iPhones to GCL on the same day using his private vehicle.

272. Mr Zaigham informed Officer Coker that NZ Electronics did not have a bank account when it began trading in February 2011 – the account was only opened later that month. GCL, he said, had therefore paid him in cash and he had signed a cash receipt slip on each occasion to confirm that he had received the money.

273. Mr Zaigham was, however, unable to produce the original iPhone receipts from Apple, the original NZ invoices to GCL or the signed cash receipt slips. These, he said, had all been destroyed in a fire in the basement of NZ Electronics premises on 10 April 2011.

274. Officer Cordwell inspected the premises and was shown the area where the alleged fire took place. Mr Zaigham alleged that the fire was caused by a gas leak. Officer Cordwell observed that there was a gas pipe approximately 3 inches from the ceiling and about 2 inches from the basement wall (he estimated the basement as being approximately 7 feet high). He could see that there had been a scorch mark on

the wall which extended approximately 1 foot down the wall. This scorch mark was the only evidence that there had been a fire in the basement.

275. Officer Cordwell was informed that the Apple receipts had been stored on the table beneath where the fire occurred. However, Officer Cordwell concluded that there was no evidence that anything had been burnt on the table and there was no evidence of scorch marks going up the wall. A report produced by the London Five Brigade stated:

> "Item ignited first: Floor coverings
>
> Estimated size of fire on arrival of Brigade: Limited to item first ignited
>
> Approximate area damaged by fire (m^2): None."

276. Officer Cordwell considered that the London Fire Brigade report contradicted Mr Zaigham's account and she concluded that NZ Electronics' records had not been destroyed in the fire.

277. Mr Zaigham was able to produce to HMRC some of the NZ Electronics invoices and iPhone IMEI numbers which were allegedly sold to GCL as they were stored on his computer.

278. GCL produced 24 invoices from NZ Electronics relating to February 2011. Attached to each of these invoices was a cash receipt slip on GCL headed notepaper signed by Mr Zaigham. These receipt slips were the only evidence of payment by GCL.

279. NZ Electronics' purchase book, examined by Officer Coker, indicated that approximately 50 iPhones appeared to have been sold to GCL before they were purchased from Apple. GCL suggested that this was a result of a typing error. There seemed no evidence, however, to support the suggestion.

280. It was apparent from the invoice numbers on the invoices issued by NZ Electronics to GCL, that GCL was NZ Electronics' only customer in relation to its first 29 invoices.

(c) Freeway

281. Freeway's bank account had also been opened on 1 February 2011 i.e. very shortly before it allegedly traded with GCL.

282. Mr Mahmood of Freeway stated that Mr Zaigham acted as a "go in-between" man as regards GCL and Freeway, delivering the goods and collecting cash from GCL on behalf of Freeway.

283. Officer Coker compared Freeway's sales invoices to GCL, which were supplied by Freeway, with those supplied by GCL. She noted that one invoice, which was in GCL's records, was not in the records of Freeway. Moreover, the IMEI number sheet attached to the invoice in the GCL records appeared to have the same IMEI numbers as a different Freeway sales invoice issued to a different customer. In other words, according to Freeway's records it had sold the same mobile phones to two different customers.

284. Freeway's bank statement from February 2011 showed a payment of £5,700 by bank transfer from GCL in payment of invoice number 13 (which was in the same amount) – one of the disputed invoices.

Onwards sales in all periods under appeal

285. Mr Brown complained that Officers Mandalia and Eraclides had, during the extended verification of GCL's returns for the periods in dispute, failed to investigate GCL's onward supplies of the mobile phones which it claimed to have purchased.

286. In cross-examination Mr Eraclides accepted that the question of onwards sales had not been covered in the HMRC decision letters denying the entitlement to input tax for the periods under appeal. However, Mr Eraclides noted that so many of the retail receipts claimed by GCL did not relate to the relevant VAT period, he thought it would be very difficult to analyse the corresponding sales. The amount of work involved and the fact that Mr Eraclides did not consider that a sales analysis would produce a meaningful result (bearing in mind the credibility issues with GCL's evidence supporting its input claims) meant that HMRC did not carry out an analysis of onwards sales.

Arguments of the parties and discussion

287. It was common ground that the burden of proof in this appeal rested with GCL. The standard of proof is the ordinary civil standard of the balance of probabilities.

The credibility of Mr Amber's evidence

288. We have significant reservations about the credibility of Mr Amber's evidence (which was repeatedly challenged in cross-examination).

289. We have highlighted above those areas in which we found Mr Amber's evidence unsatisfactory or lacking in credibility. At times we also found Mr Amber's replies under cross-examination to be vague or evasive.

290. In particular, we should draw attention to Mr Amber's claim that he kept a track of cash payments to runners in his head, with the assistance of the few scribbled notes (none of which were produced in evidence). As we have said, we regard this claim, in the context of a business with an annual turnover in excess of £8 million, as completely implausible. We accept that Mr Amber had a "hands-on" involvement in his business, but it strains credibility beyond breaking point to be required to believe that he could keep track of the cash payments which he claims were made to runners without some detailed written or electronic records. The implausibility of Mr Amber's claim seemed to us to strike at the heart of GCL's case in relation to the retail receipts.

291. The other areas, described above, in which we found Mr Amber's evidence unsatisfactory or lacking in credibility include:

(1) the manner in which he started dealing with the Gelt Centre (paragraph 164 above);

(2) the degree to which Mr Mann was involved as a runner (paragraph 191 above) and the appearance of names on receipts of individuals who worked for other companies (paragraph 194 above);

(3) his account of the manner in which expenses were handled (paragraph 204 above);

(4) the number of runners employed by GCL (paragraph 211 above);

(5) his contradictory statements about the remuneration/commissions paid to runners (paragraph 214 above); and

(6) his contradictory statements about the nature of his information sharing with Bulk GSM (paragraph 252 above).

Retail receipts: a supply made to GCL or to the runners – the Gold Standard issue?

292. On Mr Amber's own evidence, the runners were employed by GCL to buy mobile phones from retail stores. In buying the phones, the runners gave either false names or no names at all. The purpose, he said, was to circumvent the restriction operated by stores which prevented a customer buying more than a certain number of mobile phones. The whole purpose was to make it appear that the runners were buying the mobile phones on their own account and not for GCL.

293. In those circumstances, we raised with the parties whether section 47(2A) VATA 1994 precluded GCL from obtaining an input deduction. Section 47(2A) VATA 1994 provides:

> "(2A) Where, in the case of any supply of goods to which subsection (1) above does not apply, goods are supplied through an agent who acts in his own name, the supply shall be treated both as a supply to the agent and as a supply by the agent."

294. In particular, we directed the parties to the decision of this Tribunal in *Gold Standard Telecom Ltd v. HMRC*, [2014] UKFTT 577 (Judge Kempster and Mrs Tanner) which decided that section 47(2A) VAT Act 1994 precluded the appellant in that case from obtaining an input deduction on broadly similar facts to those in this appeal.

295. Mr Brown, for GCL, submitted that the decision in *Gold Standard* was incorrect. In ascertaining the recipient of a supply, the consideration of economic realities was a fundamental criterion (*HMRC v LMUK Ltd* [2010] STC 2651 at para 39) as was recognising the substance and reality of the transaction (*HMRC v. Aimia Coalition Loyalty UK Ltd* [2013] UKSC 42 at para 66). Taking the economic realities into account, when a runner visited a store and entered in to a contract he was not doing so in his own name. He entered the store with the sole intention of purchasing goods for his employer. He had been provided with money to purchase goods by his employer. If the employee made no representations about whom he was buying for, then the goods were purchased by him for his employer.

296. We cannot accept that submission. In our view, the economic and commercial substance of the operation of the runners was that the runners did buy the mobile phones in their own names (0r in no one's name) and not in GCL's name – that was the whole point of using runners. They went out with the clear purpose of buying mobile phones from the retailers on the basis that, as regards the retailers, the purchases they made were for themselves and not for GCL. Whether they gave a name (their own name or a fictitious name) or not, the reality as far as both the shop and runner was concerned, was that a supply of goods was being made to the runner. In order to circumvent the restriction that retail stores operated in respect of the

number of mobile phones that could be sold to one customer, it was essential, that runners did not represent to the stores that they were buying on behalf of GCL.

297. In our view, with respect, the decision in *Gold Standard* was correctly decided. We note that the same conclusion has been reached, again on broadly similar facts, by this Tribunal in *Xpress Telecom Limited v. HMRC* [2014] UKFTT 1003 (TC) (Judge Poole and Ms Gill Hunter) and *Scandico Ltd v Revenue & Customs* [2015] UKFTT 0036 (TC) (Judge Howard M Nowlan and Ms Sonia Gable). In *Scandico* Judge Nowlan said:

> "76. We accept that, as a matter of general English law when an agent for an undisclosed principal enters into a contract, or buys goods, on behalf of his principal, the contract and the purchase is made by the principal. Admittedly, if the principal fails to meet its obligations under the contract, the agent for the undisclosed principal is also directly liable to the counterparty, but this does not change the fact that if the agent has, for instance, paid for the goods at the time of purchase, once they have been purchased, that purchase has been made by the principal, and the goods belong to the principal.
>
> 77. For VAT purposes, however, the analysis is changed by the deeming provision of section 47(2A) VAT Act 1994. That sub-section provides that *"the supply shall be treated both as a supply to the agent and as a supply by the agent"* for VAT purposes. The *"shall be treated"* notion indicates that there is a statutory fiction, naturally with the fiction modifying the strict legal analysis. The resultant position makes pragmatic sense in the context of VAT in that the counterparty (Apple) could not indicate that the supply was made to anyone other than the agent, since no other party would be known to the counterparty. Accordingly, but for the fiction, the agent would be unable to claim an input deduction because he would not own the goods purchased, albeit that the VAT invoice would have been in his name where a valid VAT invoice had been issued. Equally the principal would be in the reverse position of owning the goods but of not having a VAT invoice in his name."

298. We agree with this analysis and therefore conclude that section 47(2A) had the effect that the mobile phones were supplied by the various retail stores to the runners, who then supplied the handsets to GCL.

299. Mr Brown's alternative argument was that, even if *Gold Standard* was correctly decided, and each runner supplied the mobile phones to GCL, the total value of supplies meant that each employee was registerable for VAT in his/her own name and was therefore a taxable person (section 3 VATA 1994), or in any event a taxable person under article 9 VAT Directive 2006/112/EC. Therefore the supplies by the runner as a taxable person to GCL were taxable supplies (section 4 VATA 1994) and GCL was therefore entitled to claim input tax thereon (sections 24-26 VATA 1994). In this case, however, the GCL would have no valid VAT invoices from each runner to support its claim for input tax and therefore HMRC had a discretion under regulation 29 A whether to accept alternative evidence in lieu of a valid VAT invoice.

300. Section 3(1) VATA 1994 provides that "a person is a taxable person for the purposes of this Act while he is, or is required to be, registered under this Act." Accordingly, if it could be shown that each runner was making taxable supplies above the registration threshold, GCL would be entitled to an input deduction for the

supplies deemed by section 47(2A) VATA to be made by the runners to GCL, provided HMRC exercised its discretion under regulation 29 to admit alternative evidence of the supplies having been made.

301. Mr Foulkes, for HMRC, accepted that, depending on the number of runners operating at any given time, it was likely that many of them, if not all of them, would be a "taxable person" by virtue of the level of supplies being made. Were it to be established that a supply was made by a runner who was a taxable person, it would follow that the GCL would be entitled to claim input tax on that supply, albeit that no valid VAT invoice would be held and such claims would therefore be subject to the Commissioners' discretion.

302. However, Mr Foulkes submitted that Mr Amber had given conflicting accounts of how many individuals were used as runners. Although a list of employees was produced, Mr Amber also said that he took on a number of other people to act in this role. In Mr Foulkes' submission it was impossible to say - by virtue specifically of the Appellant's complete failure to record purchases undertaken by any individual, or funds given to each individual - which individuals were taxable persons by virtue of the level of purchasing / supply conducted by them. It was entirely possible that not all so qualified. Any attempt to quantify the level of supplies that came from taxable persons would be guesswork, precisely because the Appellant kept no records. In the circumstances, the Appellant had failed to satisfy the burden on it to establish, in respect of any purchase by a runner as represented by a given receipt, that that purchase gave rise to a taxable supply to the Appellant.

303. We accept this submission. The burden of proof as regards the question whether each individual runner was a taxable person falls on GCL. In our view, however, GCL has not discharged the burden of proof. In the first place, Mr Amber's evidence about the number of runners which GCL employed was vague and unsatisfactory. There were no records to demonstrate how many mobile phones were bought by any particular runner. Some phones, for example, were bought by Mr Mann who did not appear to exceed the registration threshold. On a turnover in excess of £8 million it is likely that some, or indeed most, runners did exceed the threshold: but which ones did and which ones did not would be , as Mr Foulkes submitted, a matter of guesswork.

304. Accordingly, we conclude that GCL has failed to show in respect of any purchase by an individual runner that the purchase resulted in a taxable supply to it.

305. This conclusion would, of itself, be sufficient to dismiss the appeals a period 09/10, 10/10, 11/10, 12/10 and 01/11. However, because both parties fully argued the question whether GCL received a supply we shall now turn to consider that issue. The following discussion proceeds on the basis that, contrary to the conclusion we have just reached, section 47(2A) VATA 1994 does not apply so that any supplies by the retail stores would be to GCL directly rather than to the runners.

The retail receipts – were supplies of mobile phones made to GCL?

306. As explained in paragraphs 55 – 57 above, this question is relevant to all the periods under appeal. We shall, however, deal with the wholesale supplies in period 02/11 separately because slightly different considerations apply. We therefore now consider whether taxable supplies of goods were made to GCL in accordance with the retail receipts provided by GCL.

307. The main obstacle facing GCL involves the absence of records demonstrating the amounts of cash given to runners to purchase mobile phones. In addition, as we have noted, there was no evidence as to the amount of mobile phones bought by each runner from the cash float allegedly given to him/her. In the absence of such records and bearing in mind our concerns about the credibility of Mr Amber's evidence in relation to keeping track of cash payments, it seems to us impossible for GCL to establish that the relevant supplies were made to it.

308. The various summary listings and spreadsheets produced by GCL did not enable us to trace the purchases through to each individual receipt and to each applicable payment. Large numbers of receipts related to periods outside the periods in which they were claimed. This made a reconciliation of the cash amounts paid with the receipts almost impossible.

309. The attempted cumulative reconciliation i.e. for the whole of 2010, has been discussed above. The records seem to contain some very substantial discrepancies. We have mentioned the £1.4 million discrepancy as well as the omission from the Gelt Centre ledger of a number of transfers by GCL to the Gelt Centre. The fact of the matter is that GCL's records were so inadequate that any form of satisfactory financial reconciliation was impossible. We note, in this context, the attempted explanation of the £1.4 million discrepancy in Annex A of the second set of written submissions put forward by GCL. As we have indicated, most of the figures contained on page 12 of Annex A were not in evidence and no satisfactory explanation was put forward concerning why a reconciliation was not attempted earlier, particularly when the £1.4 million discrepancy had been highlighted in Mr Eraclides' witness statement for many months prior to the hearing.

310. We have considered the Apple letter which Mr Amber said he obtained from Apple's Brent Cross store. It is a strange letter (it was undated, unsigned and unspecific) and, as Mr McDougall pointed out, was not issued in accordance with Apple's standard operating practice. We do not consider it necessary to decide whether the letter was genuine – HMRC submitted that it was not – because, in our view, it does not support GCL's case.

311. First, the letter was written, on Mr Amber's account, after he may have shown (he was not definite that he did) the Apple employee a number of receipts which are the subject of these appeals. Secondly, Mr Amber could not remember whether he showed the Apple employee receipts from any Apple Store other than Brent Cross. Thirdly, there was no evidence that the receipts named GCL. On this basis, it is hard to see how the Apple employee who allegedly produced and stamped the letter could be in any position to confirm that the receipts evidenced supplies made to GCL. Accordingly, we consider that the Apple letter, even if it is genuine, provides no significant support for GCL's case.

312. We have already mentioned the fact that the Gelt Centre ledger omitted a number of transfers by GCL. There are also a number of other issues relating to GCL's relationship with the Gelt Centre indicated that the two organisations did not enjoy an arm’s length commercial relationship. First, the fact that the Gelt Centre delivered substantial amounts of cash to GCL before GCL's cheques had cleared seemed to us an uncommercial arrangement. There was no credible explanation why the Gelt Centre should take such a credit risk on GCL.

313. Secondly, Mr Amber's account of how he came to deal with the Gelt Centre seemed unconvincing. Mr Amber told the story of how one of his French customers

took him to the Gelt Centre, but it then transpired that Mr Amber had waited outside in the car and that he had only met Mr Ball, proprietor of the Gelt Centre, by a chance meeting in the street. As we noted, it appeared that Mr Amber changed his story halfway through. We were left with the impression that we had not been told the full truth.

314. Although these factors are somewhat inconclusive, the Gelt Centre played an important role in providing the cash with which GCL alleged that it made very significant purchases of mobile phones. Cumulatively, however, these factors left us uneasy about the relationship between GCL and the Gelt Centre and concerned about the credibility of Mr Amber's evidence.

315. We have noted that many of the receipts contained names of purchasers who were not employees of GCL and whose identities were unknown. Mr Amber explained that this was caused by the policy of major retailers, such as Apple and Carphone Warehouse, of preventing an individual purchaser acquiring more than two mobile phones. For this reason, Mr Amber said that his staff made up details to circumvent these restrictions. Mr McDougall's evidence, however, was that although the staff in Apple stores were instructed to ask for a potential purchaser's name, they would still sell the phone to the potential purchaser if they refused to give their name. There was, therefore, no need to make up names, at least as regards Apple stores.

316. We have recited earlier in this decision the evidence relating to how GCL paid expenses and commissions to its runners. Mr Amber's account was that the runners travelled considerable distances to buy phones for GCL. There was, however, no satisfactory or reliable evidence that the significant travelling expenses that would have been thereby incurred were accounted for or reimbursed. We did not find Mr Amber's evidence satisfactory or credible.

317. The way in which retail receipts were said to have been processed by GCL was the subject of considerable debate at the hearing. The gist of Ms Wagenheim's evidence was that she sorted the receipts as they came in and then put them in a drawer to be processed (i.e. entered on the computer) later. It was evident that periods of busyness in the office could result in the receipts being processed at a later date. The drawer was accessible both by Ms Wagenheim and by Mr Amber. There seemed no satisfactory explanation why so many of the receipts claimed in respect of a particular VAT period in fact related to earlier periods. This seemed at odds with Ms Wagenheim's evidence that she tried to process receipts as quickly as he could. She said that busy periods could result in one or two weeks' delay but that she tried to catch up at the end of the month. As we have described above, very substantial percentages of the receipts did not relate to the periods in which they were claimed (see paragraph 159 above) and some related to periods long before the periods in which they were claimed. We infer from this that the receipts were not processed in the manner in which Ms Wagenheim described. At the very least, the delay in processing was much greater than she believed. The reason for this remains unexplained. The result was that it was extremely difficult for HMRC to reconcile the receipts with GCL's funding analysis which began in September 2010, which was no doubt why Mr Eraclides suggested a cumulative reconciliation for 2010.

318. The fact that HMRC did not investigate GCL's alleged onward supplies did not, in our view, affect the position. It was open to GCL to adduce evidence in relation to the onward supplies if it thought it would assist its case but did not do so. The only evidence adduced by GCL in relation to onward supplies related to payments from

"Easylinks" to GCL in December 2010 and the fact that GCL declared output tax on supplies to UK customers. Mr Brown argued that GCL had not appreciated that HMRC would call into question GCL's onward supplies. But in any event, if GCL believed that evidence of its onward supplies would help substantiate the fact that supplies had been made to it in the periods under appeal, it should have produced evidence to support this contention. In our view, the evidence of onward supplies was not sufficient for us to identify the nature and quantity of the supplies which GCL claimed it had received in the disputed periods.

319. Furthermore, we do not accept the argument put forward by Mr Brown that HMRC did not make it clear to Mr Amber what evidence it was seeking. It is true that the letter from Mr Eraclides of 3 March 2011 in respect of the cumulative funds reconciliation referred to bank payments. It was clear, however, as we have said, that Mr Eraclides was seeking to match all sources of funds with GCL's claimed purchases. The relevant paragraph in the letter read as follows:

> "The importance of providing as much secondary evidence as possible which in this instance will predominately be proof of payment through reconciliation of your bank statements as to your purchases was made clear to you."

320. The letter clearly asks for "as much secondary evidence as possible" and indicates, not unnaturally, that this would be "predominantly" by means of bank statements. There was no suggestion that bank payments were the only or exclusive means of providing information as regards the source of funding. If there were other material sources of funding then GCL should have raised this with HMRC.

321. It may well be, as Mr Brown commented, that in reality HMRC were asking for information which GCL, because of its poor record-keeping, did not possess: that is GCL's fault not HMRC's.

322. Drawing all these strands together, the failure by GCL to keep adequate records indicating how much cash was paid to the runners, which telephones were bought by which runners, the lack of identification on many of the receipts, the identification of employees of other companies on the receipts, the indications of a lack of commerciality in the relationship with the Gelt Centre, the discrepancies in the records that have been produced by GCL, taken together with the all the other factors mentioned above (including our concerns about the credibility of Mr Amber's evidence), mean that we have concluded that GCL has not established to our satisfaction that the goods were supplied to GCL, in accordance with the receipts,.

323. It is true, as HMRC accepted, that GCL did receive some supplies of mobile phones in the periods under appeal. It is, however, impossible to determine the quantities and details of those supplies.

324. In the light of our conclusion, it is unnecessary for us to consider whether HMRC's exercise of its discretion under regulation 29 (2) of the Regulations was reasonable.

Conclusion as regards the retail receipts – periods 09/10, 10/10, 11/10, 12/10 and 01/11

325. For the reasons set out above, we dismiss the appeals in relation to the periods 09/10, 10/10, 11/10, 12/10 and 01/11

The wholesale invoices – the period 02/11

326. GCL produced VAT invoices from its three alleged suppliers in the period 02/11: NZ Electronics, Call Inn First and Freeway.

327. HMRC accepted that GCL received some wholesale supplies in 02/11 from other suppliers, but denied input tax relation to alleged supplies from the above three suppliers. We understood that the denied transactions constituted approximately 75% of the wholesale supplies received by GCL in 02/11.

328. Mr Brown submitted that HMRC's allegation of some sort of unspecified dishonesty by NZ Electronics, CIF and Freeway was irrelevant. Even if it was correct, their conduct was simply not relevant: the definitions of 'taxable person', 'economic activities', 'supply of goods' and 'taxable person acting as such' were all objective in nature and applied without regard to the purpose or results of the transactions concerned (*Optigen Ltd v Customs and Excise Commissioners* [2006] STC 419).

329. Mr Brown pointed to Mr Amber's evidence, the valid VAT invoices from the three suppliers, cash receipts and one bank transfer to Freeway as evidencing the fact that the supplies had taken place.

330. Mr Brown also pointed to the fact that HMRC had not adjusted the VAT returns of the three suppliers to reflect their allegation that the supplies had not taken place.

CJEU case-law in relation to wholesale invoices

331. We asked the parties for written submissions on the decision of the CJEU in *LVK-56 EOOD* Case C-643/11,where, having referred, at para 34, to the general rule that the right to deduct VAT invoiced is linked to actual performance of a taxable transaction (citing Case C-536/03 *António Jorge* [2005] ECR I-4463 and Case C-342/87, *Genius Holding BV v Staatssecretaris van Financiën* [1991] STC 239), the Court stated:

> "... if, in the light of fraud or irregularities, committed by the issuer of the invoice or upstream of the transaction relied upon as the basis for the right of deduction, that transaction is considered not to have been actually carried out, it must be established, on the basis of objective factors and without requiring of the recipient of the invoice checks which are not his responsibility, that he knew or should have known that that transaction was connected with value added tax fraud, a matter which it is for the referring court to determine."

332. The reference to "he knew or should have known that that transaction was connected with value added tax fraud" is a reference to the principle established in *Optigen Ltd v Customs and Excise Comrs; Fulcrum Electronics Ltd v Customs and Excise Comrs; Bond House Systems Ltd v Customs and Excise Comrs* (Joined cases C-354/03, C-355/03 and C-484/03) and, particularly, *Kittel v Belgium ; Belgium v Recolta Recycling SPRL* (Joined cases C-439/04 and C-440/04) ("*Kittel*"). It is fair to say that, in each of these cases, it was not disputed that the underlying supply of goods had taken place (albeit that it was alleged in some cases that the goods had been "carouselled") : see paragraphs [45]- [49], [52] and [59]. For convenience, we shall describe this as the "*Kittel* test".

333. In *Mahagében Kft v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Figazgatósága* (C-80/11) ("*Mahagében")* and *Péter Dávid v Nemzeti Adó- és Vámhivatal Észak-alföldi Regionális Adó Figazgatósága* (C-142/11) ("*Dávid")*, two

decisions of the CJEU which followed *Kittel*, the situation was different. In those cases, the tax authorities had denied an input tax deduction to the two applicants on the basis that there was insufficient evidence that the underlying transactions had been carried out. In addressing these questions, the Court proceeded on the basis that the underlying transactions had been carried out (see paragraphs 43 and 44 of *Dávid* and paragraph 52 of *Mahagében*) as the questions referred by the national court seemed invite the Court to assume. Accordingly, the Court held first that where the substantive and formal conditions provided for by Directive 2006/112 for the creation and exercise of the right to deduct were fulfilled, a taxable person could be refused the benefit of the right to deduct only where it was established, on the basis of objective factors, that the taxable person knew, or ought to have known, that by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT (paragraphs 45 – 50).

334. Secondly, the Court held the national tax authority could not, as a general rule, require the taxable person wishing to exercise the right to deduct VAT, first, to ensure that the issuer of the invoice relating to the goods and services in respect of which the exercise of that right to deduct was sought had the capacity of a taxable person, that he was in possession of the goods at issue and was in a position to supply them and that he had satisfied his obligations as regards declaration and payment of VAT, in order to be satisfied that there were no irregularities or fraud at the level of the traders operating at an earlier stage of the transaction or, second, to be in possession of the documents in that regard. It was, in principle, for the tax authorities to carry out the necessary inspections of taxable persons in order to detect VAT irregularities and fraud as well as to impose penalties on the taxable person who had committed those irregularities or fraud (paragraphs [53]–[55], [57], [59], [61], [62]).

335. The next relevant case is that of *Bonik EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* C-285/11 ("*Bonik*"). In that case Bonik, a company registered for VAT in Bulgaria, was investigated by the Bulgarian tax authorities in relation to purchases of wheat. Bonik had stated in its VAT return that it had bought wheat from two suppliers, F and A, and had deducted the VAT in relation to those purchases. The taxpayer had invoices for those purchases. The tax authorities had carried out checks on F and A, and on F and A's suppliers, L, E and R, but had been unable to establish whether L, E and R had actually supplied the wheat to F and A. The tax authorities therefore concluded that F and A had not had sufficient quantities of goods to make supplies to the taxpayer, and that those supplies had not therefore taken place; the tax authority accordingly refused the taxpayer's right to deduct. The Court stated:

> "20. The referring court adds that there is some evidence that direct supplies were carried out and states that the lack of evidence of the preceding supplies cannot support the conclusion that those direct supplies were not carried out.
>
> …
>
> 31. *In order to be able to conclude that there is a right of deduction, as relied upon by Bonik on the basis of those supplies of goods, it is necessary to check whether those supplies have actually been carried out and whether the goods in question were used by Bonik for the purposes of its taxed transactions.*
>
> 32. However, it should be borne in mind that, in proceedings brought under Article 267 TFEU, the Court has no jurisdiction to check or to

> assess the factual circumstances of the case before the referring court. *It is therefore for the national court, in accordance with the rules of evidence of national law, to carry out an overall assessment of all the facts and circumstances of the case in order to establish whether Bonik may exercise a right of deduction on the basis of those supplies of goods* (see, to that effect, Case C-273/11 *Mecsek-Gabona* [2012] ECR I-0000, paragraph 53).
>
> 33. *If that assessment discloses that the supplies of goods at issue in the main proceedings have actually been carried out* and that those goods were used by Bonik for the purposes of its own taxed output transactions, Bonik cannot, in principle, be refused the right of deduction.
>
> 34. In that regard, the referring court states that the Bulgarian tax authorities do not claim that Bonik acquired the goods in question from suppliers other than [F] and [A], and that there is some evidence that direct supplies were carried out. It also notes that the tax authorities do not dispute that Bonik carried out subsequent supplies of goods of the same type as those in question and in the same quantity." [*Emphasis added*]

336. It is clear, therefore, that the Court regarded it as a precondition to the right to deduct input tax that the underlying supply of goods or services should have actually taken place. This is hardly a surprising conclusion. Article 168 of the Directive makes it clear that input tax can only be deducted if actual supplies are made or intended to be made. It follows, therefore, that if no supply of goods takes place there can be no right to deduct input tax.

337. In *Bonik*, the Court continued by discussing the principle in *Kittel*, stating:

> "40 It follows that a taxable person cannot be refused the right of deduction unless it is established on the basis of objective factors that that taxable person – *to whom the supply of goods or services, on the basis of which the right of deduction is claimed, was made* – knew or should have known that, through the acquisition of those goods or services, he was participating in a transaction connected with VAT fraud committed by the supplier or by another trader acting upstream or downstream in the chain of supply of those goods or services (see, to that effect, *Kittel and Recolta Recycling*, paragraphs 56 to 61, and *Mahagében and Dávid*, paragraph 45).
>
> 41 On the other hand, it is incompatible with the rules governing the right of deduction under Directive 2006/112 to impose a penalty, in the form of refusal of that right, on a taxable person who did not know, and could not have known, that the transaction concerned was connected with fraud committed by the supplier or that another transaction forming part of the chain of supply, downstream or upstream of the transaction carried out by the taxable person, was vitiated by VAT fraud (see, to that effect, *Optigen and Others*, paragraphs 52 and 55; *Kittel and Recolta Recycling*, paragraphs 45, 46 and 60; and *Mahagében and Dávid*, paragraph 47)." [*Emphasis added*]

338. Read in context, therefore, the Court was clearly contemplating that the *Kittel* principle applied in cases where it was established that the actual supply had taken place. In those circumstances, and assuming a valid VAT invoice was held by the taxpayer, the right of deduction could only be refused if the taxpayer knew or should have known that its transaction was connected with fraud. The issue whether a supply

took place was, however, a matter for the national court to determine taking into account all the facts and circumstances of the case (*Bonik* paragraphs 31 and 32).

339. The Court in *Bonik* concluded as follows:

> "43. Consequently, since the refusal of the right of deduction is an exception to the application of the fundamental principle constituted by that right, it is incumbent upon the competent tax authorities to establish, to the requisite legal standard, the objective evidence needed to substantiate the conclusion that the taxable person knew, or should have known, that the transaction relied on as a basis for the right of deduction was connected with fraud committed by the supplier or by another trader acting upstream or downstream in the chain of supply (see *Mahagében and Dávid*, para 49).
>
> 44. *It follows that, if the referring court were to find that the supplies of goods at issue in the case before it had actually been carried out and that Bonik had subsequently used those goods for the purposes of its taxed transactions, it would be for that court subsequently to determine whether the tax authorities concerned had established the existence of objective evidence to the effect described above.*
>
> 45. In those circumstances, the answer to the questions referred is that arts 2, 9, 14, 62, 63, 167, 168 and 178 of Directive 2006/112 must be interpreted as meaning that, in circumstances such as those of the case before the referring court, a taxable person may not be refused the right to deduct VAT in relation to a supply of goods on the ground that, in view of fraud or irregularities committed upstream or downstream of that supply, the supply is considered not to have actually taken place, where it has not been established on the basis of objective evidence that the taxable person knew, or should have known, that the transaction relied on as a basis for the right of deduction was connected with VAT fraud committed upstream or downstream in the chain of supply—a matter which it is for the referring court to determine."[*Emphasis added*]

340. Thus, both the question whether the underlying supply of goods took place and, if so, whether the *Kittel* test was satisfied were matters for the national court to determine. What is clear from *Bonik*, however, is that if the national court's assessment, having taken account of all the relevant circumstances leads to the conclusion that no supply has taken place, there can be no right to deduct input tax regardless of whether the taxpayer knew or should have known of the supplier's fraud or irregularities – the right simply does not arise.

341. The CJEU considered these issues in Case C-643/11 *LVK - 56 EOOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* (31 January 2013) ("*LVK*"). LVK was a Bulgarian company carrying on business as an agricultural producer. LVK claimed to deduct input tax on the purchase of goods from suppliers in Bulgaria. After an investigation, the Bulgarian tax authorities concluded that it had not been proved that the supply of the goods had taken place. The suppliers failed to produce documents requested by the tax authorities: documents relating to the origin of the goods delivered and the performance of the actual delivery. In addition, LVK submitted delivery notes, weight certificates and consignment notes, which contained mistakes. As a result, the tax authorities refused LVK's deduction of input tax. It was accepted that the suppliers had entered the supplies in their sales ledgers, issued VAT

invoices and accounted for VAT. The tax authorities decided that there was no need to adjust the VAT accounted for by the suppliers of the goods. LVK appealed and the matter was referred to the CJEU.

342. The first point to note is that the CJEU was obviously not intending to lay down any new principle of community law. The Court did not require an opinion from the Advocate General which (according to article 20, paragraph 5 of the Court's statute) it may only do "where it considers that the case raises no new point of law." Evidently, the Court appeared to consider that the case involved the straightforward application of established principles (see, to a similar effect, *HMRC v Amia Coalition Loyalty UK Ltd* [2013] UKSC 15 at [34]). Accordingly, we approach the *LVK* decision on the basis that the Court intended to apply the same principles as enunciated in *Bonik*.

343. The CJEU held (at [42]) first, that Article 203 of Directive 2006/112 meant that a supplier is liable to pay VAT shown by him on an invoice whether or not there was an actual taxable transaction. The CJEU also held that it could not be inferred from the fact that the tax authorities did not correct the VAT declared by the supplier that they had accepted that there was an actual taxable transaction.

344. The CJEU then considered whether EU law (specifically, Articles 167 and 168(a) of Directive 2006/112 and the principles of fiscal neutrality, legal certainty and equal treatment) precluded a recipient of an invoice, such as LVK, from being refused the right to deduct input tax where the supplier had accounted for the VAT shown on the invoice and the tax authority had not made any adjustment of the supplier's VAT liability. The CJEU held at [46] - [50] as follows:

> "46. So far as concerns the treatment of VAT that has been improperly invoiced because there is no taxable transaction, it follows from Directive 2006/112 that the two traders involved are not necessarily treated identically in so far as the issuer of the invoice has not corrected it …
>
> 47. On the one hand, the issuer of an invoice is liable to pay the VAT entered on that invoice even if there is no taxable transaction, in accordance with Article 203 of Directive 2006/112. *On the other hand, exercise of the right of deduction by the recipient of an invoice is limited solely to tax corresponding to a transaction subject to VAT, in accordance with Articles 63 and 167 of that directive.*
>
> 48. In such a situation, compliance with the principle of fiscal neutrality is ensured by the possibility, to be provided for by the Member States and noted in paragraph 37 above, of correcting any tax improperly invoiced where the issuer of the invoice shows that he acted in good faith or where he has, in sufficient time, wholly eliminated the risk of any loss of tax revenue.
>
> ...
>
> 50. It follows that Articles 167 and 168(a) of Directive 2006/112 and the principle of fiscal neutrality do not preclude the recipient of an invoice from being refused deduction of input VAT because there is no taxable transaction, even though, in the tax adjustment notice addressed to the issuer of the invoice, the VAT declared by the latter was not adjusted." (Emphasis added)

345. The CJEU also concluded that the principles of legal certainty and equal treatment did not prevent the different treatment of the supplier and recipient of the supply. This is an answer, therefore, to an argument raised by Mr Brown that GCL

should be allowed an input deduction because HMRC had not adjusted the output tax of the three wholesale suppliers.

346. At [57] – [60], the CJEU considered the position of the person claiming deduction of input tax in cases of fraud or abuse and held as follows:

> "57 So far as concerns the main proceedings, it is apparent from the order for reference that the tax authorities inferred that there was no taxable supply from, in particular, the fact that the supplier did not submit the documents required during a tax audit. *Since that conclusion is contested by the claimant, it is for the national court to verify it, by carrying out, in accordance with the rules of evidence of national law, an overall assessment of all the facts and circumstances of the case* (see, by analogy, Case C-273/11 Mecsek-Gabona [2012] ECR I-0000, paragraph 53, and Case C-285/11 Bonik [2012] ECR I-0000, paragraph 32)
>
> 58. … it is true that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by Directive 2006/112 and European Union law cannot be relied on for fraudulent or abusive ends (see, inter alia, Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraphs 68 and 71; Joined Cases C-80/11 and C-142/11 *Mahagében and Dávid* [2012] ECR I-0000, paragraph 41; and *Bonik*, paragraphs 35 and 36).
>
> 59. It is therefore incumbent upon the national authorities and courts to refuse the right of deduction where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent or abusive ends (see, to that effect, Joined Cases C-439/04 and C-440/04 *Kittel and Recolta Recycling* [2006] ECR I-6161, paragraph 55; *Mahagében and Dávid*, paragraph 42; and *Bonik*, paragraph 37).
>
> 60. Nevertheless, according to case-law that is also well-established, it is incompatible with the rules governing the right of deduction under Directive 2006/112 to impose a penalty, in the form of refusal of that right, on a taxable person who did not know, and could not have known, that the transaction concerned was connected with fraud committed by the supplier, or that another transaction forming part of the chain of supply prior or subsequent to the transaction carried out by the taxable person was vitiated by VAT fraud (see, inter alia, Joined Cases C-354/03, C-355/03 and C-484/03 *Optigen and Others* [2006] ECR I-483, paragraphs 52 and 55; *Kittel and Recolta Recycling*, paragraphs 45, 46 and 60; *Mahagében and Dávid*, paragraph 47; and *Bonik*, paragraph 41).
>
> 61. Furthermore, the Court held in *Mahagében and Dávid*, paragraphs 61 to 65, that the tax authorities cannot, as a general rule, require the taxable person wishing to exercise the right to deduct VAT, first, to ensure that the issuer of the invoice relating to the goods and services in respect of which the exercise of that right is sought has the capacity of a taxable person, that he was in possession of the goods at issue and was in a position to supply them and that he has satisfied his obligations as regards declaration and payment of VAT, in order to be satisfied that there are no irregularities or fraud at the level of the traders upstream, or, second, to be in possession of documents in that regard.
>
> 62. It follows that a national court which is called upon to decide whether, in a particular case, there was no taxable transaction, and before which the tax authorities have relied in particular on

> irregularities committed by the issuer of the invoice or one of the issuer's suppliers, such as omissions in the accounts, must ensure that the assessment of the evidence does not result in the case-law recalled in paragraph 60 above being rendered meaningless and in the recipient of the invoice being indirectly obliged to carry out checks of the other party to the contract which, in principle, are not a matter for him.
>
> 63 With regard to the main proceedings, it is necessary, however, to take account of the fact that, according to the order for reference, the documents submitted by the recipient of the invoices at issue also contained irregularities, which are factors to be taken into consideration by the national court when carrying out its overall assessment.
>
> 64 In the light of the foregoing, the answer to the second part of the third question and the fourth, fifth and sixth questions is that European Union law must be interpreted as meaning that Articles 167 and 168(a) of Directive 2006/112 and the principles of fiscal neutrality, legal certainty and equal treatment do not preclude the recipient of an invoice from being refused the right to deduct input VAT because there is no actual taxable transaction even though, in the tax adjustment notice addressed to the issuer of that invoice, the VAT declared by the latter was not adjusted. However, if, in the light of fraud or irregularities, committed by the issuer of the invoice or upstream of the transaction relied upon as the basis for the right of deduction, that transaction is considered not to have been actually carried out, it must be established, on the basis of objective factors and without requiring of the recipient of the invoice checks which are not his responsibility, that he knew or should have known that that transaction was connected with VAT fraud, a matter which it is for the referring court to determine." (*Emphasis added*)

347. For completeness, we should note that the CJEU came to a similar conclusion is that in *LVK* in *Jagiello v Dyrektor Izby Skarbowej w Łodzi* [2014] EUECJ C-33/13.

348. It seems to us, therefore, that the case-law of the CJEU establishes that it is for a national court to determine whether a supply of goods or services has actually taken place. If that assessment concludes that no supply has occurred, there is no right to deduction of input tax. However, where the national tax authorities deny the right to deduction of input tax on the basis of the supplier's fraud or irregularities, then it must be shown that the recipient of the alleged supplies knew or should have known that it supplies were connected to fraud i.e. the *Kittel* test. It would follow, therefore, that where the evidence of the supplier's fraud was part of a wider body of evidence relating to the disputed supplies (which included but was not limited to the supplier's fraud or irregularities) which indicated that the supplies did not take place then the *Kittel* test can have no application, as *Bonik* makes clear. The application of the *Kittel* test as applied in *LVK* is, therefore, limited to circumstances where the only evidence, which leads the national authorities to deny the deduction for input tax on the basis that the supply did not take place, is that of fraud or irregularities of the supplier. If that is correct, then it appears that *LVK* extends the principle in *Bonik* only to a very limited extent. As we have already indicated, by dispensing with an opinion of the Advocate General, the Court was indicating that it was not establishing a new principle of law. In most cases, where no actual taxable transaction takes place, the recipient who claims an input deduction will be aware or should have been aware of the fraudulent nature of the transaction. There may, however, be cases where the recipient of the non-existent supply may not be aware of the fact that the supply has not occurred e.g. where the recipient has on-sold the goods on a back-to-back basis

and where the recipient has arranged for the goods to be delivered from his supplier directly to his customer.

Conclusions in respect of wholesale supplies

349. In accordance with the above-mentioned case-law of the CJEU, it falls to this Tribunal, as the relevant national court, to decide whether the wholesale supplies in the period 02/11 took place.

350. In this case, Mr Brown accepted that the supplier's fraud could be relevant in determining whether a supply had actually taken place. Furthermore, throughout the hearing (although not in subsequent written submissions) Mr Brown accepted that the burden of proof lay upon GCL. We conclude that the burden of proof lies upon GCL to establish, on the balance of probabilities, that the relevant wholesale supplies took place.

351. We should note that HMRC did not plead or base its case on the *Kittel* test i.e. that GCL knew or should have known that its 02/11 wholesale transactions were connected with fraud.

352. The evidence in this case shows that GCL received valid VAT invoices from its three wholesale suppliers. There were receipts evidencing the cash payments made by GCL to its suppliers and, in one case, there was a bank transfer in the same amount as one invoice amount. Mr Amber's evidence was that he and Ms Wagenheim took delivery of the wholesale supplies and checked that they match the IMEI numbers on the accompanying invoices.

353. Against this background, therefore, and even allowing for our reservations concerning the reliability of Mr Amber’s evidence, it seems to us that even though the legal burden of proof may lie upon GCL, the evidential burden must shift to HMRC to cast doubt on whether the supplies took place.

354. In our view, HMRC have failed to do this. Whilst much of the evidence in relation to the wholesale supplies relates to irregularities in the records of the three wholesale suppliers and the absence of records (e.g. those of NZ Electronics destroyed in the alleged fire), and raises some suspicions as to the conduct of the three wholesale suppliers, it is not in our view sufficient to persuade us that the supplies in question did not take place in 02/11. Accordingly, in relation to the period 02/11 we allow GCL's appeal.

355. If we are wrong about our conclusion in relation to the relevant test to be applied and the burden of proof, we conclude, alternatively, that HMRC have failed to prove that GCL knew or should have known of the fraud allegedly perpetrated by its three wholesale suppliers. HMRC did not plead the issue of the application of the *Kittel* test (as extended by *LVK*) in this case. If, as HMRC contend, the wholesale supplies did not take place in 02/11 it is plain that this is tantamount to an allegation of fraud on the part of the three wholesale suppliers and of GCL. Allegations of fraud must be pleaded clearly and not merely by implication and the allegations must be particularised. Most of the evidence in relation to the wholesale supplies focused on irregularities in the records and allegedly suspicious circumstances of the manner of conducting business of the wholesale suppliers. It seems to us, therefore, that this case falls within paragraph [64] of the *LVK* decision and that HMRC have failed to prove that GCL knew or should have known that its disputed wholesale purchases in 02/11 were connected with fraud.

356. Accordingly, we allow GCL's appeal for the period 02/11.

Summary of conclusions

357. For the reasons given above, GCL's appeals for the periods 09/10 to 01/11 are dismissed and the appeal for the period 02/11 is allowed.

358. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 28 May 2015