Appeal number: TC/2012/06849

VAT — receipts from Apple stores for 1216 IPhones – receipts not valid invoices for purposes of regulation 14 of the value added tax regulations 1995 (as amended)- HMRC declined to exercise discretion under section 29 of the value added tax act 1954- 55% of receipts unnamed – legitimacy of the transactions in doubt- appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

LONDON CELLULAR COMMUNICATIONS LTD **Appellant**

- and -

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

TRIBUNAL: DAVID S PORTER (JUDGE)
DEREK SPELLER FCA (MEMBER)

Sitting in public at Bedford Square, London on 24, 25, 26, 27 and 28 March 2014

Leon Kazakos, of counsel, for the Appellant

Aparna Nathan, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. Mrs Neeta Kotecha, the sole director of the Appellant, appealed on behalf of London Cellular Communications Ltd (LCC) against the decision by the Respondents (HMRC) contained in its letter of 18 July 2011 denying LCC the benefit of the right to deduct input tax of £102,609.40 accrued through the purchase of Apple IPhones, which it had sold on to London Cellular Accessories Ltd. Neeta Kotecha said that the Apple IPhones had been purchased on a retail basis from Apple stores by members of her family and staff of LCC. The members of her family and staff had obtained VAT receipts accordingly. HMRC said that the VAT receipts were not valid receipts and that it could not exercise its discretion to accept them as such as there was insufficient further evidence to justify the same.

2. Mrs Aparna Nathan (Mrs Nathan), of counsel, appeared for HMRC, provided agreed bundles for the Tribunal and called the following as witnesses:-

- Mrs Lydia Ndoinjeh (Mrs Ndoinjeh), a higher officer working for the Missing Trader Intra–Community (MTIC) verification team, who gave evidence under oath.

- Mr Robert James David Lamb (Mr Lamb), a senior officer of HMRC working in the Specialist Investigation Appeal and Reviews Team, who provided the review of Mrs Ndoinjeh's decision. Mr Lamb had been on long term sick leave. Mrs Nathan produced to the Tribunal a statement of fitness to work. Mrs Nathan asked that this statement should be received by the Tribunal under Rule 15 on the basis that it had been seen by the parties and was readily understandable. Judge Porter allowed the same to be so admitted.

3. Mr Leon Kazakos (Mr Kazakos) of counsel appeared for LCC and called the following witnesses:-

- Mrs Neeta Kotecha, (Neeta) the sole director of LCC, who gave evidence having taken the oath on the Gita.

- Mr Chandrakant Kotech, (Chandrakant) Neeta's father, gave evidence having taken the oath on the Gita.

- Mrs Saryu Kotecha, (Saryu) Neeta's mother, who gave evidence having taken the oath on the Gita.

- Mr Rohit Patel (Rohit), a member of staff, who gave evidence under oath.

- Mr Gitesh Kotecha (Gitesh), company secretary and brother–in–law to Neeta, who gave evidence under oath.

The cases

4. We have been referred to the following cases :

- *Elite Designs International Ltd v The Commissioners of Customs and Excise* 16925.
- *Enviroengineeing Ltd v H M Commissioners for Revenue and Customs* 19756
- *McAndrew Utilities Ltd v The Commissioners for Her Majesty's Revenue and Customs* TC 02406.
- *G B Housley Ltd v The Commissioners for Her Majesty's Revenue and Customs* TC 02548.
- *Taygroup Limited v The Commissioners for Her Majesty's Revenue and Customs* TC02739.
- *Kohanzad v Customs and Excise Commissioners* [1994] QBD 967.
- *Express Medicare Ltd v The Commissioners of Customs and Excise* 16969
- *Reisdorf v Finanzamt Koln West* ECJ C-85/95.
- *Jeunehomme and others v Belgian State* 123 and 330/87
- *Baba Cash & Carry Limited v The Commissioners for Her Majesty's Revenue and Customs* 20416.
- *Abdul Ghani El Ajou v Dollar land Holdings Limited Factorum NV* (Balli) [1993] EWCA Civ 4

The Law

5. Section 4 of the Value Added Tax Act 1994 (the Act) provides as follows:

> 4 (1) VAT shall be charged on the 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.
> (2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.

6. Section 24(1) defines input tax:

> 24(1) Subject to the following provisions of this section, "input tax", in relation to a taxable person, means the following tax, that is to say –
> (a) VAT on the supply to him of any goods or services

(b) VAT on the acquisition by him from another member State of any goods and
(c) VAT paid or payable by him on the importation of any goods from a place outside the member States

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

(6) Regulations may provide:

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

7. Section 25 (2) of the Act provides that:

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

Paragraph 4 (1) of Schedule 11 of the Act provides that:

The Commissioners may, as a condition of allowing or repaying input tax to any person, require the production of such evidence relating to VAT as they may specify.

8. The Value Added Tax Regulations 1995 (as amended) (the Regulations) state:

Part 111 VAT Invoices and Other invoicing Requirements...

Obligation to provide a VAT invoice

13(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 to a person in another member State for the purpose of any business activity carried out by that person, 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 a person as mentioned above with a VAT invoice

9. Contents of a VAT invoice;

10. 14 (1) Subject to paragraph (2) below and regulation 16 [and 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) A sequential number based on one or more series which uniquely identifies the document

(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) ....

(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 [any currency].

(i) the gross total amount payable, excluding VAT, expressed in [any currency].

(j) the rate of cash discount offered

(k) ...

(l) The total amount of VAT chargeable, expressed in sterling

(m)[the unit price].

11. Claims for input tax.

Section 29 states:

29 (1) 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.

29 (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 regulation13...

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.

The facts

12. Having sworn the oath on the Gita Neeta gave evidence and confirmed her two witness statements. She is the sole director of LCC, which was incorporated on 23 March 1998 and registered for VAT on 1 April 1998. From the VAT registration application it appeared that she might have taken the business over as a going concern, as it had originally been owned by her husband Amit Kotecha (Amit). She was unsure whether she was a shareholder. LCC traded in the retail of mobile phones and accessories. London Cellular Accessories Limited, traded as Foneart (Foneart), and was incorporated on 12 June 2000. Foneart was set up as a wholesaler of mobile phones as opposed to LCC, which acted as a retailer. Neeta had been company secretary of Foneart since 29 May 1997, but retired in October 2006. Neeta was responsible for the back office duties for LCC and the book-keeping. She had originally had a full time job with the NHS but spent about 2 hours each evening working on the books and administration for LCC. She left the NHS in 1999/2000. She has an MBA and an accountancy training having run management accounts for the NHS.

13. LCC had two retail shops, one managed by Gitesh, who was also the company secretary, with two members of staff, the other managed by Karmjit Bhopal. The retail shops had been very successful but by 2008 the market was saturated. Neeta's father-in–law owned the shop premises at 100 High Road, Willsden and he wanted to modernise the entire building therefore LCC decided to stop trading in March 2008 whilst the work was done. It was thought that the work would take about 6 months. Unfortunately, the original builders had charged her father-in-law for work they had not done and he had run out of money. He had had to employ new contractors as and when he could afford the funding and it took many years to complete the refurbishment.

14. Foneart moved into temporary offices at Borehamwood and Gitesh began working for Foneart. Neeta carried on the administration and book-keeping for Foneart. LCC did not carry on business for a number of years from 2008. During 2010 Gitesh identified an opportunity for LCC to recommence trading due to the phenomenal demand for the Apple IPhone, which had been launched on 24 June 2010. Apple had decided only to sell the Iphones though its retail outlets and only to allow two phones to be purchased by any one customer. As Foneart was a wholesaler and LCC a retailer, LCC decided to make the purchases. Neeta's husband, Amit, confirmed that Foneart would buy the IPhones from LCC but Fonart was not prepared to source them from Apple as that would be a logistical nightmare. LCC, had enquired from its accountants and Officer Pankaj Manadali how it should set up the business. Both had advised that so long as they kept an audit trail of the purchases from Apple, it ought to be able to recover the VAT LCC paid on the Iphones from Apple.

15. The IPhones were selling for £440.83 in the United Kingdom and 570.59 Euros in Europe. Neeta produced a print out of the prices dated March 2013. She advised that

the phones also sold for more in Europe in 2011. (We note that her figures are in pounds and Euros. £440 equalled 538 Euros in 2011 a difference of £32.59). Foneart decided it would help LCC to buy the IPhones by lending it the money to do so. As a result, LCC could provide the IPhones in bulk after the acquisitions. This enabled LCC to return to trading and Foneart felt secure in the funding as it was dealing with family members. Neeta produced a copy of Foneart's Barclays Bank account showing a payment to Gitesh on 17 August 2010 of £25,000 for the purchase of IPhones. There appears to have been no written agreement as to the terms of this loan and the subsequent others loans, which amount in total to £631,592 as this was a family matter.

16. Barclays Bank appear to have been aware of some of the details. The Tribunal was referred to a letter, undated, from the Bank addressed to Foneart, which must have been written sometime after 5 January 2011 as it referred to a visit to the bank on that day. The letter set out what the Bank understood was happening. In the Letter the Bank stated:

> "You explained. There was a short term advantage for the business (Foneart), in purchasing 3G IPhones, originally issued from August 2010. Apple would only sell from their stores in the UK, and not use wholesale distributors.
>
> This had created a new market for traders, who have exploited the short term imbalances between the supply of Apple IPhones, and the sale only to retail purchasers visiting the Apple stores. This window of opportunity was expected to last 5 months.
>
> These intermediate traders use family members, or in the instance of LCC Ltd-you were to use 7 employed family/friends who visit the Apple stores to make purchases in quantities of 2 per visit."

The same letter appears to have been sent to LCC and is dated 31 October 2011.Neeta conceded to the Tribunal that, as evidenced by the two letters, the Bank must have been unclear as to the arrangements.

17. Neeta has produced copies of 18 till receipts for the first series of purchases on 17 August 2010. In her witness statement at paragraph 28 she stated that they bought 16 IPhones purchased, 15 from Westfield Shopping Centre in White City and one from Covent Garden. The IPhones cost £424.68 plus VAT of £74.32 making a total of £499 for the 16 gb IPhone. The 32 gb IPhone costs with VAT £599. She could not recall whether she had bought the IPones on her own or with Gitesh. She recalled that her husband, Amit, had joined her on the trial runs. She recalled that there were long queues and when she got to the front of the queue she was only allowed to purchase two phones. She then went to the back of the queue and repeated the purchase procedure. As Apple had brought in extra staff, they did not notice that she had purchased some IPhones previously. She claimed that the staff did not always put LCC names on the till receipts even when they were asked to re-issue a receipt in the correct name. Both Neeta's and Gitesh's names appear on only one receipt on each of those purchases.

18. Neeta kept a log of the phones that the family and staff had purchased on behalf of LCC, at which shop they had been purchased, the IMEI number, price and date. She produced a copy of the log for the period from 18 August 2010 to 24 August 2010. On one receipt the name Neera J Kumar appeared. She believed that the Apple staff had merely got her name wrong. She confirmed that LCC sold the IPhones to Foneart for £515 for the 16 gb IPhone and £615 for the 32gb IPhone. We note that on that basis it would appear that any profit that Foneart could have made on the IPhones in Europe would have disappeared as the cheapest IPhones would have cost them the equivalent of 630 euros. We were told by Neeta that the Iphones were selling for 570.59 euros each. Neeta said that LCC had agreed the price with Foneart as it was the price that Gitesh said was prevailing in the market place at the time. No evidence has been produced to confirm how the price had been negotiated. We had the impression that Foneart had merely agreed LCC's proposal.

19. Neeta produced copies of 3 accounts addressed to Foneart for both types of IPhone at the agreed price and without VAT. Neeta confirmed that no VAT had been charged because the invoice value to Foneart was over £5000. The rules in relation to the 'reverse charge' required that no VAT was chargeable. Neeta confirmed that there was a mobile phone scanner at Borehamwood and that all the IMEI numbers were scanned. In her second statement, she produced a copy of the IMEI scanner she had used. In spite of that, no other evidence has been produced as to the actual scanning and it was unclear from the other witnesses where the location of the scanner might have been. On an earlier occasion, when HMRC visited LCC, it had been suggested that the meeting should be held elsewhere than at Borehamwood as there had been so little space in the office. It was suggested by Mrs Nathan, in cross-examination, that the IPhones had not been scanned as there was nowhere for the scanner to be located. We were told that the scanning had been carried out by Gitesh.

20. LCC had employed a number of staff on a part-time temporary basis, who included

- Saryu
- Chanrakant
- Gaurav Kumer
- Kitty Sharma and
- Rohit

Gaurav, Kitty and Rohit were friends or associates of Gitesh and LCC trusted them with the task of purchasing the IPhones. The others were family members. Neeta produced to the Tribunal the P46's in relation to the employees together with the details of the monthly wage slips. The staff were paid at the rate of £420 per month. All the P46 have been completed by the same person and signed on 1 November 2011 by each employee. The wages slips are for the periods 1/11/10, 1/12/10, and 1/01/11 and the wages were paid in cash.

Neeta did not appear to know why that rate of pay had been agreed, but accepted that it was at a figure that did not require full PAYE records. The hours had not been agreed because the family and staff could be trusted to work such hours as were required. In any event Gitesh or others were with the family most of the day, whilst they were buying the IPhones.

21. When cross-examined about the meeting on 7 April 2011, Neeta said she did not recall Gitesh saying anything about a trip to Newcastle as he had never been there. She had also stated that LCC did not have its full business records, because the records were with the accountant. Mrs Nathan asked why Neeta had not mentioned that at the visit. Neeta said that she had done so.

22. Neeta told us that the money to purchase the phones was given in envelopes. Further details of this procedure appears in the evidence from other witnesses. Neeta said that she recorded the money each day on the spreadsheet, which she produced to the Tribunal. She had also logged the IPhones on a spreadsheet. When asked in cross-examination, she said she did not know who had bought which IPhones, unless their names appeared on the receipts.

23. Mrs Nathan referred her to the letter signed by all of the family and staff produced by Neeta to confirm that the family and staff had purchased the IPhones. She noted that the document was in the same format and confirmed in the last paragraph:-

"I have looked at the schedule of purchases of IPhones prepared by the company for the quarter ended 31 January 2011, and I can confirm that I did actively participate in these purchases and that where my name is listed, I did effect purchase of stock for the company on those days indicated"

Both the staff and family had signed identical letters. Neeta confirmed that she had drafted the letters. She produced to the tribunal the schedule she had prepared showing the purchases and the details, where the names were available of the people who had purchased the IPhones. She had put the individual's initials against the purchases, where their names appeared on the Apple receipts. She confirmed that some of the IPhones had been bought on credit cards and LCC repaid the amounts to the purchaser. No details of any of the credit cards were produced to the Tribunal. It also appeared that Gift Cards were made available to the buyers and they were used to pay for other IPhones. We consider the purchase of the IPhones by the family and staff at paragraph 30 below. We are satisfied that the confirmations as above were produced for the purposes of the appeal and that none of the staff or family would have been able to confirm which of IPhones they had purchased from the list provided by Neeta.

24. Neeta confirmed that loans had been made by Foneart to the LCC bank account with Barclays. Subsequently LCC withdrew cash from its bank account and distributed it around the family and staff, who then bought the Apple IPhones. LCC boxed up the IPhones and subsequently sold them to Foneart. The details appear in the following table:

Date loan	Loan £	Purchase	Date sold	Price £
17.08.10	25,000	22,060	17,18,24.8.10	23,060
3.12.10 *	61,500	55,999	3.12.10	61,500
7.12.10	61,500	55,999	6.12.10	61,500
		13,473		
		8483	20.12.10	21,956
31.12.10	50,000	49,900	30.12.10	49,900
		26,256	2.01.11	26,256
4.01.11	102,000	57,630	5.01.11	57,630
		94,860	6.01.11	94,860
		29,580		
		28,050		
7.01.11	81,000	3060	7.01.11	60,690
		40,800		
11.01.11	29,800	31,100	11.01.11	71,910
12.01.11	102,000	19,380	12.01.11	19,380
14.01.11	100,000	18,870	14.01.11	18,870
		16,320	15.01.11	16,320
		19,380	17.01.11	19,380
		18,972	17.01.11	19,005
		21,420	22.01.11	21,495
Totals	642,800	631,592		643,712
Purchase	From Apple		669,994 VAT @20%	127,939.60
31.01.11	30,000	30,420	31.01.11	30,420

(* **Note:** There is an email from Barclay's Bank confirming that cash was withdrawn of the 3 December amounting to £61,500 but was not entered in the statement until the 6 December because the withdrawal was made on 3 December before it could be added to the statement on the 6 (Monday).

25. From the table at paragraph 24 we observe:

(1) After the first three loans there is only £9,942 left in cash (£148,000-138,058) to buy a further £21,956 IPhones.

(2) When £50,000 was borrowed on 31 December 2010 there was a shortfall of £12,014 (£21956 - £9,942) leaving £37,986 to buy a further £76,156 IPhones. This appears to happen down the list until it appears that £642,800 was borrowed to buy £631,592 IPhones leaving a balance of £14208 to purchase the £30,000 on 31 January 2011 which were included in the repayment claim in error.

(3) We refer to our examination of the receipts at paragraph 49 and note that the purchase price represents the price of the IPhone plus VAT. It can be seen that all the sales to Foneart were at the same price save for the first 3. This appears to mean that Foneart has agreed to pay 20% more for the IPhones. Neeta stated that LCC made approximately £10 per IPhone, which is not the same.

26. The money was withdrawn from LCC's Wembley Park Royal Branch with a Cash Pass provided by the bank. The Cash Pass identified the amount which could be withdrawn. LCC had to take the pass to the Wembley Branch, with details of LCC's account, so that the amount notified could be withdrawn in cash and debited to their account in Willesden.

27. Once the IPhones had been purchased the IMEI numbers were scanned and stored on an excel spreadsheet which helped to prepare the list showing who had purchased which IPhones. As indicated at paragraph 19, it was unclear who had scanned the IPhones, Neeta stated that Gitesh had done so. Neeta confirmed that the purchase orders for Foneart had been created retrospectively. When she knew what IPhones were being sold to Foneart she could create the purchase order. She also created the invoices. The phones were stored at Foneart's facilities at Safestore Ltd, at Britannic House, Stirling Way, Borehamwood, Hertfordshire.

28. She submitted LCC's VAT return for the period ending 31 January 2011 on 4 March 2011 using the online service. She realised when she had submitted the return that she had not included LCC's last invoice for number 2022 and indicated that she would include that in the next return on 8 March 2011. LCC had been deregistered 13 Sept 2011 as it was no longer trading. She listed the sales as follows:

London Cellular Communications

Sales November 2010 – January 2011

Date	Purchase no	Company	Amount	Reverse VAT
22/01/2011	1839	Foneart	21,495	4299
17/01/2011	1838	Foneart	19,005	3801
17/01/2011	1837	Foneart	19,380	3876
15/01/11	1836	Foneart	16,320	3264
14/01/11	1835	Foneart	18,870	3774
12/01/11	1834	Foneart	19,380	3876
11/01/11	1833	Foneart	31,110	6222

Date	Purhcase no	Company	Amount	Reverse VAT
11/01/11	1832	Foneart	40,800	8160
07/01/11	1831	Foneart	60,690	12138
06/01/11	1830	Foneart	94,860	18972
05/01/11	1829	Foneart	57,630	11526
04/01/11	1828	Foneart	14,280	2856
02/01/2011	1820	Foneart	11976	2395.20
			425,796	**85,159.20**
31/12/10	1815	Foneart	49,900	9980
20/12/10	1814	Foneart	21,956	4391.20
06/12/10	1813	Foneart	61,500	12300
Date	Purchse no	Company	Amount	Reverse VAT
03/12/10	1812	Foneart	61,500	12300
			194,856	**38,971.20**
24/08/10	1807	Foneart	8640	1728
18/08/10	1805	Foneart	6180	1236
17/08/10	1802	Foneart	8240	1648
			23.060	**4612**
	Totals		**643,712**	**128,742**
INPUT TOTALS				
Purchase from Apple	Net purchases	VAT on Purchases	Apple Iphones purchased	
669,994	**537,090**	**102,609.40**	**1216**	

It is surprising that Neeta has not used Xcel for these figures as they appear to be incorrect. The VAT rate changed from 17.5% to 20% on 4 January 2011. Neeta appears to have used the 20% rate throughout. The output tax should have been £122,963.30 as the sales period prior to 4 January should have been at 17.5%. The gross purchases add up to £639,699. It would appear that the figure of £669,994 may be a typing error. These errors from an accountant, with an MBA, throw considerable doubt as to their veracity.

29. We found Neeta's evidence to be unconvincing. She implied that the administration was a little chaotic. Given that she has an MBA, accountancy training and is familiar with dealing with complex financial matters, we were surprised that she had allowed LCC to operate in such a chaotic fashion. The more so as Foneart was also a family business and because the sales to Foneart were, therefore, not at arm's length. We would have expected her to have put in place procedures, which would have shown that all the transactions were transparent.

30. Gitiesh Kotecha (Gitesh) gave evidence under oath. He explained that he was the company secretary of LCC having been appointed in March 2001. He confirmed the position with regard to the original building, which had been occupied at number 100 by LCC and number 100B by his sister company Foneart. He confirmed that Neeta had been a director of LCC from 27 March 1998. The retail shop had been very successful and had run for some ten years. He had dealt with the top Mobile Phone distributors. The shop had two other members of staff. When the building was closed down he had started an internet business focussed on a white label website, but that had been unsuccessful. He had started to work for Foneart, where he was involved in online selling and building a global client base. He was not, however, content to continue to work for Foneart and he wanted to develop his own business.

31. He had noticed the potential for the purchase of IPhones in July 2010 and as Foneart was not interested in the laborious work involved in sourcing IPhones, two at a time from Apple stores, he decided to setup LCC to do the task. LCC could have sold the IPhones to other companies but decided to sell to Foneart as it was already a large buyer in the marketplace. Foneart was prepared to purchase the phones at the market rate. No evidence has been provided as to what the market rate was and how it had been calculated.

32. He explained that he had approached his mother and father to assist along with Mr Patel, Gaurav Kumer and Kitty Sharma, who were trusted members of staff. He arranged to collect his mother and father and to take them to the appropriate Apple Store. He would contact the store before the visit to make sure that it had IPhones for sale. He would sometimes park a little way from the store where he had left his mother and father or he would return to the office. He would go out again to see how his mother and father were getting on.

33. He had arranged to collect substantial amounts of cash from Barclays as indicated by Neeta. He had then placed £1000, and sometimes £1020, of cash into various envelopes and had given his mother, father, and the other staff, sufficient envelopes for each of them to buy 4 or 5 IPhones. As they could only buy two at a time he had

split the money up into envelopes so that it would not be too obvious to others buying IPhones. When the IPhones had been purchased, he would be given the phones with the balance of the money in the envelopes in separate bags for each person, which he would put in the vehicles' boot. He said that he had further bags in the boot, so that he could keep the purchases separate. If he could not get back to the vehicle immediately, he would try to remember to whom each bag belonged. He suspected that he might have got it wrong from time to time. When he got back to the office he would be scan the IMEI numbers and Neeta took a record as indicted. He would initial the receipt on the list being prepared by Neeta as he took them out of the appropriate bags. He reconciled the cash when he went home having put a post note on the envelopes. We do not believe on the balance of probabilities that Gitesh could, in the circumstances, have known whose bag was whose.

34. He was crossed examined by Mrs Nathan. He had received the letter of 18 March 2011 from HMRC saying that they were to visit LCC. He told Mrs Nathan that he had thought it was a routine visit arising from LCC's repayment claim. He said that he had discussed the employment of his family and staff with the Accountant, who indicated that he would deal with the appropriate forms. Mrs Nathan asked why Gitesh had not given that information to the officers when they attended at the meeting on 7 April 2011. He explained that he had not been asked and he had not thought to raise it with HMRC.

35. Mrs Nathan pointed out that HMRC had given both LCC and its representatives Veracis, a consultancy business, the opportunity to provide further evidence with regard to an audit trail. Gitesh said that LCC had never carried out an audit trail for the cash it had withdrawn from the bank. He had only used the envelopes and had not appreciated that he needed to record the whole process. We note that Neeta had been told that she needed to keep full and correct records of the purchases so that LCC's claim for a repayment could be processed.

36. Chandrakant Kotecha (Chandrakant) gave evidence under oath having sworn on the Gita. Chandrakant did not have the best of health. He was clearly unwell at the hearing and he confirmed that he had recently been in hospital and his health was deteriorating because he had diabetes. His diabetes had started in 1995 and was much worse by 2008. He had been able to work in his shop for long hours before his health deteriorated.

37. He had not been very well when queuing for the IPhones at the various stores. He and his wife queued together and were taken to the various stores by either Gitesh or Rohit. They were provided with money in envelopes, which held £1000 or £1020 so that they could buy at least two phones. Sometimes the stores would only accept credit cards and he had paid with his card. He produced a bank statement showing eight payments for IPhones and the corresponding Apple receipt. Gitesh had refunded the payments but no evidence has been reproduced showing the repayments. Chandrakant was unclear as to when the envelopes had been made up and what happened to the IPhones and the money when they were handed to Gitesh. After purchasing the IPhones, he was driven home each day by 6.0 pm.

38. His wife and he often queued more than once at a store, as the staff did not realise that they had already purchased two phones. They would visit two or three shops each day. His wife would take sandwiches for them. Once he had purchased the IPhones he put them in a separate bag, rather than the keeping them in the Apple bags, so that people would not know that he had bought the phones. He then gave that bag together with the balance of any money in the envelopes, to Gitesh or Rohit. He did not know what happened to the phones and the money thereafter.

39. His son had wanted to pay him for the time involved purchasing the IPhones and Gitesh completed the P46, which he signed. He received his wage at the end of each month and gave it to his wife, who gave the money to their grandchildren. He confirmed that he had signed the form prepared by Neeta confirming the IPhones, which he had purchased. We do not believe, on the balance of probabilities that he would have been able to identify all of the IPhones that he had purchased, as he has accepted that he paid for some of them by credit card.

40. Mrs Saryu Kotecha gave evidence under oath having sworn on the Gita. Saryu confirmed her husband's evidence. She was content to help her family out. At the time she worked, on a casual basis, for her son Amit at Foneart helping with the administration and photocopying. She confirmed that Gitesh or Rohit had given her envelopes containig £1000 so that she could buy the IPhones-"in a nice bag round my neck". There was often a big queue. There were very many other people queuing and she saw many of the same people all the time. She asked for two IPhones when she reached the front of the queue and sometimes the staff would give her more.

41. She had been told by Getish to ask for LCC's name to be put on the receipt. The staff were very busy and often they just printed anything. In her witness statement at paragraph 13 she states:

> "13. When I was buying the phones Gitesh and Neeta had told me to give the company name when the sales persons asked for a name, however, sometimes at the time the sales staff would ask for a name sometimes they did not. Then they print out the receipt without checking properly about the name. It was difficult for me to explain, sometimes they would not listen. **Sometimes an Indian name is hard for other people to understand**. It was tiring and sometimes a nightmare. If they did not hear me properly they would just print anything and give me a receipt."

We do not understand the reference to her Indian name. LCC was simple enough to put on the receipt and if the staff were busy, we would have thought that they would put LCC rather than Saryu Kotecha.

42. She also thought she might have paid on her credit card, but she could not remember. No evidence to that effect has been produced to the Tribunal. She always put the IPhones in one of the thick shopping bags from Tesco, Marks & Spencers or one of her Indian bags with a long handle. When she had purchased the IPhones she would give the bag to Gitesh or Rohit. She did not know why they stopped buying the IPhones as she did not enquire into her sons' businesses.

43. Mr Rohit Patel (Rohit) gave evidence under oath. He confirmed that he was 28 years old and that he had known the family since he had been 14 as his father had known Chandrakant. He had worked in the retail shop until it closed down. He had been paid £97 per week to buy the IPhones and he agreed that, as he had no other job, it was not very much. He had hoped that the business would develop and that he would be asked to work for the new business. He had filled in his P46 at the request of the accountants

44. Gitesh had provided the money for the IPhones in envelopes and he had carried his money in his coat. They had telephoned the shops before the visit and the driver would sometimes park the car near the store. We understood that Gitesh and Rohit were the drivers. We were told that a friend collected Chandrakant and Saryu on one occasion but there has been no reference to any other driver. When Rohit had purchased the IPhones he would put them in a substantial bag, together with the envelopes with the balance of the money and met up with the others to give the bags to Gitesh. He kept in contact with Gitesh using his mobile phone. He had never paid by credit card as he did not have one.

45. When he and Gitesh returned to the Office in Borehamwood the IPhones were scanned for their IMEI number and logged against the individuals whose bag they had come out of. The money was also checked. He confirmed that he had signed the letter prepared by Neeta and that he believed that the IPhones referred to in the schedule were the IPhones he had purchased. Mrs Napthan had asked how he could know that if gift cards had been used. Rohit said that the receipts for his IPhones were with his bag and they could be checked against the IMEI numbers.

46. Lydia Ndoinjeh (Mrs Ndoinjeh) gave evidence under oath on behalf of HMRC. She is a higher officer based in Uxbridge. She has been employed by HMRC since 1997. From October 2004 until 31 January 2008 she was a member of the Lanyard Freight Team responsible for visiting a number of freight forwarders that dealt predominately in the storage of mobile phone. She was currently employed in the Missing Trader Intra-Community (MTIC) verification team. Her duties include the verification of repayment claims submitted by traders suspected of trading in supply chains vitiated by MTIC fraud.

47. She confirmed her statement to the Tribunal. Mrs Ndoinjeh had wanted to see the cash records and an audit trail in relation to the supply of cash and the purchase of the IPhones. She had also wanted to know who all the staff were that had assisted in the purchases. She was shown the bank statement for the 6 and 7 December 2010 and she had expected to see a further record of the transfer of the two amounts of £61,500 from Foneart to LC,C but none had been forthcoming. She had visited LCC on 7 April 2011 and produced a copy of her report. She noted that there had been no mention of a scanner at the meeting. She had also asked for the employment records but none had been forthcoming.

48. When cross-examined she had been asked when she wrote up the report of the interview. She confirmed that it was the following day. Mr Kazakos put it to her that the report was inaccurate in recording that LCC had pre-booked staff through the

accountant. Further, the letter of 18 March 2011, which had been sent advising of the meeting, was a generic letter and would not have led Neeta and Gitesh to believe that there was any problem and that the visit was no more than routine arising from LCC's claim for a repayment. Mrs Ndoinjeh disagreed. We believe that Mrs Ndoinjeh's recollection of the meeting was correct. We can see no reason as to why she would compile a report, which Mr Kazakos suggested bore little relationship to what had happened.

49. On an examined of some of the receipts we noted as follows:-

(1) The following shops were visited

(a) Covent Garden, London.

(b) White City, London.

(c) Churchill Square,Brighton.

(d) Bentall Centre, Kingston

(e) Regent Street,London

(f) Blue Water, Kent

(g) Brent Cross,London

(h) Lakeside, Essex

(2) All the receipts have the time of purchase on them. Many of them have the same time on two or three different receipts. We accept that where more than one person was buying the Iphones it is possible for the same time to appear on the receipt.

(3) In their evidence, the family and staff indicated that they queued in some circumstances all day. They also said that they could only buy 4 to 6 IPhones in the shop due to the Apple limit of 2 IPhones per person which limited their purchases. 1216 IPhones were purchased in total and if each person purchased about the same number of IPhones and as there were seven people involved , including the occasional purchases by Gitesh and Neeta, they would have averaged 173 phones each over the period. As they worked for 3 months, and had to queue, that would amount to 15 each week. It would appear that Gitesh and Neeta did not buy very many IPhones so that 15 to 20 IPhones per week fits in with all the evidence.

(4) It is surprising, therefore to see that:

(a) There appears to have been no difficulty in staff at the Apple shops adding the appropriate names on the receipts which appear as LCC, London Cellular Comms, and the individual names. The family and staff were told to ask for LCC to be recorded on the receipts. Saryu has even confirmed that she thought Indian names might have caused a problem, which is unlikely if she had asked for LCC's name to appear on the receipt.

(b) On 27 December 2010 A Kotecha bought 3 IPhones at Lakeside in Essex and Amit and Neeta bought 18 IPhones on 28 December 2010. We assume A Kotecha is Amit. We have been told that Amit refused to buy any IPhones as it was too much trouble although he had assisted in the purchase on the trial run. He was not included in the employees and staff provided to HMRC. (See paragraph 20)

(c) On 6 January 2011 Gaurav Kamer was able to be in Regent Street at 13.48, White City at 13.52 and back at Regent Street at 13.57 all in the space of 9 minutes.

(d) On 31 December 2010, 24 IPhones were purchase at White City all without names. Similarly on the same day 54 IPhones were purchased again with no names. We suspect these might have been the IPhones which were taken off the repayment claim as they had been added in error. They indicate the inconstancies in relation to the alleged purchases.

These receipts throw some doubt as to whether the IPhones were acquired as suggested by the family.

50 Mrs Ndoinjeh confirmed that Neeta had subsequently emailed details of the staff to her on 25 May 2011. Mrs Ndoinjeh had not been satisfied that the people named had been employed by the LCC at the time of the purchase and she needed to make further enquiries. An enquiry of the PAYE division revealed no such employees. She considered that all the letters signed by the family and staff were generically the same. She also considered that the receipts were not valid receipts, because they did not have the full company name on them. Where the receipts did carry the company name it was in the foreshortened format of 'LCC'. Mr Kazakos submitted that as HMRC had addressed LCC in those terms in correspondence it could hardly object if LCC was used on some of the receipts as it was clear to whom they referred. Mrs Ndoinjeh said that as 53% of the receipts could not be identified as having been funded by LCC, she had been unwilling to exercise HMRC's discretion to allow any of the receipts to be treated as valid. Her decision had been reviewed by Doug Armstrong on 17 June 2011 and he had upheld her view.

51. Mrs Ndoinjeh confirmed that the receipts from Apple were compliant as receipts save for the fact that they did not have the name and address of the company on them. She also stated that she did not have enough external evidence to be able to exercise HMRC's discretion. She also stated that if she was asked to exercise her discretion in light of what she has heard, she would still not do so. She had suggested that there was a duplicate receipt in the name of Gaurav Kumar but we were satisfied from the evidence that the same receipt had been copied twice.

52. Mr Kazakos referred her to her letter of 29 November 2011 addressed to Stephen Plowman at Veracis in which she said that she still could no exercise her discretion because there was not an adequate audit trail. Mt Kazakos suggested that she kept

changing her mind as to why she was refusing to exercise HMRC's discretion. Mrs Ndoinjeh said that she did not need to repeat what she had said in earlier letters and in any event her response arose as the result of the provision of further evidence from Veracis. Mrs Ndoinjeh confirmed to the Member, Mr Speller, that she had not considered the IMEI numbers. She also confirmed that she had not seen either companies' books and could not therefore say how the advances from Foneart to LCC had been evidenced. She had seen what she believed to be the original receipts produced as copies for the Tribunal.

53. Robert James David Lamb a Senior Officer of HMRC working for the Specialist Investigations Appeal and Review Team provided a witness statement, but was too ill to attend. Mr Stephen Plowman of Veracis had written on 19 December 2011 for an independent review. Mr Lamb stated that before the review was carried out the decision had been subjected to extensive internal checking by the decision maker, her Senior Officer, the responsible technical team and HMRC's policy unit.

54. He had referred to HMRC's Electronic Folder system to ensure that governance procedures had been followed. He noted that LCC had been supplied with the appropriate VAT notices and it would be aware of its obligations. LCC had failed to demonstrate that the purchases had been made by its employees. Neeta and Gitesh had previously been advised that they had to keep full and proper records of retail sales over £250 when they had been visited at Foneart by Officers Okolo and Mandalia on 20 September 2006. Having considered all the evidence, he had concluded that original decision was correctly made and that it should be upheld.

The Appellant's submissions

55. Mr Kazakos submitted that the transactions occurred a stated. Apple had paid to HMRC the VAT that it owed as a result of the sale to LCC so that there had been no loss of tax. There is no suggestion of fraud so that the two issues are:

(1) Are the receipts from Apple valid VAT invoices, and if not

(2) Have HMRC acted reasonably in exercising its discretion not to treat them as valid invoices.

In refusing to exercise its discretion did HMRC take into account matters that it should not have and/or did it not take into account matters which it should have?

56. In *Environengineering Ltd v H M Commissioners for Revenue and Customs*

> " Paragraph 31 ...Having accepted that there were supplies of services between taxable persons, the only issue relevant to these appeals appears to be whether the invoices complied with regulation 14 (1) (g) of the VAT Regulations.
>
> Paragraph 32. Within that context, compliance with Regulation 14 is essentially a question of fact. An omission of a key identifying number or the value added tax registration number of a supplier may of itself call the adequacy of an invoice in question. But the adequacy of other elements, such as the type of supply or the description, is to be evaluated by looking at the invoice as a

whole. It is not something to be evaluated item by item by some objective standard in isolation from all else."

Many of the invoices are compliant in that they had LCC on them, but no address. He submitted that the receipts were not simple invoices as would have been acceptable if the value was less than £250. HMRC was wrong to have considered them as such as they contained a great deal of information.

57. Mrs Ndoinjeh has mistaken her obligations as she had decided that the receipts were invalid and she had not then considered all the surrounding circumstances to decide whether HMRC ought to exercise its discretion to treat them as valid. Mrs Ndoinjeh made it clear at the Tribunal that she required some other documentary evidence to exercise the discretion. She does not appear to have taken an overview of how the transactions had been carried out. As a result she had not acted fairly as she had not taken into account the other matters which she ought to have.

58. He submitted that Mrs Ndoinjeh was wrong to believe that the names on the receipts were not connected. The evidence was clear that the family had purchased the IPhones on behalf of LCC. Her letter of 16 September 2011 referred to her examination of the schedule so that she was aware, when making the decision, that family members had been purchasing the IPhones. It is unreasonable of Mrs Ndoinjeh to suggest that LCC on the receipts could not have been the Appellant.

59. Mrs Ndoinjeh also relied on the fact that there were duplicate receipts. The evidence showed that there was one receipt, but it was clearly a second copy of the same receipt. As she has relied on the duplicity as a reason for not exercising the discretion, she has relied on a fact that she was not entitled to rely on and has, therefore, acted unreasonably. She has also relied on the fact that there were no PAYE records with HMRC in relation to direct taxes. She has been provided with details of the employees for the purposes of VAT and she should have accepted that the staff and family were employed by LCC to buy the IPhones. The staff and family have all been cross-examined and it was never put to them that they were not working for LCC.

60. Mrs Ndoinjeh was also concerned that anybody could have bought the IPhones and said that they were for LCC. Mr Kazakos submitted that it had not been suggested that the individuals had not made the purchases. He also wondered who else in the world at large would have said that they were working for LCC. If that was the case, all of the purchases would have been for cash not debit cards. He also suggested that Mrs Ndoinjeh kept moving the goalposts and finding other reasons as to why the repayment should be refused.

61. He asked that the Tribunal should take little note of Mr Lamb's evidence as he had mistakenly said that Gitesh had attended the meeting at Foneart on 20 September 2009, when in fact he had not been present. The meeting had provided appropriate Notices to Neeta and it had identified how VAT transactions should be carried out. He submitted that knowledge gained as a director for one company was knowledge known by that director when involved with another company. In *Abdul Ghani El Ajou*

v Dollar Land Holdings Limited Factorum NV Lord Justice Nourse , in the court of Appeal, at the paragraph headed Agency states:

"it is established on the authorities that the knowledge of a person who acquires it as a director of one company will not be imputed to another company of which he is also a director, unless he owes, not only a duty to the second company to receive it, but also a duty to the first company to communicate it."

As a result Mr Kazakos submitted that as his decision contained factual and legal errors it should not be taken into account.

62. Mrs Napthan had suggested that Gitesh was in some way acting improperly because he knew that Apple would only sell two phones at a time and he had found a way round that constraint. There was nothing illegal or immoral in Gitesh's actions and is if Mrs Ndoinjeh had relied on that as a reason for refusing to exercise HMRC's discretion then she had taken into account something which she should not have. He had also suggested that it was misguided to give substantial sums of cash to casual employees. It had become clear at the Tribunal that those casual employees were a mother and father and long serving and trusted staff. If her decision was based on the superstition that this was something that no commercial individual would do, then that was incorrect.

63. It had been put to Neeta in cross-examination why she had not just altered the names on the receipts to show that LCC was purchasing the IPhones. Neeta had responded that she did not wish to doctor the invoices because if she had done so she would have been criticised. He submitted that the fact that she had not sone so was to her credit.

64. Mrs Ndoinjeh had suggested that running the business in the way LCC did was unusual. Mr Kazakos submitted that the business was in its infancy and had had no time to organise how the business might be run. As a result, LCC had relied on the goodwill of the family and staff. As the business developed, the systems improved. All the later receipts had been in LCC's name. A correct accounting procedure would have been developed later. It had been suggested that Neeta did not appear to have a working knowledge of how the IPhones had been dealt with. He submitted that her evidence had been straightforward and honest. He submitted that HMRC had set the bar unreasonably high and that it ought to have exercised its discretion and allowed the receipts to be treated as valid invoices. The appeal should be allowed.

The Respondents submissions.

65. Mrs Napthan took us through the legislation as set out at the beginning of this decision. She then referred us to the case law. In *Reisdorf* the Court at paragraph 30 stated:

> "30. Accordingly in the absence of specific rules governing proof of the right to deduct input tax, Member States have the power to require production of the original invoice in order to establish that right, as well as the power, where a

taxable person no longer holds the originals to admit other evidence that the transaction in respect of which the deduction is claimed actually took place.

In *Jeunehomme and others v Belgian State* the Court at paragraph 17 stated:

> "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 obsessively difficult."

She submitted that in those circumstances the requirement for a name and address was not unreasonable.

66. She submitted that if a taxpayer does not have a valid invoice, as in this case because of the lack of the name and address, it is for the taxpayer to prove the genuineness of the transactions. In *Baba Cash & Carry Limited* John Walters QC the Chairman in the First –tier Tribunal stated;

> "13. Further, the supervisory jurisdiction is to be exercised in relation to matters which were before the Commissioners, rather than in relation to later material.
>
> 14. The test for the exercise of this tribunal's supervisory jurisdiction is whether, in relation to the materials which were before the Commissioners when they made their decision, their refusal to allow the input tax deduction was a decision that no reasonable commissioners could have taken. In order to be successful in its appeal, the Appellant has to show that the Commissioners' decision was unreasonable (including disproportionality as a type of unreasonableness) having regard to their legitimate requirements both to be satisfied that the alleged supplies to the Appellant took place and also to operate procedures which appear to them to be necessary to prevent fraudulent claims..."

67. Mrs Ndoinjeh's decision not to exercise HMRC's discretion was reasonable based on the information that she had at the time and that she had to make the decision for the following reasons:

- LCC did not use a cash book to record the expenditure of the cash it withdrew from Barclays
- There was no valid receipt.
- There was no contemporaneous reconciliation to identify how the funds had passed from Foneart to LCC.
- There were no written records of the cash movements.

- Neeta was a CEMA qualified accountant familiar, as a result of a visit to Foneart by HMRC, with the VAT requirements contained in the various HMRC Notices. As a result of that information, she had a duty to make such information available to LCC.

- Much of the information has been created retrospectively as Neeta had indicated that she did not have the necessary information at the meeting on 7 April 2011.

- There had been no audit trail in relation to the monies lent and their subsequent expenditure. No details of the terms of the loans has been provided, either as to any interest payment or the repayment proposals.

- At the meeting on 7 April 2011 there had been no mention of IMEIs and a suggestion that the accountant had arranged for the staff to purchase the IPhones

- HMRC had made enquires of the direct taxes department as to any PAYE involvement and it had been told that there were no records.

- There were uncommercial features with regard to the purchase of the IPhones. Payments appeared to have been by cash, credit-card and gift card.

- LCC carried no insurance for the transactions or the storage of the IPhones. It had made no claim for petrol and other expenses involved in the transactions.

68. Mrs Napthan submitted that it was reasonable for Mrs Ndoinjeh to ask for information with regard to the transactions and to ascertain the status of the individuals purchasing the IPhones. Further, the relative positions of Foneart and LCC in the transactions was far from clear. There had been no challenge by Mr Kazakos as to the comments made by Getish at the meeting on 7 April 2011 which noted:

> "GK said the boxes were sealed with brown tape and plastic security tape.
>
> GK said the stock belonged to AK (Armit), LCA Ltd"

Mrs Ndoinjeh acted reasonably when she considered that she required corroborative information with regard to Foneart's position in the transactions.

69. Mrs Napthan submitted that the evidence from the various parties purchasing the IPhones had been unsatisfactory. There had been no clear statement as to how the money and the ultimate receipts had been identified to each collector. It appeared that the remaining monies and the receipts for the IPhones were put in the envelopes and those and the IPhone placed in various bags. It was also unclear when the envelopes had been handed to the individuals. This appeared to have been in the cars or outside the Apple shop in the street. In all the circumstances HMRC had acted reasonably in refusing to exercise its discretion and the appeal should be dismissed.

The decision

70. We have considered the law, the cases and the evidence and have decided that Mrs Ndoinjeh acted reasonably when she refused to allow the receipts to be treated as VAT invoices. As John Walters Q C stated in *Baba Cash & Carry Limited* :

> "The test for the exercise of this tribunal's supervisory jurisdiction is whether, in relation to the materials which were before the Commissioners when they made their decision, their refusal to allow the input tax deduction was a decision that no reasonable commissioners could have taken. In order to successful in its appeal, the Appellant has to show that the Commissioners' decision was unreasonable (including disproportionality as a type of unreasonableness) having regard to their legitimate requirements both to be satisfied that the alleged supplies to the Appellant took place and also to operate procedures which appear to them to be necessary to prevent fraudulent claims..."

71. Mrs Ndoinjeh's letter refusing the repayment was dated 18 July 2011. Thereafter there has been correspondence between the parties explaining the position in more detail. We have consider the position as at 18 July 2011. Mrs Ndoinjeh had received copies of the receipts. She confirmed that she had seen the originals and that she believed that the copies were made from them. In light of our examination of the receipts that we have seen we would have preferred to have seen the originals for ourselves. The receipts were for more than £250 the cut of amount for a simple receipt. It was accepted by the parties that the receipts were not valid for the purposes of regulation 14 because they did not carry the name and address of LCC.

72. As a result the only way that the receipts could be accepted as valid would have been if HMRC had exercised its discretion after considering all the surrounding evidence. The evidence Mrs Ndoinjeh had at that time was insufficient for her to be satisfied that LCC had acquired all the IPhones through its staff and family. 53% of the receipts have no names on them at all. Of the 47% which do have names, not all appear to relate to LCC because they have the individuals names inserted as previously discussed. Neeta has supplied details of the P46's, wage details, and a note signed by all the employees to the effect that they bought the IPhones. From Mrs Ndoinjeh's enquiries at the time there were no PAYE details as to the employment. From the evidence at the hearing the P46's and wage details appear to have been prepared at a later date. As a result she could not have been sure that the IPhones had necessarily been purchased by the named individuals for LCC.

73. The letters from Barclays Bank are unusual. One is undated and addressed to Foneart at the beginning of 2010 and the other dated in October 2010 addressed to LCC. Both referred to the arrangements as if they were being organised for each company. Under cross-examination Neeta confirmed that the Bank might have been confused. For our part, we are unclear for whom the 'staff' were buying the IPhones. We have been told that LCC was making a profit of about £10 per IPhone. It was unclear what the arrangements as to the price was for Foneart. From the table at paragraph 24 it would appear that LCC was including the VAT in the sale price to Foneart, which would represent a profit of 20%. Given the close relationship between

the companies and Neeta's obvious accountancy ability, we would have expected there to be a clearer explanation as to the agreed price. It also appears that that price is greater than the price Foneart could have charged in Europe (See paragraph 15). We were told that the IPhones had been purchased with a view to selling them into Europe. We note that Foneart appears to have sold the IPhones to another trader in the United Kingdom. We accept that Mrs Ndoinjeh was, like the Bank, also confused as to who the IPhones were being acquired for, LCC or Foneart..

74. The methodology for the purchase of the IPhones is also unclear. The more so from an examination of the receipts. It is not possible that all the phones were purchased as the witnesses have suggested. The impression given was, even after the initial launch of the IPhones in July 2010 when the idea came to Gitesh, that there were extensive queues in all the shops in November, December and January. Saryu indicated that they had had to take sandwiches with them. From the timings on the sample of receipts we have seen that cannot be right. There appeared to be no difficulty in buying more than one IPhone at a time nor in arranging an appropriate name. Saryu said that she had thought there might have been difficulties with Indian names. This implies that she has had to spell out her name. There was no need to do that as LCC was a much shorter name and that was the name she had been told to use.

75. The explanation with regard to the IPhones being collected in the Tesco, Marks & Spencer and other bags is not believable. Not least because Saryu told us that Gitesh had given her a bag for the money to 'hang round her neck'. If he could go to that trouble, why did he not provide a specific bag for each of them, so that there would have been no confusion as to who had bought what. There are inconsistencies in the evidence. Rohit referred to a driver but we understood that he and Gitesh did the driving.

76. We were told that the staff and family might have had three to five envelopes holding £3000 to £5000. On that basis with the cheaper IPhones being £510 they could only have bought 9 or less IPhones. 50 IPhones would have needed £25,000 or more in cash. It also appears that Amit purchased some IPhones during the periods in question. We have been asked to accept that where the IPhones were purchased without a name but by an individual, whose name appears in the same sequence, that that person bought those IPhones. Amit had said categorically that he would not be involved in the purchase of the IPhones. We do not understand why he has done so.

77. On the balance of probabilities we do not believe the IPhones were purchased as suggested and Mrs Ndoinjeh was entitled on the evidence before her to come to the same conclusion. Neeta has provided spread sheets showing the date of purchase, the IMEI number and, where she had the information, who had purchased the IPhones. That spreadsheet has clearly been constructed from the receipts. We do not believe that any of the staff or family would have been clear which IPhones they had bought given the various ways the IPhones appear to have been collected and stored. They have all signed the note to that effect to help with the recovery of the repayment.

78. With her qualification, Neeta knew very well how to record the necessary information. It was also unclear who had copied the IMEI numbers. The production of

a photograph of the machine does not assist. We understand that the IMEI scanner is connected to a computer, which then retains the numbers as they are scanned. These would, we understand, be on a separate list. It would have assisted if the list of the IMEI numbers on their own had been produced as evidence that a scanner had been used. On the balance of probabilities we do not believe the IPhones were scanned. In any event there would have been no need to scan them as Apple receipts contained that information, which could be extrapolated on to the spreadsheet.

79. We cannot make the money add up. It would appear that the drawdown of cash was out of synchronisation with the purchases. We accept that the invoice need not necessarily have been paid at that time. It is unusual that Neeta prepared all the invoices for Foneart from the receipts as and when she collated them. Whatever the transactions were, it was clearly not at arm's length. Given her knowledge of accountancy and the need to satisfy HMRC as to the purchases, we would have expected her to have been more transparent. There has been no provision for the expenses. Petrol to Brighton and the shops out of the town centre must have incurred some expense.

80. Mr Kazakos suggested that the fact that Neeta had learnt of the necessary VAT formalities whilst working for Foneart did not mean that she should pass that knowledge on to LCC. He referred to *Abdul Ghani El Ajou v Dollar Land Holdings Limited Factorum* in support of that submission. We do not accept that. The information supplied related to Notices from HMRC which are generic for all businesses and which she needed to know.

80. We dismiss the appeal and find that Mrs Ndoinjeh acted reasonably in not exercising HMRC's discretion to allow the receipts to be valid invoices. We do not accept that she has merely relied on the documentation. She has sought to have the surrounding information as provided to her, confirmed, where possible by appropriate evidence. Further, if she had had all the information, which was before the Tribunal, at the time of her decision, we would consider that she would have still have acted reasonably in refusing to exercise the discretion.

81. 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.

David Porter
TRIBUNAL JUDGE
RELEASE DATE: 8 September 2014