



Neutral Citation: [2022] UKFTT 167 (TC)

Case Numbers: TC08494

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal references: **TC/2018/02840**
TC/2018/02841

VAT – PLNs - deliberate inaccuracy penalties after denial of zero rating by trader applying Mecsek-Gabona; whether underlying assessments should be considered – yes – had HMRC sufficiently identified link to fraudulent tax loss – no – appeals allowed
Procedural – whether an issue should be dealt with as a preliminary issue – Wrottesley applied – no; submission of no case to answer – decision that the application would not be entertained.

Heard on: 16 November 2021 – 1 December
2021, and 15 December 2021
Judgment date: 16 May 2022

Before

**TRIBUNAL JUDGE BOWLER
JANE SHILLAKER**

Between

**NEEGUM SHETH
SAM GHAZI
and**

Appellants

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Matthew Sherratt QC and Michael Firth of Counsel for the Appellants.

For the Respondents: Aparna Rao of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

INTRODUCTION

1. The Appellants appeal against two decisions of the Respondents (“HMRC”) dated 4 August 2017 issuing a Personal Liability Notice (“PLN”) under Paragraph 19 of Schedule 24 to the Finance Act 2007 (“FA07”) to each Appellant in the sum of £880,373.60. The PLNs were issued following the denial by HMRC in a decision dated 2 November 2015 of zero-rating of supplies made by Aircall International Ltd (“AIL”), applying what are referred to as the “Mecsek-Gabona” principles. Mr Sheth was director of and Mr Ghazi was a manager of AIL. The denial of zero-rating had been followed by an assessment on AIL for the amount of £2,959,239.00, after which AIL had been placed into voluntary liquidation. AIL’s assessment was initially appealed, but the appeal was subsequently withdrawn.

2. HMRC challenged the ability of the Appellants to address the underlying assessment of AIL where the appeal by AIL had been withdrawn. For the reasons we explain we decided that the underlying assessment of AIL should be addressed by us.

3. Having heard and considered the evidence, we have concluded that HMRC has not discharged the burden of proof on them to show that the conditions for the application of the *Kittel/ Mecsek-Gabona* principles to AIL’s zero-rating of supplies made by it had been met. In particular, the evidence did not show the existence of tax losses or connection of AIL’s supplies to fraudulent transactions.

THE FORM OF HEARING

4. With the consent of the parties, the form of the hearing was V (video) using the Tribunal’s remote platform.

5. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

BACKGROUND

6. On 2 November 2015 HMRC notified AIL of its decision to deny AIL’s claim to zero-rating of 28 dispatches of mobile telephones to Tisca in VAT periods 02/13, 3/13, 04/13 and 05/13 on the basis that the transactions were part of a tax fraud committed by AIL’s customer; AIL knew or should have known of that fraud; and AIL had not taken every reasonable step within its power to prevent its own participation in the fraud.

7. On the same date HMRC notified AIL of a total assessment of output VAT under Section 73 of the Value-Added Taxes Act 1994 (“VATA”) in the sum of £2,959,239 plus interest.

8. On 3 November 2015 AIL entered creditors’ voluntary liquidation.

9. On 2 December 2015 the Khan Partnership submitted the Notice of Appeal of the denial and assessment of AIL on the instructions of the liquidator of AIL. (This is shown by a letter of 19 April 2016 from HMRC.)

10. On 9 August 2016 AIL, via its representatives, the Khan Partnership, withdrew its appeal against the assessment citing lack of funds.

11. On 4 July 2017 HMRC issued a penalty calculation summary to AIL showing a penalty of £1,760,747.19 and this was followed by a penalty assessment on 4 August 2017 for the same amount. The assessment notified the liability of the company’s officers (i.e. the Appellants) to pay the penalty and the appealed PLNs were issued on that day.

12. The liquidator of AIL wrote to HMRC on a date which we take to be 7 September 2017 (not 2016 as printed) to say that the penalty assessment issued to AIL had not been received by him.

13. In preparation for this appeal HMRC identified exchange rate errors and a typographical error which have resulted in corrections to the assessed amount of VAT. As a result the total assessment should be £2,950,997.88.

14. A deduction for disclosure has been made which has resulted in a penalty of £1,755,843.74, with the result that the amount claimed from each Appellant as a consequence of the PLNs is £877,921.87.

THE GROUNDS OF APPEAL

15. The grounds of appeal set out in the Notices of Appeal can be summarised as follows:

(1) the Appellants had neither knowledge of the fraudulent connection of its transactions, nor the objective means to acquire the requisite knowledge, at the time when the transactions were entered into;

(2) the Appellants' actions do not meet the high threshold for "deliberate behaviour";

(3) the Appellants only had knowledge of immediate purchases and sales and did not have any knowledge of the circumstances of any other transactions. HMRC have failed to clearly identify how and when the requisite knowledge was obtained;

(4) there is no commercial requirement for written contracts in the wholesale commodity market and therefore the lack of them cannot be said to show knowledge or means of knowledge of MTIC fraud;

(5) the Appellants undertook sufficient and reasonable due diligence;

(6) the Appellants did not and could not have known that the transactions in question were connected to the fraudulent evasion of VAT; and

(7) the Appellants do not accept, and put HMRC to proof of, the alleged fraudulent evasion of VAT.

THE STRUCTURE OF THIS DECISION

16. We start by addressing the preliminary application made by HMRC for that part of the Appellants' case addressing the underlying assessment imposed on AIL to be struck out.

17. Having concluded, for the reasons we explain below, that the Appellants' case addressing the underlying assessment imposed on AIL should not be struck out, we then proceed to address the substantive issues connected with that assessment and set out our conclusion allowing the appeals.

18. We then record our decisions made in relation to a series of procedural issues which arose during the hearing.

19. For ease of reading we have set out the names of companies referred to in this decision in full in the Appendix.

PART 1 HMRC'S STRIKE OUT APPLICATION

20. HMRC applied in Ms Rao's written opening submissions for that part of the Appellants' case addressing the underlying assessments imposed on AIL to be struck out ("the Application").

HMRC'S SUBMISSIONS

21. Ms Rao's submissions can be summarised as follows.

22. Ms Rao submitted that the Appellants, as the director and “operations director”, had the opportunity to challenge the denial and assessment issued to AIL. Indeed, such proceedings began but were then withdrawn. For the Appellants to re-litigate the liability for these matters, is an abuse of the Tribunal’s process which should not be permitted.

23. Reliance was placed on *HMRC v Kishore* [2021] EWCA Civ 1565 and *Littlewoods v HMRC* [2014] EWHC 866 (Ch), together with Judge Mosedale’s summary of the law in *Foneshops Ltd v The Commissioners for Her Majesty’s Revenue & Customs* [2015] UKFTT 0410 (TC) and her comment that abuse of process prevents previously litigated issues being re-tried. The doctrine of abuse of process applies both where a party has declined to proceed with a case and accepts that it must be dismissed but then seeks to re-litigate the matter, and where the matters sought to be litigated could and should have been litigated in earlier proceedings (*SCF Finance v Masri (No. 3)* [1987] QB 1028).

24. The doctrine also applies where the first set of proceedings involved a corporate body as a party and the second involves instead the individual of whom that corporate body was the embodiment, as confirmed by Lord Bingham in *HMRC v Kishore* [2021] EWCA Civ 1565.

25. It was recognised that the doctrine of abuse of process should not operate so as to result in an injustice by denying a party the right to have the merits of his case determined without good cause (*Nayif v The High Commission of Brunei Darussalam* [2014] EWCA Civ 1521). In line with that principle, the Tribunal has also decided that in cases where a liquidator has withdrawn a company’s appeal or failed to appeal on its behalf, such that the decision was out of the hands of the director against whom a PLN is later issued, that withdrawal or failure to appeal does not bind the director (see *Hackett v Revenue & Customs* [2016] UKFTT 781 (TC), *Jason Andrew v HMRC* [2016] UKFTT 295 (TC) and *Bell & Anor v Revenue and Customs* [2018] UKFTT 225 (TC)).

26. However, in this case AIL was already in liquidation when it decided to begin the appeal process. The liquidators ought to have made the decision to appeal and to withdraw it. However, the withdrawal letter was written by The Khan Partnership acting for the company AIL, not the liquidator. The inference is that the Appellants, as director and operations manager, made the decision to withdraw the appeal. They have consistently acted together in their control of AIL’s activities and transactions and, absent evidence to the contrary, are bound by their decision not to continue AIL’s appeal of assessments and penalties against it. The letter from the liquidator to HMRC dated 7 September 2017 shows that the liquidator was not aware of the penalties assessed on AIL.

27. A lack of funds is not, of itself, a sufficient cause to permit re-opening of the issues at a later date under the guise of a new appeal *Lighthouse Technologies Ltd v Revenue & Customs* [2010] UKFTT 374 (TC) and *London Cellular Accessories Ltd v Revenue & Customs* [2012] UKFTT 583 (TC).

28. In addition, the Grounds of Appeal do not challenge the assessment and penalty issued to AIL. Although, the Appellants purported to challenge the existence of many of the transaction chains, the existence of any fraudulent scheme, and the connection to tax losses in their List of Issues dated 27 September 2019, no application to amend the Grounds of Appeal was made.

29. Overall, a broad merits-based approach should be applied in line with *Kishore* in determining the Application.

30. If the Tribunal concludes that the Appellants seek to advance arguments that are not part of their Grounds of Appeal, or seek to re-litigate matters that were the proper province of

an appeal by AIL against the assessment and penalty notified to it, and therefore amount to an abuse of process, then the Tribunal may strike them out as having no prospect of success under Rule 8(3)(c) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (S.I. 2009/273 (L.1)) (“the Rules”).

THE APPELLANTS’ RESPONSE

31. Mr Sherratt’s submissions can be summarised as follows.

32. Mr Sherratt submitted that the Application was raised too late and was misconceived. HMRC only raised the argument that it would be an abuse for the Appellant to contest the underlying substantive issues relating to the assessment in Ms Rao’s opening submissions. If HMRC wanted to make such an argument it was incumbent upon them to set it out in their statement of case, as required by rule 25 of the Rules, and have not done so. The application undermines the entire basis upon which the appeals have been prepared by both parties and the Tribunal. There is no evidence addressed to this issue because it was not raised.

33. It was procedurally impossible for the Appellants to appeal the decisions issued against the company. However, they stated clearly in the Grounds of Appeal that they did not accept the alleged fraudulent evasion of VAT which had therefore been in their pleadings from the start of the litigation.

34. HMRC’s decision denying AIL’s zero rating was dated 2 November 2015. AIL went into liquidation on 3 November 2015 (before it was even aware of HMRC’s decision). The effect of the liquidation was that, thereafter, power to take decisions in relation to the company rested with the liquidator, not the Appellants (see Insolvency Act 1986, s.103 as it stood at the time). The inference made by HMRC that the withdrawal of AIL’s appeal by the Khan Partnership showed that it was effectively a withdrawal made by the Appellants, failed to engage with the fact that the company remained a party to the litigation/appeal and took any decision in relation to that litigation under the control of the liquidator.

35. There is no substance to the allegation of abuse. Reliance is placed upon the decision in *Hackett*.

36. Mr Sherratt also relied upon *Kishore* to submit that the suggestion that the Appellants should be denied the opportunity to properly challenge criminal penalties totalling £1.7m because an insolvent company initially made, but could not afford to pursue, challenges to related decisions is totally without merit. He agrees with Ms Rao that a broad merits-based approach is required by *Kishore*.

37. Mr Sherratt submitted that key issues in this case include whether there was fraud in Poland and the state of the Appellants’ knowledge. The case of *Johnson v. Gore Wood & Co* [2003] All ER (D) 58 identifies that relitigation should be avoided and there is a public interest in the use of court resources; but in this case there would be no economy if HMRC’s application succeeded as it would still be necessary to traverse the same issues in order to address the Appellants’ knowledge for determining whether any inaccuracies were deliberate. Regard should be had to the fact that the penalties which HMRC seeks to impose on the Appellants are criminal in nature for the purposes of Article 6 of the European Convention on Human Rights (“ECHR”).

DISCUSSION

38. Our decision to refuse the Application was delivered orally at the hearing and we record below the basis for it.

39. We considered that there were two inter-related issues raised by the Application: one addressing the fairness of the Application in the context of the Appellants’ previous

pleadings; and another considering whether the Appellants were estopped from challenging the basis of the AIL assessments, or such a challenge would give rise to an abuse of process.

Pleadings and the Fairness of the Application

40. The first issue concerns the extent to which the Appellants' pleadings identified that they challenged the underlying basis of the assessments on AIL.

41. We are satisfied that HMRC were put on notice by the Grounds of Appeal submitted for each of the Appellants that the basis of the underlying denial of the zero-rating was challenged. In each case the grounds of appeal stated:

“The Appellant does not accept, and put HMRC to proof of, the alleged fraudulent evasion of VAT”.

42. Furthermore, on 4 February 2019 Judge Poole issued directions in which it was stated that:

“the Appellants shall specify in writing to HMRC and the Tribunal whether, in relation to each of its impugned sales of goods to Atheus and Tisca, the Appellants accept that AIL was participating in VAT evasion (but without making any admission as to whether it knew or ought to have known that such was the case).

43. On 27 September 2019 a list of issues was prepared on behalf of the Appellants in response to the directions. That list of issues clarified that the sale of goods to Atheus was not in fact challenged (as HMRC acknowledges); and, more importantly, in relation to the sales of goods to Tisca, the list challenges the evidence of the alleged transaction chains stating that:

- (1) at the time when the disputed transactions took place AIL was only aware of its immediate customers and suppliers;
- (2) the Appellants do not accept that AIL's transactions were part of an orchestrated fraudulent scheme;
- (3) the Appellants do not accept that there is a tax loss at any point in the transaction chains involving their immediate supplier and customer;
- (4) in relation to alleged tax losses in Poland, the Appellants accept that tax losses were suffered in Poland in respect of Lineks and Nikopol, but do not accept that these tax losses are connected to the transaction chains. In particular, the Appellants referred to the Witness Statement of Officer Patterson where he notes that it is difficult to ascertain with any degree of certainty which letters from the Polish tax authorities relate to AIL's deals. Consequently, it was said that HMRC had failed to show any connection between the tax losses suffered in Poland and the transaction chains in which AIL was involved;
- (5) the Appellants do not accept that any of the tax losses suffered in Poland were fraudulent and put HMRC to strict proof of the alleged fraudulent nature of any relevant tax losses.

44. Therefore these matters have been clearly identified in the Appellants' pleadings for at least two years before the hearing. As a result we consider that as a matter of procedural fairness it was incumbent on HMRC to identify, and make, its strike out application explicitly (rather than within opening submissions prepared for the hearing); and in any event more than 2 weeks before the start of the hearing.

Abuse of process/estoppel

45. The parties agreed that a broad merits-based approach should be applied by us in considering the Application in line with the principles set out in *Kishore*. At paragraph 27 of that case Lord Justice Newey set out the following principles:

- i) Where a civil claim has been the subject of an adjudication, issue estoppel will generally bar a party from re-opening in a second claim an issue determined against him in the first one if the issue was essential to that decision;
- ii) Where a civil claim has been struck out as an abuse of process on account of intentional and contumelious conduct, want of prosecution or wholesale disregard of rules of Court or, perhaps, struck out by reason of other “inexcusable” procedural failure on the part of the claimant, a second claim covering the same subject matter will be struck out unless there is special reason not to do so;
- iii) Where a civil claim has been discontinued, the claimant will need to obtain the Court’s permission to bring a second one arising out of facts which are at least substantially the same if the defendant had filed a defence in the first claim;
- iv) Where a point was not raised in a set of proceedings but could have been, it may be an abuse of process for the party to raise it in later proceedings. When deciding whether that is the case, the Court takes a “broad, merits-based” approach in accordance with *Johnson v Gore Wood & Co*;
- v) While the point was left open in *Shiner*, the weight of authority suggests that issue estoppel has, at most, a much smaller part to play in the context of tax appeals. However, it may be abusive for a party to contest a point which has been decided against him in such an appeal in later proceedings and, in that context, the Court will again make a “broad, merits-based” evaluation.

46. *Kishore* also concerned an appellant who was appealing personal VAT penalties, but in that case the appellant was also the same person who was denied input tax by HMRC on the basis of *Kittel* principles. His appeal of the underlying denials was struck out by the tribunal and HMRC applied to strike out grounds of his penalty appeal on the basis that it would be an abuse of process for him to be permitted to litigate the *Kittel* issues in the penalty appeals. The Court of Appeal rejected arguments urging it to apply the narrower approach, described in *Arbuthnot Lathan Bank Ltd v Trafalgar Holdings Ltd* [1998], that a court should start with the assumption that if a party has had one action struck out for abuse of process, some special reason has to be identified to justify a second action being allowed to proceed. In particular, in the context of tax penalties, Lord Newry commented that the stricter *Arbuthnot* type approach “must be no more than limited significance in the context of appeals against tax penalties” (at para 30). It was noted that it might be in point if a person brought a second appeal against a penalty where a previous appeal against the same penalty had been struck out. Penalty appeals which concern punitive measures are particularly appropriate for a broad merits-based approach rather than an *Arbuthnot* test.

47. An example of the broad merits-based approach (albeit before the description of the principles in *Kishore*) is provided by Judge Berner’s decision in the case of *Hackett*, which is also of particular relevance to this case as the appellant there was appealing a personal liability notice imposed following the denial of input tax to the appellant’s company applying *Kittel* principles.

48. Judge Berner distinguished *Foneshops* on the basis that in that case the penalty appeal was brought by the same party as had been the appellant in prior MTIC proceedings. By

contrast, (as in this case) the penalty appeal was by a different person - the director of the company which had previously appealed MTIC assessments. He noted that this did not prevent the *Johnson v Gore Wood* principles applying, but commented that the abuse of process principle enunciated therein “is no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression” (at para 45).

49. Judge Berner distinguished appeals whether had been a previous determination of facts and issues by the tribunal, where he considered it would be an abuse of process for those to be effectively relitigated, albeit by a different appellant. In the case before Judge Berner, one appeal had been heard by the tribunal, but two further appeals had been withdrawn. He therefore concluded that it would be an abuse of process for the appellant to dispute the facts and issues only insofar as determined by the tribunal in the first appeal.

50. The approach adopted in *Hackett* was therefore consistent with the principles set out by the Court of Appeal in *Kishore* and we have decided not only to follow the *Kishore* principles which bind us, but also to adopt the approach taken in *Hackett*.

51. Turning to the situation in this case, the following factual circumstances are therefore particularly relevant:

- (1) given the fact that the Khan Partnership acted on the instructions of AIL’s liquidator to appeal the denial of zero-rating and assessment to VAT, and in the absence of any evidence to show otherwise, we are satisfied that on the balance of probabilities the Khan Partnership acted on the instructions of the liquidator to withdraw the appeal. We note that HMRC relied on a letter of 7 September 2017 in which the liquidator said that he was not aware of the penalty assessment on AIL, but the penalty assessment was a separate assessment to the VAT assessment of AIL. A lack of knowledge of the penalty assessment/notice does not infer a lack of knowledge of the VAT assessment;
- (2) in fact, the penalties to which AIL was assessed on 4 August 2017 were never appealed and that is consistent with the withdrawal of the appeal of the underlying assessment;
- (3) there has been no consideration of the AIL VAT assessments or penalty assessment by the tribunal;
- (4) the Appellants have not previously brought an appeal of the penalties which are the subject of these proceedings;
- (5) there is no suggestion of unreasonable conduct or abuse of process more generally on the part of the Appellants;
- (6) as explained above, the Appellants’ pleadings had made clear for some time that the basis of the underlying assessments on AIL was challenged. There was no reason to conclude that that was an unreasonable challenge, or one which on its face would have little or no chance of success.

52. Furthermore, as Mr Sherratt submitted, it is intrinsic to our consideration of whether the Appellants’ knowledge was sufficient for them to be found to have acted deliberately for us to address of what their alleged knowledge was about. Without consideration of the underlying substantive issues we saw little basis on which the overriding objective of acting in the interests of fairness and justice could be applied. A deliberate inaccuracy penalty is, by definition, reliant upon there being an inaccuracy; and is intrinsically reliant upon the knowledge of the person on whom the penalties imposed. If we conclude that HMRC has not shown that the requirements for denying the zero-rating are satisfied, there cannot be an

inaccuracy and the Appellants cannot have the required level of knowledge to be found to have made deliberate inaccuracies in the returns of AIL.

53. We therefore decided for all of these reasons that HMRC's application should be rejected. The basis of the AIL assessments should be considered by us.

54. The application was made by HMRC at the start of the hearing. In fact, having heard and considered all of the evidence, we have concluded that the evidence is inadequate to show that the requirements of *Kittel/ Mecsek-Gabona* were met for the reasons we explain below. It therefore became clear that it had, indeed, been vital to consider the AIL assessments. However, this was not, of course, a matter which we were in a position to know when HMRC's application was made.

PART 2 – SUBSTANTIVE DECISION

HMRC'S CASE

55. Both parties have provided extensive submissions in their Statement of Case and submissions. This part of the decision sets out the submissions in relation to the application of *Mecsek-Gabona* in some detail, given that this is the focus of our decision; but records only the key elements of the submissions on the other key issues which would have arisen if we had concluded that AIL's transactions had been shown to be connected to fraud. These additional points are noted in particular so that readers other than the parties are aware of the arguments raised.

56. In essence, HMRC's case is that the Appellants are liable for deliberate inaccuracies in AIL's VAT returns as a result of treating supplies made by AIL as zero-rated when the application of the principles in *Kittel* and *Mecsek-Gabona* mean that the zero-rating should be denied.

57. Following our decision to reject HMRC's strike-out application, Ms Rao submitted that the following approach should be adopted in our decision in relation to the matters in dispute (recognising that no point is taken by the Appellants in relation to, for example, the validity of the PLNs):

(1) did the VAT returns contain an inaccuracy? HMRC contends that they did as a result of incorrectly claiming that supplies were zero-rated. In order to determine this, the Tribunal has to decide whether AIL's transactions were connected with a fraudulent evasion of VAT;

(2) was the inaccuracy deliberate? HMRC submit the inaccuracy was deliberate because AIL knew that its transactions were connected with fraud even if AIL/the Appellants were not aware of *Mecsek-Gabona* and its implications. If HMRC's interpretation of what knowledge is required for an inaccuracy to be "deliberate" is correct, it is then necessary to decide:

(a) whether AIL knew that its transactions were connected with a fraudulent evasion of VAT; and

(b) whether AIL took every reasonable step within its power to prevent its own participation in that fraud; and

(3) was the conduct leading to the AIL VAT assessment properly attributable to each Appellant?

58. Ms Rao submitted that AIL's challenged transactions, in which it sold mobile telephones to Tisca, were part of a vast multi-country web of fraud which has been investigated under arrangements entered into with other EU Member States. AIL's transactions in VAT periods 06/12 – 02/13, in which it sold goods to the value of £53.8

million to Atheus, formed part of an antecedent version of the same highly complex orchestrated scheme to defraud the Polish Revenue.

59. HMRC are not obliged to identify each and every participant in the fraudulent scheme. HMRC rely upon a series of facts and circumstances to show that there was an overall scheme to defraud.

60. HMRC say that AIL's sales of telephones to Tisca were part of a highly complex orchestrated scheme to defraud the Polish revenue. AIL sold telephones to Tisca, which invoiced a Bulgaria trader for an onward sale, but its bank accounts show that money was in fact received from a Polish trader. HMRC say that Tisca issued false invoices to Bulgarian companies in an attempt to disguise the presence of fraudulent defaulting Polish traders in the transaction chains, the aim of which was to create VAT defaults at the bottom of the transaction chains in Poland, with VAT reclaims being made by the traders at the top of the chains who made intra-Community supplies.

61. In this case the nature of the fraud is such that the entire chains of transactions cannot be identified by HMRC. Even though HMRC cannot identify a specific tax loss incurred by a specific trader in Poland in relation to the goods sold by AIL, on the balance of probabilities there must have been such a tax loss as that was the very purpose of the scheme to defraud the Polish revenue.

62. Three other UK companies made zero-rated sales to Atheus and Tisca, the appeals for two of whom were struck out or withdrawn. In the case of the third, Prizeflex, the company lost an MTIC appeal before the Tribunal and that decision was upheld by the Upper Tribunal. Further activity had led to the company being denied its claim to zero-rate supplies of phones to Tisca.

63. HMRC allege that Tisca was a fraudulent enterprise. Its declared business activity did not include the wholesale trading of mobile telephones and similar electronics. The Cypriot authorities confirmed that the goods never entered Cyprus. From a standing start, in the period of 22 January-28 June 2013 Tisca made total gross sales of €241.9 million. This was not commercially credible. Such turnover could only be achieved as part of contrived trading, the aim of which was a facilitation of VAT fraud.

64. Tisca's three largest customers in the period 22 January-28 June 2013 were three Bulgarian registered companies: Kameya, Elit and Sigma who purchased 92% of Tisca sales. However, Tisca did not receive any money from those companies. The Polish authorities had no record of the three companies in the freight forwarding documents associated with the transaction chains. Each of them therefore either had its details hijacked by fraudsters or was itself a fraudulent entity. None of them had any ostensible business wholesaling mobile telephones and none of them declared any intra-community acquisitions or sales. All of Tisca's invoices issued to the Bulgarian traders were therefore false and fraudulent and their only purpose was to disguise the transaction chains featuring the fraudulent defaulting traders in Poland. Almost all of the goods that Tisca purported to sell to the Bulgarian traders were purportedly delivered to one of two Polish freight forwarders: Dor-Cel and Cargo Services.

65. The vast majority of Tisca's receipts were from Polish traders who were buffers in tax loss transaction chains. The following Polish companies were identified as such: Jacobin, Lineks, Jaystone Trading and Nikopol. Only €1.8 million of an amount in excess of €290 million credited to Tisca's bank accounts came from other customers. In paying Tisca the four traders paid away VAT due to the Polish revenue.

66. As the majority of monies that can be traced through Tisca's bank accounts were connected to the fraudulent evasion of VAT in Poland, on the balance of probabilities any transactions involving Tisca were connected with the fraudulent evasion of VAT.

67. Three further Polish traders - Limo, Roxa and Norfolk - also made third or fourth party payments to Tisca as part of the fraud on the Polish revenue. Tisca's purchases for the period from 7 January - 9 June 2013 totalled €231.5 million. Therefore Tisca should have made a profit of €10.3 million on its transactions in the period. However, Tisca also cumulatively overpaid its suppliers by more than €40 million.

68. The only explanation for Tisca's bank payment pattern is a facilitation of VAT fraud on industrial scale.

69. Jacobin, Lineks, Jaystone and Nikopol all acted as buffers, but also caused fraudulent tax losses. Details of the way in which each company was set up and operated are relied on to assert that they should be viewed as "buffers" and/or caused fraudulent tax losses. Similar matters are relied on in relation to a series of other Polish companies which are also said to have operated as "buffers".

70. In Ms Rao's opening submissions she says that the Polish fraudulent defaulting traders are: Fonset, Benox, Flatop, Ron Poland, Multistrada, Havana and Nectel.

71. In the context of transactions involving Nikopol the fraudulent defaulting traders, Fonset and Benox are said to be again found at the bottom of the chains. Fonset did not carry out any business activities but just issued invoices without supplying any goods. Benox and Flatop did not receive any payments for the invoices that it issued.

72. The failure to conduct any meaningful due diligence can only mean that the Appellants knew that Atheus', and then Tisca's, activities were connected with a fraudulent evasion of VAT.

73. AIL, through the Appellants, had actual knowledge that its sales to Atheus and Tisca were part of a VAT fraud being committed in the transaction chains, as shown by the inference which arises from cumulative circumstantial evidence.

74. AIL had not taken every reasonable step within its power to prevent its own participation in the fraud. AIL's due diligence in relation to Atheus and Tisca was inadequate for AIL to conclude that they were not engaged in MTIC fraud and had the financial wherewithal to enter into transactions in the values at which they were carried out.

75. It is beyond coincidence that, just as in the transactions subject to the denial of input tax in 2006 (which was the subject of a dismissed appeal in this tribunal), the Appellants have again engaged in transactions that are connected with the fraudulent evasion of VAT. Their previous involvement in such transactions suggests that they knew that the purpose of the impugned transactions was to facilitate VAT fraud. If they did not so know, their previous experience in relation to the circumstances surrounding transactions connected with the fraudulent evasion of VAT should have alerted them when the transactions which are the subject of this appeal occurred. The only reasonable explanation for the transactions was the facilitation of fraud.

76. If there was an overall scheme to defraud, it is more probable than not that, for the said scheme to have worked, the key parties to the transaction chains must have been told: from whom to purchase, what goods to trade, when to trade, at what prices, whom to pay and when.

77. The proper inference to be drawn from the existence and operation of the overall scheme to defraud the Polish revenue is that AIL knew that its transactions, that formed part of the scheme, were connected with the fraudulent evasion of VAT.

78. HMRC also rely upon a series of factors to show that AIL had actual knowledge that its sales were connected to the fraudulent evasion of VAT including: AIL's knowledge of MTIC activity, the fact that previous transactions had been linked to fraudulent transactions, its change from supplying Atheus to Tisca once the Cypriot authorities began to investigate Atheus, the supply of UK specification goods to Cypriot companies, the lack of evidence of negotiation of deals, the ease with which a large turnover was achieved with Atheus and Tisca and the ease of making profits on those sales, AIL's due diligence, AIL's commercial documentation (or the lack thereof), the lack of records about rejected counterparties and the lack of evidence of adequate insurance and inspection of goods. In addition, HMRC relied on claimed inconsistencies in the Appellants' evidence regarding matters such as payments made by Tisca to AIL. The Appellants themselves have recognised that their due diligence had been inadequate.

79. The VAT inaccuracies were deliberate. Claiming zero-rating that a taxable person knows is not due because he knows that the relevant transactions are connected with the fraudulent evasion of VAT, is deliberate behaviour, as is claiming zero-rating in circumstances where the only reasonable explanation for them is fraud.

80. HMRC do not plead recklessness. They plead actual knowledge which includes 'Nelsonian' blind eye knowledge. This means that, if the maker of the statement was wilfully blind as to the inaccuracy of the statement, the test in *Tooth v. HMRC [2021] UKSC 17* would be satisfied (relying upon *Clynes v HMRC [2016] UKFTT 369 (TC)* and *Chohan v HMRC [2021] UKFTT 096 (TC)*).

81. In relation to the Appellants' argument regarding the treatment of the charges imposed by the Polish authorities under what is referred to as "Article 108", Ms Rao submits that the argument misses the core features of MTIC transactions: the Polish companies issued invoices whereby they purported to handle goods, even though they did not in fact do so, in order to disguise the presence of a fraud. In addition, the Tribunal cannot properly make a finding on the interpretation and effect of Polish law without an adequately evidenced translation thereof and legal opinion being made available to it.

82. Mr Sheth's liability is derived from his role as director and by his oversight of AIL's activities as well as the fact that he actively took part in the business of the company including managing its cash flow and was responsible for the accuracy of its VAT returns, even if he delegated this task to an accountant.

83. Mr Ghazi's liability is predicated upon his integral role within AIL. Mr Ghazi was the person who knew the most about AIL's trading behaviour, customers, suppliers, transaction decisions, due diligence, defaulters in the supply chain, and overall conduct of its business. It is plain that the directors relied upon Mr Ghazi in making any decisions in relation to AIL. He was responsible for ensuring that every reasonable step was taken to avoid entering into transactions that were connected with a fraud. If he allowed such transactions to go ahead, knowing that VAT returns would be submitted on behalf of AIL claiming zero-rating on those transactions, the inaccuracy is properly attributable to him.

84. The Appellants sought for the first time in the proceedings at the hearing to suggest that persons other than themselves made decisions in relation to the company. That suggestion, coming so late and with no support from the individuals named as responsible, was wholly unbelievable; although once the evidence is closely analysed it is clear that, in fact, despite the purported claims, the other individuals had no real part in the decision-making.

85. There are no special circumstances in this case.
86. Although this was not entirely apparent from the written opening submissions, it was clarified during the hearing that HMRC do not allege dishonesty.
87. HMRC do not allege that there was any VAT loss in Bulgaria or Cyprus.

THE APPELLANTS' CASE

88. Mr Sherratt submitted that the Appellants' case starts from the submission that even if HMRC prove everything that they propose to prove regarding the connection of AIL's transactions to fraud, their case will still fail as a matter of law because they have not proven a deliberate inaccuracy in the VAT returns. In order for the inaccuracy in the VAT return to be "deliberate", it was necessary for AIL to know that the VAT return contained that inaccuracy; and to have intended to mislead HMRC as to the truth of the inaccurate statement, applying *Tooth*. This means that it must be shown that AIL intentionally declared the relevant deals as zero-rated and intended, thereby, to make an inaccurate statement. AIL cannot have intended to mislead HMRC in respect of the truth of applying zero-rating if it did not know that zero-rating was unavailable.

89. Mr Sherratt submitted that there are two types of knowledge involved in this case:

- (1) knowledge that the deal was connected to fraud; and
- (2) knowledge that zero-rating was not applicable.

90. He submits that a person can have the first knowledge without the second. If AIL did not know the *Kittel* test could lead to denial of zero-rating, it cannot have provided the relevant information, intending it to mislead (irrespective of any consideration of the broader conduct). There may be other consequences of the *Kittel* test being satisfied that no one is presently aware of, but which the CJEU later identifies. There can be no deliberate inaccuracy until there is such awareness. The declaratory effect of EU law is not relevant. It may well be the case that as a matter of law zero-rating should always have been denied for transactions where the *Kittel* test is satisfied. That does not mean, however, that persons who zero-rated transactions where the *Kittel* test was met, in ignorance of this legal principle, were causing deliberate inaccuracies. As far as AIL was concerned the reality was that all HMRC ever required to see to authorise zero-rating was the material stipulated by Notice 725, and that was the total of both the Appellants' and Officer Patterson's knowledge at the time.

91. HMRC have not pleaded or submitted a case that the alleged inaccuracy was deliberate because AIL knew it was not entitled to zero-rate the transactions in the relevant VAT returns. There is no allegation that any inaccuracy was attributable to either of Mr Sheth or Mr Ghazi because they actually knew that there was an inaccuracy in the VAT return.

92. HMRC rely on an allegation of wilful blindness to try and establish knowledge of connection to fraud, but they do not rely on it to establish knowledge that it was inaccurate to apply zero-rating in the VAT return (if it was inaccurate). It would only be the latter that is relevant to an allegation of deliberate inaccuracy.

93. In relation to the question as to whether there was an inaccuracy in the tax returns, Mr Sherratt submitted that the evidence of fraudulent tax loss and connection is inadequate. It consists entirely of translations of decision letters sent to companies in Poland. The evidence, on its own terms, does not establish a fraudulent tax loss or a connection between AIL's transactions and a fraudulent tax loss. It has not been proven that these goods were in any transaction chain leading to tax losses in Poland.

94. HMRC had pleaded that various identified Polish companies were the defaulting traders, but their closing submissions appeared to have abandoned this line of argument, or

changed their case to arguing that the companies who directly paid Tisca were the defaulting traders. If the latter, this change from their stated case should not be permitted given that no application had been made to make the change. However, even if those companies were considered the same fundamental problems with the evidence in relation to them applies as it does to the companies originally identified. Sending goods to Poland does not in itself establish fraudulent VAT default.

95. Mr Sherratt submitted that the weight given to the reports from the Polish tax authorities should be reduced given the lack of primary documentation and the lack of Polish tax authority witnesses who could be cross-examined on the contents of the letters. The Polish letters are, in large part, comment and opinion. He relies upon *Mungavin v. HMRC* [2020] UKUT 11 (TCC), in which Nugee J said in the context of a revenue officer's evidence:

“He could not prove the primary facts as he had no more knowledge of them than anyone else: either they could be proved from the documents and other matters he referred to (in which case his evidence was not needed) or they could not (in which case his evidence would not assist). And as to what inferences could be drawn from those facts, again his evidence was not strictly evidence of facts he could speak to of his own knowledge, but amounted to a series of submissions.”

96. However, to the extent that the Polish reports are relied upon, they in fact prove that AIL's transactions were not connected with supplies by alleged fraudulent defaulters. Each of the alleged fraudulent defaulters identified by HMRC was described by the Polish authorities as a fictitious company that did not handle or supply goods or incur any VAT liabilities. All they did was issue “blank invoices”. Logically therefore those companies could not be found to have fraudulently defaulted on VAT liabilities.

97. There is considerable irony in HMRC asking the Tribunal to accept the Polish letters as proof of the existence of a fraudulent tax loss in Poland under Polish law but, at the same time, asserting that the Tribunal cannot rely on what those documents say about the nature of the sums charged against the Polish companies. However, in any event in the absence of satisfactory evidence of foreign law, the Tribunal should assume that the foreign law is the same as English law relying upon *Iranian Offshore Engineering and Construction Company v. Dean Investment Holdings SA* [2018] EWHC 2759 (Comm).

98. The result of the inadequacies in HMRC's case is that no tax loss has been proven and AIL's supplies cannot be connected to any defaults by Polish companies.

99. In considering the requisite knowledge of any fraudulent scheme, the Tribunal must be wary of relying unduly upon the quality of the taxpayer's due diligence, particularly where it is necessary to conclude that AIL/the Appellants knew, rather than should have known, of a fraudulent scheme.

100. HMRC's reliance on factors such as lack of insurance and lack of contractual documentation should not be taken as indicators of knowledge of fraud given that AIL applied the same practices to the many transactions which were not challenged.

101. There is no evidence as to the price at which the mobile phones were sold after Tisca's supply. The ultimate price of disposal of the mobile phones logically must dictate pricing throughout the chains, if they are contrived. The evidence does not disclose where the ultimate supply of the goods took place after they arrived at the Polish freight forwarders.

102. The Appellants had adequately explained the payments made by AIL to Tisca as refunds and the invoiced supplies by AIL to Tisca reconciled with total payments made by

Tisca less total payments by AIL. Refunds from AIL to Tisca do not become more likely if there is an orchestrated fraud, they become less likely. The fact that deals fell through and refunds had to be made is not just the best explanation, but the only explanation for these payments that is before the Tribunal and there is no sensible reason to doubt that explanation.

103. Mr Sheth as director accepted that ultimately, responsibility for transactions undertaken by the company rested with him. But that does not mean that he had detailed knowledge of all relevant details which led to the Tisca trade. HMRC have not proved that he did have detailed knowledge of the relevant detail in respect of the Tisca trades.

104. Mr Ghazi plainly had important input in discussions as to the decision whether to trade with a particular customer. The evidence does not support the inference that Mr Ghazi made the final decision, or ran AIL on a day-to-day basis, or was a ‘controlling mind’ as asserted. The ultimate decisions on trades rested with Mr Sheth. He was not responsible for making VAT returns. HMRC have not asserted or proved any case on motive for Mr Ghazi. It is not at all apparent what motive he would have to cause or permit AIL to deal with customers where he knew deals would be connected with fraud.

THE LAW

105. If a taxable person has incurred input tax that is properly allowable, he is entitled to set it against his output tax liability and, if the input tax credit due to him exceeds the output tax liability, receive a repayment (Regulation 29 of the VAT Regulations 1995).

106. However, the European Court of Justice (“the ECJ”), in its judgment dated 6 July 2006 in the joined cases *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL* [2008] STC 1537 (“*Kittel*”), confirmed that, in the context of MTIC fraud, traders who “knew or should have known”, that the transactions in which they were engaging were connected to such frauds would not be entitled to reclaim any input tax incurred. However, the starting point was stated at paragraph 55 of the ECJ judgment:

“Where the tax authorities find that the right to deduct has been exercised fraudulently, they are permitted to claim repayment of the deducted sums retroactively...”

107. This case does not concern denial of input tax but denial of zero-rating.

108. In relation to the dispatch of goods to another Member State, the relevant provisions of the 2006 Directive state:

Article 2

1. The following transactions shall be subject to VAT:

...

(b) the intra-Community acquisition of goods for consideration within the territory of a Member State by:

(i) a taxable person acting as such, or a non-taxable legal person, where the vendor is a taxable person acting as such.

Article 138

1. Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began...”

109. This is reflected in domestic legislation by s.30 VATA 1994 and Regulation 134 of the VAT Regulations:

“Section 30 VATA Zero-rating

(1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section-

(a) no VAT shall be charged on the supply: but

(b) it shall in all other respects be treated as a taxable supply; and accordingly the rate at which VAT is treated as charged on the supply shall be nil.

...

(8) Regulations may provide for the zero-rating of supplies of goods, or of such goods as may be specified in the regulations, in cases where-

(a) the Commissioners are satisfied that the goods have been or are to be exported to a place outside the member States or that the supply in question involves both-

(i) the removal of the goods from the United Kingdom; and

(ii) their acquisition in another member State by a person who is liable for

VAT on the acquisition in accordance with provisions of the law of that member State corresponding, in relation to that member State, to the provisions of section 10; and

(b) such other conditions, if any, as may be specified in the regulations or the Commissioners may impose are fulfilled.

110. Regulation 134 provides:

“134 Supplies to persons taxable in another member State

Where the Commissioners are satisfied that-

(a) a supply of goods by a taxable person involves their removal from the United Kingdom,

(b) the supply is to a person in another member State,

(c) the goods have been removed to another member State, and

(d) the goods are not goods in relation to whose supply the taxable person has opted, pursuant to section 50A of the Act, for VAT to be charged by reference to the profit margin on the supply,

The supply, subject to such conditions as they may impose, shall be zero-rated.”

111. In *Mecsek-Gabona Kft v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága* (Case C-273/11) the CJEU extended the *Kittel* principles to situations of zero-rated intra-Community transactions as follows:

46 However, where the supply of goods concerned is part of a tax fraud committed by the purchaser and where the tax authority is not certain that the goods have actually left the territory of the Member State of supply, it is necessary to consider, thirdly, whether that authority may subsequently require the vendor to account for the VAT on that supply.

47 According to settled case law, the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by Directive 2006/112 (see Joined Cases C 487/01 and C 7/02 *Gemeente Leusden and Holin Groep* [2004] ECR I 5337, paragraph 76; R., paragraph 36; and Joined Cases C 80/11 and C 142/11 *Mahagében and Dávid* [2012] ECR, paragraph 41 and the case law cited) which can, in certain circumstances, justify stringent requirements as regards vendors' obligations (*Teleos and Others*, paragraphs 58 and 61).

48 Accordingly, it is not contrary to European Union law to require an operator to act in good faith and to take every step which could reasonably be asked of it to satisfy itself that the transaction which it is carrying out does not result in its participation in tax fraud (*Teleos and Others*, paragraph 65, and *Mahagében and Dávid*, paragraph 54).

49 The Court found those factors to be important for the purposes of deciding whether the vendor can be obliged to account for the VAT after the event (see, to that effect, *Teleos and Others*, paragraph 66).

50 Consequently, in the event that the purchaser in the case before the referring court has committed tax fraud, it is justifiable to make the vendor's right to exemption from VAT conditional upon its good faith. [emphasis added]

51 It is not immediately clear from the order for reference that Mecsek Gabona knew or should have known that the purchaser had committed tax fraud.

52 However, in its written and oral submissions before the Court, the Hungarian Government claims that several factors not mentioned in the order for reference prove, in its opinion, that Mecsek Gabona acted in bad faith. To that effect, the Hungarian Government argues that, even though Mecsek Gabona was not familiar with the purchaser of the goods at issue in the main proceedings, it had not requested any guarantees from the purchaser; it did not check the purchaser's VAT identification number until after the transaction; it did not collect any additional information on the purchaser; it had transferred the right to dispose of the goods as owner to the purchaser, while accepting that payment of the original sale price could be deferred; and it had presented the CMRs returned by the purchaser even though they were incomplete.

53 In that regard, 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 to carry out an overall assessment of all the facts and circumstances of the case in order to establish whether Mecsek-Gabona had acted in good faith and taken every step which could reasonably be asked of it to satisfy itself that the transaction which it had carried out had not resulted in its participation in tax fraud.

54 If the referring court were to reach the conclusion that the taxable person concerned knew or should have known that the transaction which it had carried out was part of a tax fraud committed by the purchaser and that the taxable person had not taken every step which could reasonably be asked of it to prevent that fraud from being committed, there would be no entitlement to exemption from VAT.

55 In the light of all the foregoing considerations, the answer to Questions 1 and 2 is that Article 138(1) of Directive 2006/112 is to be interpreted as not

precluding, in circumstances such as those of the case before the referring court, refusal to grant a vendor the right to the VAT exemption for an intra-Community supply, provided that it has been established, in the light of objective evidence, that the vendor has failed to fulfil its obligations as regards evidence, or that it knew or should have known that the transaction which it carried out was part of a tax fraud committed by the purchaser, and that it had not taken every reasonable step within its power to prevent its own participation in that fraud.

112. We adopt the summary of this by Judge Poole in *Turkswood Limited v HMRC* [2021] UKFTT 0166 (TC) where he stated:

“In short, if it is “established, in the light of objective evidence, that [the vendor] knew or should have known that the transaction which it carried out was part of a tax fraud committed by the purchaser, and that it had not taken every reasonable step within its power to prevent its own participation in that fraud”, then the zero-rating of an intra-Community supply could be denied.”

113. The principles were explained further in *Staatssecretaris van Financiën v Schoenimport 'Italmoda' Mariano Previti vof* (C 131/13) where the CJEU said:

62 ... the Sixth Directive must be interpreted as meaning that it is for the national authorities and courts to refuse a taxable person, in the context of an intra-Community supply, the benefit of the rights to deduction of, exemption from or refund of VAT, even in the absence of provisions of national law providing for such refusal, if it is established, in the light of objective factors, that that taxable person knew, or should have known, that, by the transaction relied on as a basis for the right concerned, it was participating in VAT evasion committed in the context of a chain of supplies.

69 ... the Sixth Directive must be interpreted as meaning that a taxable person who knew, or should have known, that, by the transaction relied on as a basis for rights to deduction of, exemption from or refund of VAT, that person was participating in evasion of VAT committed in the context of a chain of supplies, may be refused the benefit of those rights, notwithstanding the fact that the evasion was carried out in a Member State other than that in which the benefit of those rights has been sought and that taxable person has, in the latter Member State, complied with the formal requirements laid down by national legislation for the purpose of benefiting from those rights.

114. We have noted in the underlined words in the extract from the *Mecsek-Gabona* decision that the denial of zero-rating requires a purchaser to have committed tax fraud. As made clear by *Italmoda* that does not have to be the direct customer of the taxpayer, but VAT fraud must take place in the chain of supplies. That is consistent with the starting point expressed in *Kittel*.

115. The courts have considered the application of the *Kittel* principles on numerous occasions. There was no dispute in this case that principles set out in that context could (where not limited to specific issues concerning the denial of input tax) be extended to *Mecsek-Gabona* cases.

116. Consistent with the conclusion that HMRC must identify the alleged tax fraud, is the following description of the burden of proof in *Red 12 Trading v R & C Comrs* (Christopher Clarke J):

“In *Calltell Telecom Ltd v Revenue and Customs Comrs; Opto Telelinks(Europe) Ltd v Revenue and Customs Comrs* (2007) VAT Decision 20266 the tribunal considered the burden of proof in the following terms:

‘67. Mr Cunningham made the point that it was for a trader seeking to exercise the right to deduct to show that he was entitled to do so: [*Rompelman v Minister van Financiën* (Case 268/83) [1985] ECR 655, [1985]2 CMLR 202]. He did not concede that, in a case such as this, the burden shifted to the Commissioners; rather, he said, the rule remained as it had been since the decision of the High Court in [*Tynwydd Labour Working Men’s Club and Institute Ltd v Customs and Excise Comrs* [1979] STC 570] that, save in prescribed cases of which this was not one, the burden of proof before this tribunal lay with the appellant. Nevertheless, he accepted that it was for the Commissioners to establish the chain of transactions, the relevant default and the fraudulent purpose of the default. So much was decided by the tribunal in *Bond House* and that allocation of the burden has been generally accepted, including by the Commissioners themselves—see, for example, paragraph 82 of the decision in *Dragon Futures*.

117. The result has been that the tribunal and other courts have sought to encapsulate the relevant questions in the following way as accepted to be correct by the High Court in *Blue Sphere Global Ltd v Commissioners for Her Majesty’s Revenue and Customs* [2009] EWHC 1150 (Ch):

- (1) Was there a VAT loss?
- (2) If so, did this loss result from a fraudulent evasion?
- (3) If there was a fraudulent evasion, were the transactions the subject of this appeal connected with that evasion?
- (4) If such a connection was established, should [the relevant company, in this case AIL] have known that its purchases were connected with a fraudulent evasion of VAT?

118. No reason to deviate from this approach in this case applying *Mecsek-Gabona* has been identified by HMRC other than, as accepted by both parties, the addition of one more step which is to identify whether the taxpayer had taken every reasonable step within its power to prevent its own participation in that fraud.

Consideration of overall circumstances

119. The courts have made clear that consideration of the overall circumstances of a taxpayer’s transactions is required when assessing the taxpayer’s knowledge or what the taxpayer should have known. So, in *Mobilx, Blue Sphere Global and Calltel v HMRC* [2010] STC 1436 (“*Mobilx*”), the Court of Appeal (Moses LJ giving judgment) formulated the following test and approach for the purposes of the application of the principle in *Kittel* in paragraph 59:

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

120. The Court of Appeal endorsed the following description of the approach to be applied by Charles J in *Red 12 Trading Ltd v Revenue and Customs Comrs* [2009] EWHC 2563 (Ch) at [109]–[111]:

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

[110] To look only at the purchase in respect of which input tax was sought to be deducted would be wholly artificial. A sale of 1,000 mobile telephones may be entirely regular, or entirely regular so far as the taxpayer is (or ought to be) aware. If so, the fact that there is fraud somewhere else in the chain cannot disentitle the taxpayer to a return of input tax. The same transaction may be viewed differently if it is the fourth in line of a chain of transactions all of which have identical percentage mark ups, made by a trader who has practically no capital as part of a huge and unexplained turnover with no left over stock, and mirrored by over 40 other similar chains in all of which the taxpayer has participated and in each of which there has been a defaulting trader. A tribunal could legitimately think it unlikely that the fact that all 46 of the transactions in issue can be traced to tax losses to HMRC is a result of innocent coincidence. Similarly, three suspicious involvements may pale into insignificance if the trader has been obviously honest in thousands.

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

121. Further, Lewison J in the decision of the Upper Tribunal in *Brayfal Ltd v HMRC* [2011] UKUT 99 (TCC) said:

“In answering the factual question, Tribunals should not unduly focus on the question whether a trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is that his transactions have been or will be connected to fraud. The danger in focusing on the question of due diligence is that it may deflect a Tribunal from asking the essential question posed in *Kittel*, namely, whether the trader should have known that by his purchase he was taking part in a transaction connected with fraudulent evasion of VAT.”

122. The Court of Appeal’s and Upper Tribunal’s directions to consider the surrounding circumstances are to determine the evidence of a fraudulent scheme and a taxpayer’s knowledge or the expectations concerning their knowledge thereof. It does not go so far as to say that surrounding circumstances are sufficient to conclude that “there must have been VAT losses somewhere connected to the challenged transactions”. This is made clear by the reference in the Court of Appeal’s judgement to the assumed first step of tracing of transactions to tax losses.

123. However, if HMRC shows that a taxpayer’s transactions were connected to fraudulent VAT losses, it is not necessary to show that the taxpayer knew the specific details of the

fraud: *Fonecomp Limited v HMRC* [2015] EWCA Civ 39 per Arden LJ (with whom McFarlane and Burnett LJ agreed) said, at [51].

124. The result of these cases is that if fraudulent evasion of VAT in Poland (or another EU Member State) by those participating in AIL's transaction chains by purchasing directly or indirectly from AIL's customer is established, and AIL knew or should have known that by its supplies of the mobile phones in question to its customers it was participating in that fraudulent evasion, then the zero-rating of its supplies should be denied, unless it is shown that AIL had taken every reasonable step within its power to prevent its own participation in that fraud.

125. It is not disputed that the burden lies on HMRC to show that the relevant VAT frauds have taken place and that AIL's transactions were connected to those frauds.

If there was an inaccuracy was it deliberate and was Mr Sheth and/or Mr Ghazi responsible?

126. If HMRC discharges the burden on it to show that those inaccuracies existed, the question is then whether the provisions in Schedule 24 FA 2007 apply so that the Appellants are liable for the PLNs issued to them.

127. Schedule 24 FA07 stated at the material time, in as far as is relevant:

“Schedule 24 Penalties for errors

1 Error in taxpayer's document

(1) A penalty is payable by a person (P) where -

(a) P gives HMRC a document of a kind listed in the Table below, and

(b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to –

(a) an understatement of a liability to tax,

(b) a false or inflated statement of a loss, or

(c) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.

...

19 Companies: officers' liability

(1) Where a penalty under paragraph 1 is payable by a company for a

deliberate inaccuracy which was attributable to an officer of the company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC may specify by written notice to the officer...

...(3) In the application of sub-paragraph (1) to a body corporate other than a limited liability partnership “officer” means–

(a) a director (including a shadow director within the meaning of section 251 of the Companies Act 2006 (c. 46)),

(aa) a manager, and

(b) a secretary.

128. These provisions therefore give rise to the following issues:

(1) Did the Appellants fall within the categories of person identified in paragraph 19 as potentially liable for inaccuracy penalties?

(2) If so, in the case of each Appellant were the inaccuracies deliberate on their part?

129. In deciding the second of these questions the leading authority, as recognised by both parties, is the Supreme Court decision in *HMRC v Tooth* [2019] EWCA Civ 826 where Lords Briggs and Sales said at paragraphs 42-43 and 47:

“[regarding] the true construction in this very different context of the phrase “deliberate inaccuracy” in section 118(7). The question is whether it means

(i) a deliberate statement which is (in fact) inaccurate or (ii) a statement which, when made, was deliberately inaccurate. If (ii) is correct, it would need to be shown that the maker of the statement knew it to be inaccurate or (perhaps) that he was reckless rather than merely careless or mistaken as to its accuracy.

43. We have no hesitation in concluding that the second of those interpretations is to be preferred, for the following reasons. First, it is the natural meaning of the phrase “deliberate inaccuracy”. Deliberate is an adjective which attaches a requirement of intentionality to the whole of that which it describes, namely “inaccuracy”. An inaccuracy in a document is a statement which is inaccurate. Thus the required intentionality is attached both to the making of the statement and to its being inaccurate...

... 47 It may be convenient to encapsulate this conclusion by stating that, for there to be a deliberate inaccuracy in a document within the meaning of section 118(7) there will have to be demonstrated an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement or, perhaps, (although it need not be decided on this appeal) recklessness as to whether it would do so.”

130. As explained in setting out the parties’ cases, there is a dispute, in essence, as to whether it needs to be found that the Appellants knew that their sales to Tisca were connected to fraudulent tax evasion, or whether it is also necessary to conclude that they were aware of the results of the *Mecsek-Gabona* case. We say no more on this matter given the conclusions regarding the existence of inaccuracies in the first place.

131. However, we would note that in the context of the PLNs relying upon deliberate inaccuracies in the tax returns, the effect of the amalgamation of the *Tooth* principles and the MTIC principles is accepted by HMRC to mean that it is necessary for HMRC to show that the Appellants knew that the transactions were connected with a fraudulent evasion of VAT (and not simply that they should have known that this was the case).

Use of MTIC terminology

132. We have used MTIC terminology in this decision such as “buffers”. We have not set out the caselaw describing those terms which have been amply described in other contexts, but refer, in particular, to Christopher Clarke J in *Red 12 Trading Ltd v HMRC* [2009] EWHC 2563(Ch).

The approach to foreign law

133. The evidence provided by HMRC in reports from the Polish tax authorities makes frequent reference to provisions in Polish law and, in particular, to a provision referred to as “Art 108”. The approach to that provision was the subject of extensive oral submissions by Mr Sherratt and Ms Rao.

134. The Upper Tribunal made clear in the case of *CS and Others (Proof of Foreign Law) India* [2017] UKUT 00199 (IAC) that the content of any material foreign law is a question of fact, normally determined on the basis of expert evidence. (Although that is a decision made in the context of the Immigration and Asylum Chamber, a relevant decision of the Upper Tribunal is binding on this Tribunal regardless of the chamber to which the appeal relates.)

135. The Upper Tribunal said (at paragraph 16):

“The burden of proof rests on the party relying upon the relevant foreign law. Any question of foreign law is one of fact. Judicial notice of foreign law is rarely appropriate. The general principles are rehearsed in Halsbury’s Laws of England (2015), Volume 12 (2015) at [746].”

136. In referring to Halsburys Law we note that the description therein (now contained in Volume 12 at 740) states:

The burden of proof rests upon the party who asserts that foreign law differs from English law...[It] is a question of fact to be decided in each case on the actual evidence in that case (*Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, HL).

137. We consider that as the Upper Tribunal expressly referred to Halsburys we should read the judgement as referring to and incorporating the principles stated therein.

138. We note that overall this is consistent with the description set out by Andrew Baker J in *Iranian Offshore Engineering and Construction Company v. Dean Investment Holdings SA* [2018] EWHC 2759 (Comm) (and relied upon by Mr Sherratt) where he stated:

“[2] Dicey Rule 25 is in the following, familiar terms:

(1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.

(2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case”.

The burden of proof

139. The standard of proof is the normal civil standard of proof i.e. the balance of probabilities and the parties accept that the burden of proof rests with HMRC.

THE EVIDENCE

140. We have been provided with 4644 pages of evidence in the bundle and heard evidence from the Appellants and Mr Barry Patterson, Mr Simon Marsh and Mr Jon Peet of HMRC.

141. Mr Marsh has been the officer at the heart of HMRC’s investigations into alleged empty transactions involving companies located in other European jurisdictions and, in particular Poland. He was particularly involved in an investigation into another UK trader called EP Consultants UK Ltd (“EP”), as a result of which HMRC placed EP into liquidation. A substantial amount of his Witness Statement relates to the case against EP. However, that is of limited relevance to this case. Mr Marsh has also set out a diagram for the alleged transactions, but, as we identified at the hearing with him, the diagram starts with EP, not AIL. Overall, we would have expected Mr Marsh’s Witness Statement to have been more tailored to this case.

142. At the hearing we found Mr Marsh’ oral evidence somewhat confused. He said that there would have been VAT losses at the first Polish trader, but when seeking to understand the basis of this statement he also told us that the Polish tax authority letters explained that the companies played the role of buffers. The companies may have played both of those

roles in different transaction chains, but Mr Marsh's evidence does not identify the roles in AIL transaction chains and, in particular, the basis of the allegation that there were VAT losses at the first Polish trader. As our findings later show, this evidence is missing.

143. Similarly, when working through one of the Polish tax authorities' letters with Mr Marsh, he identified in the context of the company, Jacobin, that Jacobin had dealt with a supplier called Gallent which he said was a missing defaulting trader, but he recognised that there is no evidence showing that Jacobin and Gallent were together involved in the AIL transactions.

144. Mr Marsh explains he reviewed the data which he had obtained from other EU member states to identify any further potential supply chains involving UK companies. He asked the Polish authorities to trace the supply chains forwards and backwards. From the information received he identified AIL as a participant in the orchestrated scheme. However, he has provided little to show how AIL was so identified. He notes that a large amount of data was obtained but it was sometimes fragmented because some traders were missing traders with no documentation available. The Polish authorities have provided very detailed letters explaining the role of various Polish companies and often the supply chains involving the Polish companies are set out. However, none of those supply chains show AIL. Much of the focus is on the involvement with EP. Only one Polish letter mentions AIL and the reference is not in the context of transactions which can be connected to those challenged by HMRC. Ultimately the identification of AIL appears from the evidence overall to have been on the basis that it was a supplier to Tisca.

145. Mr Marsh has provided evidence in his Witness Statement regarding other companies against whom action was taken as a result of the investigations, one of which withdrew its appeal against resulting assessments and one of which was based into liquidation. The fact that other companies have had assessments raised on the basis of the investigations has little bearing on the position of AIL.

146. Mr Marsh relies on an affidavit which was prepared for action taken by HMRC against EP in the High Court. The affidavit runs to 362 pages, most of which has little bearing on the case against the Appellants. There is no reference to AIL or the Appellants in it. Most of the exhibits referred to in the affidavit have not been produced, including potentially relevant ones for this case; such as, the evidence showing that the Bulgarian companies said to have purchased the goods from Tisca were missing traders, had failed to declare any trading on their VAT returns, lacked trading activity or simply did not engage with Tisca as described by Mr Marsh; and evidence that Polish companies, which are said to be relevant to the case against the Appellants, should be treated as a defaulter or missing trader.

147. Mr Peet provided evidence which was based upon his review of, and adoption of, an affidavit produced by a retired HMRC officer, Mr Porteous. However Mr Porteous' affidavit was prepared in the context of the EP litigation and is therefore addressing EP transactions. Although he has provided tables showing, for example, the percentage of sale made by Tisca to various customers, we have not been provided with the underlying documents or data. We do however, make reference to Mr Porteous affidavit, supported by bank statement evidence, in addressing the evidence of monies received by Tisca as explained later.

148. Similarly, Officer Peet's Witness Statement addressed sales made by EP to Tisca. Apart from the front page to his Witness Statement Setting out Mr Sheth's name, Officer Peet does not mention AIL or the Appellants once throughout his Statement. Much effort was put into providing us with an updated and annotated version of the Witness Statement correcting numerous figures therein, but it still failed to mention AIL or the Appellants, or identify links

between the transactions described and AIL. It considers Tisca in some detail, but with reference to its deals with EP.

149. We would note that this is not a helpful way of presenting the case. The Tribunal has been provided with an extremely large volume of material and it is unhelpful to provide copies of affidavits used in other proceedings with no proper indication of which parts (if any) are relied upon in this case.

150. HMRC have relied upon cases presented in relation to other companies where their appeals have been struck out or withdrawn. However, those cases had not been judicially tested and we find reference to them to be of little assistance to HMRC's case.

151. In relation to one UK company called Prizeflex Limited, HMRC relies upon an MTIC decision dismissing that company's appeal. However, the decision in Prizeflex's appeal did not relate to Polish transactions. The circumstances do not relate to the circumstances in this appeal beyond the fact that in both cases mobile phones were involved. HMRC say that they have denied zero-rating on seven supplies of mobile phones made on four invoices to Tisca in the VAT period 06/13 on the same basis as AIL's denial. The fact that HMRC has taken such action is again of no relevance this case: HMRC may be wrong in both cases, right in both cases, or right in one case.

152. This Tribunal is first and foremost a fact-finding tribunal and simple assertions made in Witness Statements which have not been accepted as evidence by the other party provide little assistance to the Tribunal in its role. In the absence of primary source documents, there is little basis for us to assess the basis on which statements are made. Furthermore, the lack of underlying documents means that the Appellants are limited in the challenges which can be made to the evidence. To make findings based simply on assertions made in Witness Statements would therefore be wrong in law and would be procedurally unfair. We give little weight to evidence prepared for other cases with no stated linkage to the AIL deals.

153. In relation to the opinion evidence, which is a major component of HMRC's witnesses' Witness Statements, we adopt the approach set out in *Megantic Services Limited v HMRC* [2013] UKFTT 492, at [15], that such evidence:

“... is not a matter of fact but a matter of opinion. It is merely a view of a witness on a matter on which the tribunal itself must reach its own conclusion, and as such is of no value as evidence. Such evidence may rightly be excluded on that basis. In most cases, however, we would not see it as necessary, or indeed proportionate, for a forensic exercise to be undertaken, either by the parties or by the tribunal, to identify any such matters in each witness statement and for the tribunal formally to direct that they be excluded.

Generally speaking, we think that the parties can rely upon the good sense of the tribunal to disregard purported evidence that represents conclusions that the tribunal itself must reach. That can usually conveniently be the matter of submission at the substantive hearing, rather than a formal application to exclude.”

154. Officer Patterson's evidence has the advantage of being more directly related to AIL. However, his evidence was notably inconsistent on several matters to which HMRC are seeking to place significance, such as the following:

- (1) in his Witness Statement he says at one place that AIL added no value to the goods but made significant profit, but later says in the same Witness Statement that AIL only made a slim profit;

(2) he sought to place weight on the funding of AIL in 2007 even though he recognised that was not relevant in 2013;

(3) he identifies in his Witness Statement that a feature of AIL's business which is said to be indicative of MTIC trading is that AIL was often only making payments to its own suppliers once it been paid by its customers even though he recognised at the hearing that it was good cash flow practice for a business to do this where it is able;

(4) he sought to place weight in his Witness Statement on the fact that a trader occupying premises next to AIL's premises was found to be engaged in MTIC activity even though that company only made unchallenged supplies to AIL in the context of the relevant transactions, and he could not identify a reason at the hearing for the reference to the trader.

155. Officer Patterson's evidence in his Witness Statement frequently strayed into the realms of opinion or unsupported assertion. For example, he says that the bank statements produced by Tisca at the request of the Cypriot authorities confirmed the fraud because they showed payments being received from Poland. Quite clearly the fact that Tisca received payment from Poland does not in itself evidence fraud.

156. In relation to the alleged transaction chains Officer Patterson sets out chains including AIL's supplier, Tisca and one of the Bulgarian companies. However the underlying documentation referred to and exhibited for each deal does not provide evidence of the transactions between Tisca and one of the Bulgarian companies. Similarly, he lists the de-registration dates in respect of a number of EU customers, but provides no evidence to support the list.

157. HMRC have also referred to the fact that a related company to AIL (AEL) had an MTIC appeal dismissed. While elements of that case may be relevant in the context of, for example, in relation to evidence of Mr Ghazi's involvement and management of the business and to show knowledge and awareness of MTIC issues, the fact that the related company's appeal was dismissed should not colour our conclusions in this case,. Our duty is to reach a decision based on the evidence placed before us (*Djebbar v SSHD* [2004] EWCA Civ 804).

158. Mr Sherratt made comprehensive submissions in writing and orally regarding the weight which should be given to HMRC's evidence and, in particular, the evidence in the letters from the Polish revenue authorities given that there was no witness who could be cross-examined on the contents. We consider that Mr Sherratt raised valid concerns. In particular, there are problems relying on the translations of the Polish revenue authorities' letters given that the translations themselves are at times very unclear and potential inconsistencies are apparent. Those inconsistencies could not be put to any witness (see, for example, our comments in relation to the findings regarding Nikopol below). We can see no good reason why HMRC did not seek to call a Polish tax inspector to give evidence in just the same way as HMRC would call a responsible officer to explain the evidence about actions taken in relation to UK companies in the context of UK-based MTIC appeals.

159. In this context we are also somewhat confused by HMRC's position regarding the Polish reports. On the one hand they have sought to rely on them extensively, but on the other hand Ms Rao submitted that the Tribunal cannot properly make any finding on the interpretation and effect of Polish law without an adequate evidenced translation thereof and legal opinion. Yet the letters are almost universally based on the application of Polish law and, in particular, one particular provision referred to as "Art 108". (We explain our approach to Art 108 and our findings later in this decision.)

160. We have decided, however, that a full assessment of the varying weight to be given to the evidence relied upon by HMRC would be otiose in this case. That is because even when HMRC's evidence is considered at its highest, HMRC has not discharged the burden of proof upon it for the reasons we explain later. This means that we have set out, in our findings, various conclusions derived from the evidence in letters from the Cypriot and Polish tax authorities, despite the issues regarding the Polish evidence in particular, so that our conclusions regarding the position taking HMRC's evidence at its highest can be explained.

161. However, we note that our conclusion, explained later in this decision, that HMRC has failed to show that the AIL transactions were connected to fraudulent tax losses, is one which we have taken despite significant reservations regarding the evidence provided by the Appellants. As a result of our conclusions regarding the connection to fraudulent tax losses it has not been necessary to consider further elements of the case where the Appellants' evidence and the extent to which it rebuts HMRC's evidence and inferences therefrom would be of particular relevance. We note, however, that we identified several issues with the Appellants' evidence; in particular:

- (1) their almost identical Witness Statements which were shown during the course of the hearing to contain significant errors;
- (2) issues as to the basis on which certain statements were made in the Witness Statements given that there was claimed reliance upon discussions with AIL employees for information, yet those employees were not called to give evidence. The Witness Statements failed to address where matters were within the knowledge of the statement writer and where they were based on information provided by another person;
- (3) the introduction of a significant new element of the Appellants' cases during the hearing when it was said that much of the decision-making was handed over to a person, previously unheard of in the course of the litigation, called Mr Jay Kumar. Mr Sheth claimed that there were difficult personal circumstances affecting him which had caused him to hand-over much of his role to Mr Kumar, but given that this was potentially a major feature of the Appellants' cases we would have expected it to have been identified earlier and for Mr Kumar to have been called to give evidence. Furthermore, we found the evidence overall regarding the involvement of Mr Kumar to be inconsistent and unreliable;
- (4) similar concerns arise in connection with the description for the first time at the hearing of the reason for starting to trade with Tisca being that its trader had come from their previous customer Atheus with whom staff at AIL were said to have had a personal relationship. Again, given the fact that the reasons for trading with Tisca have been a clear and fundamental issue in this case for some time we would have expected reference in the Appellants' Witness Statements to this important feature of their relationship with the company;
- (5) numerous inconsistencies in the Appellants' evidence on significant matters such as: claiming to have only traded with companies that operated for more than one year when this was clearly not the case for Tisca; claiming in Witness Statements no knowledge of goods going to Poland when this was contradicted in the hearing; claiming in Witness Statements that no payments had ever been made to Tisca when the bank accounts showed this to be incorrect, even if the payments had been made as refunds as was claimed at the hearing; inconsistencies about whether AIL only purchased goods when a customer for them had been identified; and inconsistencies about dates of payment vis-à-vis delivery and/or inspection of goods. A particularly notable inconsistency concerned the evidence about Mr Ghazi meeting a Polish freight

forwarder in October 2012, whom it was said AIL was introduced to by Tisca as the chosen company for its deals even though Tisca did not start trading with AIL until some five months later. The Appellants said that the trade only started as a result of the trader moving but that is inconsistent with contact with Tisca several months earlier.

162. This means that overall we did not find Mr Sheth or Mr Ghazi to be reliable witnesses and we reduced the weight given to their evidence. This would have had particular implications, for example, in the context of weighing up the conclusions to be drawn from inferences from the conduct of AIL's trade compared to the denial of knowledge provided by the Appellants.

FINDINGS OF FACT

AIL background

163. AIL was incorporated on 11 February 1998. Mr Sheth was company secretary of AIL from its incorporation and has been a director of the company since 6 November 1998.

164. AIL had an associated company, Aircall Export Ltd ("AEL"). AEL was incorporated on 27 December 2000 and dissolved on 19 April 2016.

165. AEL and AIL were operated as a single enterprise on a day-to-day basis and shared the same premises, staff and resources. They also shared a director: Mr Sheth was a director of AEL from 1 December 2001 until its dissolution.

166. AIL was a wholesale commodity trader trading in electronic consumer products. The trade was primarily in mobile phones. It employed approximately 12 staff including 5 or 6 traders who negotiated deals with suppliers and customers. The traders worked on a trading floor. They were paid commission and in line with other traders operating on a similar basis, they operated intensely in seeking to achieve deals and the best profit margins. AIL undertook upwards of 100 deals per month.

167. AIL's traders would frequently organise transactions such that the customer paid for the goods before AIL had to pay its supplier. We accept the evidence of Mr Sheth that this was a technique employed as often as possible to manage cash flow.

168. AEL was involved in two previous HMRC investigations leading to litigation. AEL was successful in the litigation of the denial of £67,550 input tax claimed for the period 01/04 in relation to two transactions and £60,000 for the period 02/04. In the second case, AEL's appeal of an assessment in 2010 denying the right to deduct input tax totalling £1,806,526.31 claimed on 34 wholesale purchases of mobile telephones in VAT periods in 2006 was dismissed. The Tribunal decided that AEL knew that one of the transactions was connected with the fraudulent evasion of VAT and, at the very least, should have known that the remainder were so connected. As explained earlier, the existence of this litigation informs the extent of the Appellants' knowledge of MTICs.

169. Officer Patterson acknowledged that the Appellants were not responsible for any missing transaction documents and had been fully compliant with producing any documents requested from them/AIL.

170. However, AIL had a history of poor VAT compliance in years before 2012 and then repeatedly in 2012/13.

171. VAT returns were prepared by an employee we refer to as "Ms T". She was an accountant working in the back office of AIL. She did not decide who AIL traded with and had no responsibility for due diligence. Her role was to prepare accounts and returns as well as the spreadsheet setting out deals and traders' commissions.

The challenged VAT returns

172. HMRC have not shown when the VAT returns which are said to contain the inaccuracies were filed, even though this is potentially relevant to the state of knowledge of the Appellants at the time of the filings. It was at some time or times during the period April 2013-October 2013.

The purchases and sales by AIL

173. HMRC have challenged 28 deals out of 517 deals carried out by AIL in the relevant periods.

174. In each of the challenged deals AIL sold mobile telephones to Tisca.

175. AIL sourced its telephones from a large number of suppliers (more than 100). In the context of the challenged deals, AIL purchased the telephones sold to Tisca from 11 separate suppliers.

176. AIL sold telephones to a large number of corporate customers (more than 80).

177. The evidence does not show that there was a repeated supply of the same goods.

178. In some of the challenged deals AIL bought and sold the telephones on the same day; in other cases there was a gap ranging from one day to a couple of weeks.

The chains to which AIL's deals relate

179. AIL accept the transaction chains up to and including the sales by AIL to Tisca are as described by HMRC. AIL also accepts that the goods went to Poland, although it is said that the evidence does not show where they ended up. However, AIL dispute that there is sufficient evidence of the transaction chains after Tisca.

180. Officer Patterson's evidence in relation to deals 1-23 is that AIL sold the goods to Tisca but the stock ended up with one of two Polish freight forwarders; Tisca on-sold the goods to one of the three Bulgarian traders - Kameya, Ellit and Sigma; and money was paid to Tisca from Polish traders.

181. In relation to deals 24 – 28 Officer Patterson's evidence is that AIL sold the goods to Tisca, but HMRC has not identified where the goods went subsequently. He contends that given the similarities of the deals to the others, on the balance of probabilities they were connected with the fraudulent evasion of VAT. This is effectively a submission or opinion rather than evidence and is therefore excluded from our assessment.

182. The report from the Cypriot authorities attaches a schedule which they say has been prepared on the basis of invoices issued by and to Tisca in the period January-June 2013 in which they identified purchase invoices which have been matched with sales invoices. The schedule lists various purchases from AIL and shows onward sales to Kameya, Sigma or Elit. We have not been provided with the invoices referred to by the Cypriot authorities. Officer Patterson's Witness Statement describes the challenged deals, but in most cases no invoice issued by Tisca is identified.

183. However, Ms Rao has provided a helpful summary schedule for the deals identifying the underlying invoices and matching AIL's purchases with its sales invoices and Tisca's sales invoices. Mr Sheth confirmed in the hearing that the schedule had been checked and it was an accurate reflection of the evidence.

184. The schedule has been used by us to identify the relevant underlying documents and on the basis of those we are satisfied that the invoices show that Tisca sold the telephones bought from AIL in each case to one of Kameya, Ellit and Sigma in deals 1-23.

185. However, taking HMRC's evidence at its highest and relying upon Mr Porteous' evidence about Tisca's bank accounts, as well as the bank statements provided in the bundles for this hearing, we find that the Bulgarian companies did not make any payments to Tisca's bank accounts.

The Bulgarian companies

186. The Cypriot authorities have said that the Bulgarian companies are missing traders, but we have no evidence to that effect from the Bulgarian authorities. Officer Patterson says that the Bulgarian companies were deregistered and relies upon a letter from the Cypriot authorities, but that letter makes no reference to the Bulgarian companies having been deregistered. We would expect to see evidence from the Bulgarian authorities.

187. The Polish authorities refer, in the context of considering transactions entered into by EP (as opposed to AIL), to the Bulgarian authorities having described the Bulgarian companies as missing traders, but the underlying document from Bulgaria is again missing. Although Officer Marsh makes various claims regarding the Bulgarian companies, their declared businesses, their VAT declarations and their lack of trade with Tisca, we have not been provided with the underlying Bulgarian documents. However, what is clearly accepted is that no VAT loss is alleged to have arisen in Bulgaria as a result of the transactions or purported transactions with Tisca.

188. We do not consider the evidence to be sufficient to show that the Bulgarian companies are missing traders, but even if we were to find they were, this would make no difference to the outcome of this case.

189. The Polish authorities say that it was not possible to establish whether there were sales transactions between the Bulgarian companies and Polish companies. Officer Patterson's evidence recognises that it has not been possible to establish whether sales transactions were made between the Bulgarian entities and Polish traders in the alleged AIL transaction chains.

190. Invoices provided by the Cypriot authorities show that Tisca engaged freight companies to transfer telephones from the UK to Poland and one of those documents makes reference to AIL for shipment in April 2013; and one to AIL for part of a shipment in May 2013.

191. We have been provided a copy of Tisca's bank statements. Tisca's bank statements do not show payments made by any of the three Bulgarian companies.

192. The freight forwarding documentation shows that the goods went directly from AIL to Poland. The Appellants accept that the telephones ended up in Poland.

193. We therefore conclude that one or more persons in Poland purchased the goods at some stage in the transaction chains. However, we are unable to identify whether the sales were direct from the Bulgarian companies to Polish persons, or which Polish persons bought the goods when they were transferred to Poland.

Atheus

194. Although Atheus was not a customer of AIL in the challenged transactions, or otherwise involved in the relevant transactions, it is relevant to take into account some of the facts regarding this company and its links to Tisca.

195. Atheus was established on 8 August 2001, its director and secretary were the company formation agent Actinor Nominees Ltd. Atheus' beneficial owner was Mr Deepak Mahesh Puri, ("Mr Puri") an Indian national.

196. Atheus was registered for VAT with effect from 4 October 2011 with a declared business activity of metals wholesaling. No business of wholesaling mobile telephones was declared.

197. Atheus purchased large volumes of mobile telephones from AIL and other UK companies.

198. Atheus last submitted a VAT return for the quarterly VAT period ending July 2012. Atheus failed to submit EC sales list declarations to the Cypriot authorities. Atheus did not provide any books and records for its trade in the last quarter of 2012 and first quarter of 2013 to the Cypriot authorities.

199. Atheus was deregistered for VAT with effect from 31 December 2012 on the grounds that it had failed to present its books and records to the Cypriot authorities.

200. Atheus' invoices show sales of mobile telephones to the Bulgarian customers of Tisca. Atheus then released the goods to Polish freight forwarders and received payment from Polish traders such as Nikopol and Jaystone as Tisca subsequently did.

Tisca

201. Tisca replaced Atheus as a customer of AIL after Atheus was deregistered by the Cypriot authorities.

202. The Appellants say that the trader with whom AIL did business at Atheus called Mr Wilson moved to Tisca and this was the basis of AIL's trading relationship with Tisca. However, their evidence on this matter was inconsistent and vague at various times. For example, Mr Ghazi's evidence at the hearing about the understanding about why Atheus was deregistered and Tisca was formed was, at most, speculation, suggesting that there was some personal problem between Mr Wilson and another person, but this failed to explain deregistration of Atheus. There were inconsistencies in the evidence about when AIL first started engaging with Tisca and the deal logs showed that AIL had in fact dealt with the two companies on the same day, 13 February 2013. It was likely, according to the evidence about purchase orders and their numbering, that AIL has also dealt with Atheus on one occasion after Tisca had become a customer. Therefore we have not relied upon the Appellants' evidence regarding "Mr Wilson" to make findings in our decision.

203. The Appellants carried out limited due diligence into Tisca. They did not ask about Tisca's directorship and ownership structure, or where Tisca was getting its funds from. There was no consideration of money-laundering regulations and requirements.

204. Tisca was incorporated on 17 February 2012. Tisca's principal place of business was different to Atheus', but its director was the same formation agent, Actinor Nominees Ltd. and its beneficial owner was the same person Mr Puri, as Atheus'.

205. Tisca was registered for VAT from 1 July 2012 with a declared business activity of wholesale of alcohol and other beverages. Tisca's website stated, that it was "poised to be an international leader in commodities trading" and deal in Power & Energy, Metals, Crude Oil and petroleum and Technology. No business dealing in the wholesale of mobile telephones and similar electronics was declared.

206. We are satisfied that Tisca stepped into Atheus' shoes when Atheus ceased to buy and sell mobile phones even though one deal took place with Atheus on 13 February 2013 on the same date that AIL started trading with Tisca.

207. Tisca commenced trading in January 2013. In the period of 22 January – 28 June 2013, Tisca made total gross sales, mainly of Apple and Samsung mobile telephones, of €241.9

million. However, this was not a brand new operation as HMRC have asserted. As stated Tisca effectively stepped into Atheus' shoes.

208. AIL started to sell mobile phones to Tisca on 13 February 2013 and then entered into two further deals on 15 February 2013 and one on 18 February 2013 even though a VAT validation check was not obtained for the company until 19 February 2013. This is indicative of the lax attitude to due diligence. Matters which should have been raising alarm bells in due diligence were overlooked or ignored as the Appellants conceded at the hearing.

209. Tisca paid AIL for the supplies of mobile telephones before AIL paid its supplier. This was inconsistent with the description of purchasers inspecting goods directly or through an agent before making payment and the inconsistency could not be explained when put to Mr Ghazi at the hearing.

210. Tisca was a Cypriot registered company registered for VAT in that country although it did not have any premises or employees there. It was deregistered by the Cypriot authorities from the VAT register in April 2012 when the Cypriot authorities were unable to make contact with the company, but after contact was renewed it was re-registered. Tisca produced documents such as bank statements at that time which have been relied upon by HMRC.

211. On 3 October 2014 Tisca was again deregistered when contact ceased again. The effective date was 31 December 2013. It was registered for VAT purposes when the challenged transactions took place.

212. The Cypriot authorities have confirmed that there was no VAT lost for Cyprus as a result of any of the transactions entered into by Tisca.

213. Although it was denied by the Appellants in their Witness Statements, payments were made by AIL to Tisca as shown by the evidence in bank statements. However, we rely upon the evidence provided during the hearing to conclude that these payments were made for refunds on deals.

Art 108

214. Much of the evidence from the Polish tax authorities refers to the application of Art 108. The Polish tax authorities explain that under Art 108 if a legal entity issues an invoice with the indicated amount of tax, they are obligated to pay it. They explain the provisions further as follows:

“obligation to pay tax occurs as soon as the invoice [unclear] a payable tax is issued. The issue of an invoice means that it will be signed and forwarded to another entity, i.e. introduced into a legal transaction system. In light of the above, the issuer of an invoice is obligated to pay tax indicated there even if it exceeds the actual output tax resulting from the certain transaction if certain activity is non-taxable or VAT exempt or doesn't refer to any actual transaction. This is because of the special role a VAT invoice plays within the common VAT system. Such invoice allows a taxpayer to lower an output tax or claim its refund. This regulation prevents taxpayers from illegal actions related to VAT procedures. A word “tax” referred to in Art 108(1) of the Act shouldn't be mistaken with the output tax which is referred to in the Act on Value-Added Tax and paid by the taxpayers as specified therefore. A word “invoice” used in provisions of the Act including Art 108 is a technical name which allows to abstract it from documents which have nothing to do with value-added tax. According to Art 108 of the Act on Value-Added Tax the issue of invoice creates the public law obligation to pay the indicated tax. Such obligation results in a specific sanction which means that the indicated amount must be paid as an output tax if the invoice was accepted and signed regardless of circumstances. Therefore, tax

liability occurs together with tax obligation the moment when the invoices issued with the value-added tax on it.

Art 108 of the Act on Value-Added Tax establishes the obligation to pay tax indicated in the invoice regardless of regulations regarding the tax obligation. It refers to the obligation to pay[unclear] including certain relations between output and input tax.

Therefore, according to the regulation, issuing the invoice and estimating tax determined obligation to pay certain amount. That's why a VAT invoice which was introduced into a legal system institutes taxable effects even if it doesn't document any activity...

The issue of an invoice, in accordance with the legislation set out in Art 108 is classed as an activity giving rise to a public and legal obligation to pay the tax indicated therein. This obligation is subject to its own specific sanction.

...

Art 108 creates the obligation to pay the tax indicated in an invoice in isolation of the regulations concerning tax obligations and tax liability for VAT. This is to do with an obligation after all and this obligation is already set out within this provision without any connection, in particular, to procedures such as the calculation and payment of VAT quarterly periods and the creation of a tax liability, including in accordance with the relationship between output tax and input tax.

The said provision is of a punitive character and applicable if an entity issues a VAT invoice despite the fact that the certain activity was exempt or not subject to value-added tax."

215. We have not been provided with expert evidence to address Art 108. HMRC did not plead its construction with reference to any authority or expert evidence.

216. As a result, we are not satisfied that HMRC has shown that the Art 108 charges should be construed as VAT liabilities.

217. We note that, as explained above, where a party does not discharge the burden of proof to establish matters of foreign law, English law shall be applied. Under English law, amounts shown on an invoice that do not represent VAT actually due on a supply are collectible as a debt due to the Crown (Sch 11, para 5(3) VATA). The amounts are not themselves VAT.

The Polish traders

218. HMRC state in their decision letter of 2 November 2015 that the sales to Tisca were components of transaction chains which were part of a complex MTIC fraud which sought to defraud Poland of VAT. HMRC has written to the Polish authorities as part of its wider investigation. However, as Officer Patterson states in his Witness Statement: "it is difficult to ascertain with any degree of certainty which letters relate to AIL's deals".

219. HMRC's Statement of Case says that the following Polish companies were defaulting traders: Fonset, Benox, Flatop, Ron Poland, Multistrada, Havana and Nectel.

Fonset, Multistrada, Havana

220. The Polish tax authorities say that these companies did not carry on any economic activity. We have not been provided with evidence of Art 108 charges in respect of these companies or defaults in respect of such charges or VAT.

Benox

221. We have not been provided with evidence beyond an unsupported statement in Mr Marsh's affidavit that the company did not pursue any economic activity and a comment in

the Polish tax authorities' decision for Nikopol that Benox was considered to be a missing trader.

222. There is no evidence that Benox defaulted on VAT obligations.

Ron Poland

223. We have not been provided with evidence regarding Ron Poland.

Nectel

224. The Polish tax authorities say that:

- (1) Nectel issued 137 "empty" VAT invoices describing fictional deliveries of goods. Those invoices described actions that in fact did not take place;
- (2) Nectel was therefore not a "goods and services taxpayer in relation to actions described in issued invoices";
- (3) as a result amount shown on invoices issued between 28 May 2012 and 26 September 2012 gave rise to an Art 108 charge of 28,836,313 zł;
- (4) and Nectel did not pay the Art 108 charge.

225. However, none of the invoices identified by the Polish revenue in their letter relates to any activities or purported activities of Nectel after September 2012. We find nothing else to link AIL's supplies to Nectel and we have been provided no basis to link invoices before October 2012 to the supplies made in the relevant periods in dispute by AIL.

226. Officer Marsh told us that he believed that Nectel was one of AIL's customers. That may have been the case at some point, but Nectel was not a customer of AIL (or indeed Tisca) at the time of the disputed AIL transactions.

Other Polish companies

227. Officer Patterson says that the letters obtained from the Polish authorities demonstrate that all of the Polish companies with whom Tisca dealt and from whom Tisca received money were defaulters and that all went missing without paying tax to the Polish authorities. Mr Sherratt raised an issue regarding adequacy of pleadings given the identification of the alleged defaulters in HMRC's Statement of Case. However, given that Officer Patterson has clearly identified the companies in his Witness Statement which had been provided to the Appellants some significant time in advance of the hearing, we consider it incumbent upon us to consider the position regarding these further Polish companies.

Jacobin

228. Jacobin was deregistered by the Polish authorities on 4 February 2014 following the submission by the company of its last VAT return for April 2013.

229. Investigations into Jacobin by the Polish tax authorities have shown the company transferring funds in excess of €12.5 million to VFX Financial PLC with the description of "Tisca" during May 2013, but none of those payments have been linked to supplies made by AIL.

230. The Polish authorities also say that the information appears to show that payments made between Jacobin and Tisca refer to Sigma. The Polish revenue say that the manager of Sigma declared that neither Tisca nor Jacobin were known by Sigma which had no contact with any of them, but the basis of this statement has not been provided.

231. It is stated that Jacobin knowingly participated in fiscal fraud involving a missing trader, but there is no stated link to AIL and there is no identification of any VAT losses. Various transaction chains are identified but none of them include AIL or Tisca.

232. The Polish decision letter states that an excess of input tax over output tax in the amount of 490 PLN for the month of May 2013 should be carried forward to the next settlement period and tax under Art 108 on the VAT indicated in May invoices in the amount of 10,536,550 PLN was payable by Jacobin.

233. The evidence does not show that Jacobin defaulted on its VAT obligations or the obligation to pay the amount under Art 108.

Jaystone

234. The Polish authorities issued a letter on 27 November 2013 stating that Jaystone had no VAT liabilities. It proceeded to set out in detail and explanation of parties to whom invoices had been issued by Jaystone but the Polish authorities were of the view that the company had issued VAT invoices for the delivery of goods and services that had not taken place, that the invoices did not document actual transactions and the company did not pursue any economic activity. The letter then sets out amounts payable under Article 108 of the Act on Value Added Tax for September 2012 and October 2012 of 454,114 PLN and 2,249,550 PLN. We note those assessments were made for periods before the relevant AIL transactions.

235. The evidence does not show that Jaystone defaulted on its VAT obligations or the obligation to pay the amount under Art 108.

Lineks and Nikopol

236. In the Appellants' list of issues it was conceded that tax losses were suffered in Poland in relation to Lineks and Nikopol. This was not the case presented by Mr Sherratt who challenged the assertion that there was any tax loss shown in relation to any of the Polish companies; and no challenge to this relying upon any previous concession was made by Ms Rao. We set out our findings in relation to the two companies for completeness. As will be seen, consideration of them, even on the basis of being defaulters, leaves the matter of connection to AIL's transactions outstanding.

Lineks

237. A letter issued by the Polish tax authorities on 13 November 2013 shows that Lineks was assessed to an amount of 38,695,241 PLN under Art 108 for the first quarter of 2013. The letter states that it had been established that the company did not in fact sell goods it had purported to sell and that it did not carry out actual business activity, just simulated activity. The correct value of the supply of goods for the first quarter of 2013 should be 0 PLN. It had previously submitted a VAT return showing an amount of 46,023 PLN payable by it as output tax. The Polish authorities say that Lineks did not carry out actual business activity, just simulated activity.

238. The evidence does not show that Lineks defaulted on its VAT obligations or the obligation to pay the amount under Art 108. Indeed, Officer Marsh says in his affidavit that Nikopol and Lineks are missing traders, not defaulting traders.

Nikopol

239. On 21 November 2014 the Polish revenue authorities issued a decision in respect of Nikopol. However, interpretation of that letter poses some issues in relation to missing information and apparent potential inconsistencies. Tables setting out Nikopol's invoicing have been omitted from the English translation and cannot be identified from the Polish versions. The company was said to carry on no business and have no taxable activities so that it was assessed to charges under Art 108 totalling 45 million PLN; but it was also said to have not settled tax liabilities declared for the first quarter of 2013 in the amount of 149,643 PLN which were settled under what the Polish revenue authorities have described as "administrative enforcement procedures".

240. The Polish tax authorities also state that Nikopol’s activity “would not be justifiable if not for a predetermined specific role in change transactions involving “missing traders”. “Output tax which was not paid by those missing traders was then deducted by buffers and brokers. Therefore, Nikopol obtain financial gain in a form of said tax and its activity created a fraudulent trade of goods which does not fall into a category of any actual business activity.” This assertion lacks the provision of underlying data, not least because much of the information in the original Polish document has not been translated.

Conclusions about Lineks and Nikopol

241. We are satisfied that, even if we were to proceed on the basis that the Appellants should be treated as having conceded that tax losses were suffered in Poland in relation to Lineks and Nikopol, HMRC have not identified that the AIL sales to Tisca were part of transaction chains to those two Polish companies.

242. HMRC rely upon evidence from Mr Porteous regarding the payments to Tisca shown by its bank statements. That evidence is that the following companies paid the amounts stated below to Tisca in the period 22 January 2013 to 28 June 2013:

<u>Company</u>	<u>Euros</u>
Jacobin	77,341,292
CLW Czech	3,871,321
Lin Spolka	43,286,188
Warley	480,125
Nikopol	30,393,209
Jaystone	32,436,524
Lima SP	19,200,342
Inst Solution	1,452,732
Tisca EFX	5,450,982
MA Spolka	1,544,830
R Spolka	10,275,131
Norfolk	12,652,646
CMC	324,748
Mesto	1,625,000
Atheus	18,856,062
Remaflon	540,215
AIL	1,208,170
Sundry	350,083
Unknown	10,819,652
Akonex	16,029,657
IT Invest	752,335
Limo SP	989,640

243. We find this to be insufficient basis for us to conclude that supplies made by AIL led to supplies from Tisca to Lineks or Nikopol, even on a balance of probabilities basis, given that there are so many companies making payments to Tisca and there has been no attempt to refine the information which covers payments made before and after AIL's relevant supplies to Tisca.

Others

244. Similar information has been provided by the Polish tax authorities in relation to a large number of other Polish companies, none of whom are identified as being in AIL's transaction chains. None of the evidence shows that any of the companies has defaulted on its liability to pay VAT or the Art 108 charge. The information from the Polish tax authorities sets out the charges which are imposed under Art 108 in particular, but does not identify defaults.

245. Officer Patterson says that money equivalent to the Polish VAT element was sent from Tisca's US dollar account to accounts in Dubai. He also asserts that in paying Tisca the Polish companies paid away VAT due to the Polish revenue. Mr Marsh says that the Cypriot authorities obtained documents for Tisca's account at a UK money services bureau called Voltrex Ltd ("VFX"). He says in his Witness Statement that in April and May 2013 large amounts of money were moved within accounts at VFX and the purpose of some of the movements was to strip out the unpaid Polish VAT and move money to one of 12 Dubai-based traders. At the hearing we asked Mr Marsh about the basis of the reference to the stripping out of the Polish VAT and Mr Marsh said that the Polish companies had paid Tisca "the full invoice, including VAT" so the VAT is obviously not paid over to the Polish authorities. However, we do not have any evidence from the Polish authorities identifying that any of the Polish companies paying Tisca failed to declare or account for acquisition tax (or indeed any other VAT).

The Appellants' roles

246. Mr Sheth is a part-qualified accountant who had previously worked as an accountant advising companies in this area before setting up his own business. He was fully conversant with general MTIC issues.

247. Mr Sheth managed AIL's cash flow and foreign exchange transactions. Given this particular role, we find that he was actively engaged in monitoring AIL's bank accounts. He was also, ultimately, the person who would take decisions about whether to deal with a customer or supplier.

248. We do not accept the attempt by the Appellants, and particularly Mr Sheth, to pass responsibility for the running of AIL to any notable extent to a person called Mr Kumar, given the late introduction of this element of evidence and the inconsistencies in the evidence, as explained earlier. Even if we were to take the Appellants' evidence at its highest though we would find that Mr Kumar was no more than a management consultant looking at systems operated by AIL. He was not in fact making decisions, as confirmed by Mr Sheth in cross-examination. Mr Kumar was only in the office part-time, on average 3-4 days per week.

249. Mr Ghazi described himself as "Operations Director" for AIL and: "a senior employee who was and continues to be responsible for due diligence, customer services, business development/operations and logistics. My role has now developed into a more managerial position at AIL due to the nature of the business and my developing experience over time." He held himself out as director of operations to third parties including HMRC. He was generally the person representing AIL in meetings with HMRC. He was therefore the person with the knowledge or the means of knowledge to describe AIL's activities and processes

such as due diligence. He also signed off trades carried out by traders for AIL. Both he and Mr Sheth were bank signatories for AIL.

250. Mr Ghazi was the principal witness for AEL in the appeal of its 2010 assessment. The Tribunal found that Mr Ghazi was at the front and centre of the activities of both companies. His work, especially on due diligence and transaction logistics, was adopted by the directors of the company in deciding with whom to trade. It was noted that it was a matter of agreement that the Appellants had a good general awareness of MTIC fraud, and the Tribunal went on to find that Mr Sheth and Mr Ghazi were fully aware of the existence and significant level of MTIC fraud in the wholesale mobile telephone trade. The evidence before us is entirely consistent with that conclusion.

251. We are therefore satisfied that Mr Ghazi was a “manager” of AIL at the relevant times responsible for operations at AIL, although we find that he had no involvement with, or responsibility for the actual completion or submission of AIL’s VAT returns.

252. Mr Sheth was as director ultimately responsible for AIL. He delegated the preparation of VAT returns to book keepers who worked for AIL and never checked the returns himself.

Due diligence

253. Traders reported to Mr Sheth, but would take due diligence to Mr Ghazi who would identify whether it was sufficient or any issues were raised by it. Mr Ghazi would tell traders if they needed to obtain more information. However, he relied upon what he was told by traders, even though they had a vested interest in persuading him and Mr Sheth that they should be able to carry out deals with potential counterparties. A lot of reliance was placed on a trader’s individual relationship with the person with whom they were dealing.

254. AIL focused on the due diligence carried out in relation to suppliers. It took comfort from the introduction of the reverse charge in 2007 and carried out little due diligence into its customers.

255. The due diligence checks carried out by AIL were minimal. A company’s VAT registration and certificate of incorporation were checked, although in the case of trading with Tisca at least, the evidence shows that AIL started trading before the date of the VAT certificate.

256. There were telephone calls with freight forwarder companies although no notes were kept of those discussions even though AIL purported to rely upon them and HMRC had required evidence of them. No Companies House check was carried out; nor were bank references or trade references sought. The Appellants claimed that due diligence increased and changed as they were made aware of issues by HMRC, but we find the evidence insufficient to conclude that there were any changes given that the Appellants could not identify any.

257. AIL was also frequently careless in how it dealt with due diligence; for example, obvious issues such as inappropriate trade classifications on VAT certificates were not followed up; and reliance was placed on a letter sent to an individual who was not at AIL, but was the manager of some of the traders at their previous employer.

258. Both Mr Sheth and Mr Ghazi knew that they could not zero-rate sales if the purchaser had been deregistered and they generally applied this in practice.

259. The Appellants recognised that the due diligence documents provided for Atheus and Tisca were the same in terms of fundamental matters such as ownership and that the documents were unique (in terms of showing declarations of trust for the ownership of the

companies) when compared to other due diligence information, but no questions were raised with Tisca or Atheus about these issues.

Awareness of the Appellants

260. HMRC letters were frequently written to Mr Ghazi, but he would show those letters to Mr Sheth.

261. HMRC drew the business' attention to the risks of MTIC fraud, both in general and in relation to AIL and AEL's businesses specifically, on several occasions before 2013. Between September 2001 and March 2006 HMRC notified AIL and/or AEL on 34 occasions that actual or intended counterparties had been deregistered for VAT. On 16 August 2006 HMRC raided AIL's premises under a search warrant and took business records. AIL was aware that a number of its counterparties had also been raided. In 2006 HMRC issued 23 Joint and Several Liability letters to AIL informing it that various of its transaction chains had commenced with defaulting traders.

262. In October 2010 HMRC wrote to AIL regarding verification of VAT repayment claims and explained HMRC's position regarding the circumstances in which claims may be denied following decision in *Kittel*. That letter spoke generally about MTIC fraud with a focus on repayment claims.

263. On 12 September 2011 HMRC wrote to AIL to inform the company that it was being placed on monthly returns given the problems HMRC were facing with businesses that wholesaled commodities in the context of MTIC VAT fraud.

264. Around the time of the relevant transactions HMRC's public guidance regarding zero-rating was set out in Notice 725. That Notice set out the requirements for zero-rating the supply of goods as:

- (1) obtaining and showing on the sellers VAT sales invoice the customer's EC VAT registration number;
- (2) sending or transporting the goods out of the UK to a destination in another EC member state; and
- (3) obtaining and keeping valid commercial evidence that the goods have been removed from the UK.

265. There was no reference at the relevant times in Notices 725 to the decision in *Mecsek-Gabona*. Officer Patterson recognised that he was not aware of the decision in the period January-May 2013 and it had not been mentioned to the Appellants around, or before, that period. However we find that there were numerous communications from HMRC which explained that care should be taken with the supply of goods to customers and that such supplies could be subject to challenge on an MTIC basis, as we now explain further.

266. In January 2011 HMRC wrote to Mr Ghazi explaining that, as a result of the introduction of the reverse charge there were no tax losses currently being experienced within the UK due to missing trader fraud involving mobile phones, but there was still a significant problem in other EU member states. HMRC wrote that in principle, where a UK trader sold goods that were used by a missing trader in another EU Member State to default upon their liabilities as part of a deliberate scheme to defraud, then HMRC could deny the VAT reclaim by the UK trader if it could be shown they knew, or should have known, that the supplies were connected to fraud. The letter noted particular warning signs which should be considered, such as newly established VAT registrations and traders with little history in importing mobile phones.

267. On 16 January 2012 HMRC Officers visited AIL and explained that HMRC were tracing supply chains both backwards and forwards and that on two recent occasions AIL had sold to defaulting traders in other countries. HMRC informed AIL that it was being told this so that it could make informed commercial decisions and revisit its due diligence. The visit was followed by a letter dated 18 January 2012 repeating the information provided at the visit.

268. Later in the same month, HMRC wrote to Mr Ghazi explaining that enquiries were being made into transaction chains which may be linked to MTIC fraud involving supplies made by AIL to a company called Globalen APS. This letter advised that AIL should have the requisite evidence to support zero-rating for supplies made to overseas customers and take all reasonable measures to ensure that AIL's transactions did not lead to involvement in transactions connected with the fraudulent evasion of VAT. However, Mr Ghazi told us that no changes were made to AIL's due diligence processes as a result of this letter, or earlier correspondence.

269. In a letter dated 18 February 2013 to the directors of AIL, HMRC informed AIL that Atheus had been deregistered with effect from 31 December 2012 and any zero-rating applied to transactions involving that company after the effective date of cancellation of its registration may fail to be verified.

270. Mr Ghazi acknowledged that from the start of January 2012 at least, after correspondence and an HMRC visit, he was aware that HMRC were concerned about sales as well as purchases in looking for connection to fraud; and he understood that the *Kittel* principles could apply to sales. He understood that if AIL sold goods to a purchaser in the EU and the purchaser defaulted on its VAT liabilities and/or went missing that could have consequences for AIL.

271. Mr Sheth also confirmed that he was aware that MTIC fraud could arise in connection with schemes in the context of AIL's sales cross-border. He was fully aware of the impact of the reverse charge and therefore, although both he and Mr Ghazi were somewhat reluctant to admit this, the only element of the transactions which was exposed to action by HMRC in the context of MTIC fraud was sales. The January 2012 letter made clear that issues could arise in the context of zero-rating as well as repayment claims.

DISCUSSION

272. We recognise that situations involving potential cross-border fraud are particularly difficult to unravel, especially in the context of the sophisticated MTIC arrangements that became prevalent using numerous missing traders and buffers to block relevant tax authorities' views of the schemes being operated. However, that does not mean that we are somehow able to gloss over the need for evidence of fraud in connection thereto to conclude that by virtue of the very existence of missing traders, and in this case companies which the Polish tax authorities have concluded were essentially fictitious, that the requirements for applying the *Kittel/ Mecsek-Gabona* principles exist.

273. We have identified several problems with HMRC's evidence in this case, not least that much of it is focussed on the position of another UK company, EP. We have found HMRC's evidential approach generally in this case to have been to produce large volumes of information describing a general web of VAT fraud to which Tisca, with whom AIL dealt, is said to have been linked. That is insufficient.

274. Ms Rao's closing submissions on behalf of HMRC say that HMRC's case is based on the fact that AIL's goods went to Poland and companies that paid its customer, Tisca, have been identified by the Polish authorities as part of an overall scheme to defraud Polish

revenue. That in essence encapsulates HMRC's case and we find this to be inadequate to satisfy the primary requirements for the application of *Kittel/ Mecsek-Gabona* – which requires the proof of the existence of VAT losses connected to AIL's supplies of telephones. Those two elements of HMRC's case are missing. Even if the Appellants are treated as having agreed that two Polish companies are VAT defaulters, the evidence is insufficient to show connection of AIL's transactions to those traders.

275. We have considered the position regarding the application of Art 108 in Poland, applying the principles we set out earlier about the interpretation of foreign law. Ms Rao submitted that we could make no findings about Polish law. Despite the obvious issues with interpreting the Polish letters which we have described, we are clear that HMRC have not shown that the Art 108 charges should be treated as VAT such that default of payment of those charges causes a company to be a VAT defaulter for the purposes of applying *Mecsek-Gabona*.

276. We fully recognise that the evidence regarding Tisca, and the Polish companies which paid Tisca, is full of the hallmarks indicating MTIC activity; such as: companies starting and ceasing to operate within very short periods of time during which vast amounts of turnover passed through them from a standing start, with no employees or premises, and often where trading in telephones was not declared as a business activity; the lack of a commercial rationale for the transaction chains; the length of the transaction chains; the prices at which the goods were traded in the transaction chains; and the consistency of the transaction chains. While these would be features commonly identified in decisions of this tribunal concluding that transactions were part of an overall scheme to defraud, in this case HMRC have been unable to identify transaction chains linked to AIL's deals and (subject to the Appellants' concession regarding two companies) the existence of VAT losses.

277. We contrast the position though in this case with that in *Turkswood*. In that case the appellant supplied Polish companies directly and therefore the analysis was somewhat easier for HMRC. However, in the context of supplies made to Nectel by that appellant HMRC received a letter from the Polish authorities in similar terms to those provided in this case. At paragraph 219 of *Turkswood*, the Tribunal noted that:

“219. HMRC were clearly conscious of the need to establish the existence of a link between the Appellant's supplies to Nectel and the apparent VAT fraud committed by that company. In a further request to the Polish VAT authorities, they said this: In order to deregister *Turkswood Ltd*, HMRC needs to be able to directly link this company to assessed tax losses in other member states. Have tax losses been assessed or raised against your trader or its Officers? If so, have these assessments been raised against trades with *Turkswood*?”

278. Although no specific loss was identified by the Polish revenue or direct link between Nectel and the appellant in that case, the Polish authorities did confirm that no VAT returns had been submitted declaring the acquisition VAT which it ought to have accounted for on the supplies made to it. That was in a case where the appellant had supplied the Polish “defaulter” directly and therefore the Tribunal could fill in the gaps to conclude that the non-payment of the acquisition tax was a VAT default and there was no doubt about the connection. This case is quite different and the chains are more complex, but, notably for our purposes, the specific questions about losses have not been asked by HMRC.

279. At its heart HMRC's case is that AIL made supplies to Tisca which issued invoices to Bulgarian companies to hide sales to Poland and that, in the context of the Polish revenue authorities' conclusions, the Polish companies were, in essence, fictitious. Therefore it must be inferred that this was all part of an arrangement to avoid tax in Poland. We do not

consider that such inference from such a combination of circumstances is sufficient to discharge the burden on HMRC to show that there were fraudulent VAT losses connected to AIL's transactions.

280. We recognise that our conclusion may be considered to be frustrating in the context of a complex web of transactions ranging across several jurisdictions. We recognise that to the extent that there was any underlying VAT fraud it was designed to be difficult for outsiders to trace; for example, company names were not routinely included on freight forwarder records or CMRs. From the point of view of Polish authorities investigating receipts of goods, it was only the name of the UK freight forwarder that was generally available. However that recognition of the problems faced in cross-border investigations cannot counteract the significant evidential gaps in this case.

OVERALL CONCLUSION

281. The Tribunal's conclusions are therefore as follows:

- (1) HMRC has not discharged the burden of proof on it to show that the conditions exist for denying the zero-rating of supplies made by AIL on the basis of *Mecsek-Gabona* principles, because HMRC have not shown that the AIL's transactions were connected to transactions giving rise to fraudulent VAT losses;
- (2) Consequently AIL's VAT returns for the periods 02/13, 3/13, 04/13 and 05/13 did not include inaccuracies; and
- (3) As a result, the PLNs to which the Appellants have been assessed and which are the subject of their appeals are cancelled.

PART 3 – PROCEDURAL MATTERS

282. In this part of the decision we briefly note the procedural matters which arose during the hearing and our decisions in relation thereto.

WHETHER THE CASE BEING PRESENTED BY HMRC HAD BEEN SUFFICIENTLY PLEADED?

283. Mr Sherratt submitted that the case being presented by Ms Rao had been insufficiently pleaded. Ms Rao was submitting that the Appellants should be found to have made deliberate inaccuracies if they were aware that AIL's transactions were connected to fraud. Mr Sherratt submitted that this interpretation was not clear and that the natural meaning of "deliberate" after *Tooth* would require the Appellants to know that zero-rating was not available to AIL when it was claimed because, in effect, AIL had not complied with the requirements set out in Notice 725.

284. Although the point was not addressed at length as such in the Statement of Case, Ms Rao clarified the pleadings and we were satisfied that it had been sufficiently articulated. In the Statement of Case HMRC said:

"Claiming zero-rating that a taxable person knows is not due because he knows that the relevant transactions are connected with the fraudulent evasion of VAT, is deliberate behaviour."

285. Ms Rao's clarification was accepted by Mr Sherratt. However, this led to the next application.

WHETHER THE DISPUTE AS TO THE APPLICATION OF *TOOTH* IN THIS CASE SHOULD BE TREATED AS A PRELIMINARY ISSUE

286. Mr Sherratt submitted that if the Appellants' submissions as to the application of the law to the interpretation of "deliberate inaccuracies" were correct this would effectively be a knockout point which would result in significant savings of time and expense if dealt with as a preliminary matter.

287. The parties provided written and oral submissions.

288. We note that there was a separate issue raised at the same time as to whether HMRC was pleading dishonesty. Ms Rao clarified that HMRC were not.

The Appellants' submissions

289. Mr Sherratt submitted that if the Appellants had been better made aware of the argument being relied upon by HMRC they would have taken the preliminary issue point much earlier, as it was effectively a "knockout" point.

HMRC's submissions

290. Ms Rao submitted that the principles in *Wrottesley v Revenue & Customs* [2015] UKUT 637 (TCC) should be applied. In this case the final hearing had already commenced. The reality was that there was no preliminary issue to determine because the final hearing was well underway. Determination of this point as a preliminary issue would not cut down the cost, time, and preparation required for the appeal hearing. On the contrary, it would add to these, as the timetable for the hearing would be delayed. Account should be taken of the potential delay caused by an appeal on the issue. The interposition of this as a preliminary issue would have the effect of requiring HMRC to address points that ought properly to be part of closing submissions, without the Tribunal having heard the evidence of the Appellants. Evidence of the state of mind of each Appellant at the time the claim to zero-rating was made would be relevant to the question of whether there was a deliberate inaccuracy. The parties were diametrically opposed as to whether HMRC have to prove that the Appellants knew "that the Kittel test would lead to zero-rating" being denied in these circumstances or whether, instead, HMRC have to prove that the Appellants knew that their supply was connected with a fraudulent evasion of VAT. Such a disagreement properly falls to be resolved by the Tribunal in its ruling on the substantive case.

Our decision

291. Our decision, which we delivered in the hearing, was that the issue as to the requirements for knowledge for deliberate inaccuracies to be shown in this case should not be dealt with as a preliminary issue for the following reasons.

292. We applied the guidance in *Wrottesley*. We were of the view that our primary role was to act as the fact-finding tribunal and it would be a more efficient process for the parties and the Tribunal if the hearing progressed as originally planned, rather than pausing it to deal with one issue as a preliminary issue with the potential of then having to come back and find facts on the remaining points. Although there was potential for the Appellant's argument to be a knockout point, we were mindful of the likelihood that our decision on the matter as a preliminary issue would be appealed. Overall, treating the matter as a preliminary issue, particularly at this late stage when the hearing was already in process, was likely to cause delay.

THE APPELLANTS' APPLICATION TO MAKE A SUBMISSION OF "NO CASE TO ANSWER"

293. After we had heard the evidence of HMRC's witnesses Mr Sherratt submitted that the evidence showed that the Appellants had no case to answer relying upon the case of *Hargreaves v. HMRC* [2016] EWCA Civ 174. He therefore sought permission to submit that

there was no case to answer. We were provided with extensive written and oral submissions of which we summarise the main points below. It was clear that this application would raise a series of issues, including as to the scope of the Appellant's "election". We therefore asked the parties initially to make submissions as to whether an application should be entertained and the scope of the election if it was. In other words, we considered whether it was appropriate for submission to be entertained, rather than consider the actual submission which would be made, if so.

The Appellants' submissions

294. In *Hargreaves* the Court of Appeal said:

"Even though the appeal raises other issues, Mr Hargreaves could at the end of HMRC's case, if HMRC open, submit that there was no case to answer on the conduct/officer condition. If he won on that, there would be no valid discovery assessment. If he lost on that, he could then call his evidence on the substantive issues in his appeal, including s 29(2)." (§42)

295. The Court of Appeal was therefore accepting that, even in a case not involving a penalty that is criminal for the purposes of the ECHR, the taxpayer can listen to HMRC's case on whether there was an insufficiency of tax attributable to fraudulent/negligent conduct and, at the end of HMRC's case, submit that there is no case to answer. The penalty this tribunal is considering is a criminal penalty which reinforces the Appellants' right to make a submission of no case to answer. HMRC's case on the identification of a deliberate inaccuracy cannot succeed as a matter of law because it is contrary to the Supreme Court decision in *Tooth*.

296. Mr Sherratt submitted that Officer Patterson's evidence had made clear that he was not aware of the *Mecsek-Gabona* case and therefore the Appellants cannot be found to have been aware of it. If the Appellants' application of *Tooth* is correct that must therefore be the end of the case.

297. Mr Sherratt submitted that the correct approach to the submission of no case to answer is that applied in the criminal courts in a tax penalty case, applying the principles set out in *R v Galbraith* (1981) 73 Cr App R124 CA. There is no question of election in the criminal process. Submissions made by HMRC that in criminal cases there is a judge and jury, splitting the roles of deciding the law and finding facts, failed to recognise the position in summary trials before district judges sitting alone. The case of *Benham Ltd v Kythira Investments Ltd* [2003] EWCA Civ 1794 should be distinguished given the elements of this case which are categorised as criminal for Art 6 ECHR.

298. Mr Sherratt submitted that *Hargreaves* is authority for the proposition that the Appellants are entitled to have a submission of no case to answer determined after the conclusion of HMRC's case. If the submission fails, they would not be entitled to call evidence on that issue alone. This conclusion was supported by the decision in *Addo v. HMRC* [2018] UKFTT 93 (TC). The Appellants' submission is that deliberateness for the purposes of the penalties appealed by them refers to the question of whether AIL/the Appellants actually knew that the VAT return was wrong because they actually knew they were not entitled to zero-rating. HMRC have not advanced a case that they did have that knowledge and therefore there is no need for them to give evidence on that issue. If, however, HMRC's interpretation of the law is correct and the question is whether the Appellants knew that AIL's transactions were connected to fraud, the scope of any election would be much wider. As a result, either the election only covered the issue as understood and submitted by the Appellants (irrespective of whether they are right about that), or the

Tribunal would have to rule on the correct interpretation of deliberateness in advance of the election in order for the Appellants to know on what they are electing not to give evidence.

HMRC's submissions

299. Ms Rao submitted that we should not proceed to hear a submission of no case to answer because it is potentially disruptive of the proceedings, but if we decided to do so then the Appellants should be put to their election because that is the accepted practice in the civil courts. In other words the Appellants should not be permitted to make a submission of no case to answer unless they first confirmed that they would not be relying on any evidence in the appeal.

300. Ms Rao submitted that the Appellants failed to recognise that in tax cases involving penalties, the fact of criminal classification for the purposes of the ECHR does not mean that the rules of criminal procedure are to be adopted in the civil jurisdiction, relying on the authority of *Han and another v Customs and Excise Commissioners* [2001] EWCA Civ. The procedure in civil courts is set out at 32.1.6 of the White Book. It is submitted that the Tribunal should generally follow a similar approach to that adopted by civil courts (*BPP Holdings v HMRC* [2017] UKSC 55).

301. The application now under consideration is an argument that HMRC's evidence does not meet the case that the Appellants say should be met in relation to the *Tooth* knowledge test. The Appellants were effectively seeking to achieve the same result as that which would have been achieved if the Tribunal had decided to treat the knowledge issue as a preliminary issue.

302. There are inherent difficulties in this case with receiving a submission of no case to answer at 'half-time' based on a point of law. The Tribunal has not yet heard all the evidence that both parties may wish to rely upon. The Tribunal's primary duty at a hearing is make all necessary findings of fact in accordance with the law. The Appellants seek to have it both ways. They wish to make a submission of no case, but resist being put to their election save in the most restrictive of circumstances; namely, that they would not be permitted to give evidence on the very matter they say that HMRC has no evidence about, i.e. whether the Appellants knew their VAT return was inaccurate because they had knowledge of the *Mecsek-Gabona* decision. The case of *Hargreaves*, upon which the Appellants rely, was dealing with a very different situation where it was held that the taxpayer could make a submission on the preconditions for a discovery assessment and, if that failed, it could then address the separate issue of substantive liability. However, in the present case the scope of the issue of whether the Appellants rendered deliberately inaccurate returns is inextricably linked to the substantive question of their liability.

Our decision

303. We decided not to entertain an application to make a submission of no case to answer for the following reasons.

304. We heard very detailed arguments about the position in the criminal courts and the civil courts, and whether we should be guided by a criminal process or whether we should be guided by the civil process. The Court of Appeal has drawn the distinction between the normal criminal case, with a judge and jury, compared to the civil case, where there is a judge, and in this case a member, acting as both judge and jury. That distinction was specifically endorsed in *Benham Ltd v Kythira Investments Ltd* [2003] EWCA Civ 1794 and *Boyce v Wyatt Engineering* [2001] EWCA Civ 692.

305. In reaching our decision we recognised that this is a criminal case for the purposes of Article 6 ECHR such that the Article 6 safeguards must be applied, but these are not criminal

proceedings. This is a civil court and our primary role is to act as fact-finder. We did not consider that the criminal nature of the penalties for Article 6 ACHR purposes overrides the distinction drawn by the courts between criminal and civil cases for the purposes of a “no case to answer” submission.

306. We recognise that Mr Sherratt has said that this would be what he describes as a rare case, and that in itself opens up the opportunity to ring-fence anything that we were to do in this case by virtue of its rarity. We recognise that there are cases where there may be a “killer” legal argument that is raised during the course of proceedings, where the tribunal can very quickly determine that is the case and proceed accordingly; or it otherwise becomes clear that there is no case to answer where the law is clear. Beyond those situations the courts have made clear that caution should be applied, as shown by the approval by Brown LJ in *Benham* of the following description set out by Lance LJ in *Bentley v Jones Harris & Co* [2001] EWCA Civ 1724 (at paragraph 18):

“75. As Mance LJ has said in the case of *Boyce*, to which my Lord has already referred, it will only be in a rare case that the judge should be asked to determine the issues before him before all the evidence has been completed. However, it seems to me that, if a judge concludes at the end of a claimant's evidence, whether on the application of the defendant or of his own motion, that the claimant has no real prospect of success or, in other words, is bound to fail, on his assessment of the evidence before him at that stage, he is in my view entitled to give judgment for the defendant, in the same way as if there had been an application at an earlier stage in the proceedings for summary judgment under CPR Part 24.2. In that way he will be giving effect, in the circumstances of a trial, to the overriding objective and in particular to the need to contain within limits the expenditure of time and costs on the particular case before him.”

307. This is not one of the situations where there is a “killer” argument or the law is clear. The matter which lies at the heart of the application is a disagreement between the parties as to the legal test to be applied to the word “deliberate” in the context of these appeals.

308. We therefore had particular regard to the warnings in *Benham Ltd v Kythira Investments* about the very real need for caution in these circumstances.

309. Furthermore, we have to decide the most just way to proceed, having regard to the overriding objective encapsulated in rule 2 of the Rules. That must guide our actions and our decisions in this tribunal. In the case of *Addo v Revenue and Customs* [2018] UKFTT 93 (TC), Judge Richards (at paragraph 14) commented specifically in the context of the overriding objective that the tribunal may consider it unfair or wrong to determine whether HMRC have discharged their burden without hearing the totality of the evidence. This is a case raising a series of issues and the delineation of the Appellants’ election would itself pose further issues.

310. We agreed with Ms Rao’s interpretation of “no case to answer” being interpreted with regard to the case put, in this case, by HMRC. That seems to us to follow the normal meaning of the words “no case to answer”. According to the case presented by HMRC, the Appellants did have a case to answer on that issue. That did not mean that we had decided that HMRC’s case was correct. It simply meant that the case the Appellants were answering was that put forward by HMRC. We had regard to Brown LJ’s judgment in *Benham* where he said (at paragraph 39):

“have the claimants advanced a *prima facie* case, a case to answer, a scintilla of evidence to support the inference for which they contend, sufficient

evidence to call for an explanation from the defendants? That it may be a weak case **and** unlikely to succeed unless assisted, rather than contradicted, by the defendant's evidence, or by adverse inferences to be drawn from the defendants' not calling any evidence, would not allow it to be dismissed on a no case submission.”

311. Mr Sherratt’s submission that either the election only covered the issue as understood and submitted by the Appellants, or the Tribunal would have to rule on the correct interpretation of deliberateness in advance of the election, emphasised the problems which would arise if we entertained the submission. A submission of no case to answer would involve us determining the dispute in law about the interpretation of “deliberate” in the context of these appeals. Were we to apply HMRC’s interpretation of the law we would expect the Appellants to provide evidence about the transactions and the background to them which we had not yet heard.

312. We did not consider it right potentially to dissect the case unless we were clear that the outcome of the submission was manifestly obvious and that entertaining the submission at this stage would be in accordance with rule 2 of the Rules. We would effectively be deciding the interpretation of “deliberate” as a preliminary issue. There would be potential prejudice in terms of resources for the Tribunal in stopping at this point. If we did not entertain the submission we considered there would not be prejudice to the Appellants - they had already prepared for the three-week case. What the Appellants were facing was the possible loss of the opportunity to save costs by bringing the case to an end earlier, when, in fact, given the likelihood of onward appeal, that opportunity cost itself was probably illusory.

THE DECISION

313. For all the reasons we have set out, having considered the evidence both oral and written as explained, we have DECIDED that:

- (1) the Appellants’ appeals should be allowed; and
- (2) the PLNs issued by HMRC under Paragraph 19 of Schedule 24 FA07 to each Appellant in the sum of £880,373.60 (and reduced by HMRC to £877,921.87) should be cancelled.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

314. 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.

**TRACEY BOWLER
TRIBUNAL JUDGE**

Release date: 17 MAY 2022

APPENDIX 1 – PARTIES REFERRED TO

We list the companies referred to in our decision below.

Atheus Invest Ltd (“Atheus”)
Benox Sp. z o.o. (“Benox”)
Elit MMM EOOD (“Elit”)
Flatop Sp. z o.o. (“Flatop”)
Fonset Sp. Z o.o. (“Fonset”)
Gallent Sp. z o.o. (“Gallent”)
Havana Sp. z o.o. (“Havana”)
Jacobin Sp. z o.o. (“Jacobin”)
Jaystone Trading Sp. z o.o.
Kameya OOD (“Kameya”)
Limo Sp. z o.o. (“Limo”)
Lineks Sp. z o.o. (“Lineks”)
Multistrada Enterprise Sp z o.o. (“Multistrada”),
Nectel Sp. z o.o. (“Nectel”)
Nikopol Enterprises Spz (“Nikopol”)
Norfolk Sp. z o.o. (“Norfolk”)
Ron Poland Sp. z o.o. (“Ron”)
Roxa Sp. z o.o. (“Roxa”)
Sigma Treyd OOD (“Sigma”)
Tisca Ltd (“Tisca”)