



Neutral Citation: [2023] UKFTT 211 (TC)

Case Number: TC08737

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House

Appeal reference: TC/2018/03717

VALUE ADDED TAX – denial of relief for VAT input tax on the basis that the Appellant knew or should have known that the supplies in question were connected with the fraudulent evasion of VAT – held that, on the balance of probabilities, the Appellant knew of that connection and that, even if that was incorrect, the Appellant should have known of that connection – appeal dismissed

Heard on: 20, 21, 26, 27, 28, 29 and 30
SEPTEMBER and 17 NOVEMBER 2022
Judgment date: 21 December 2022

Before

**TRIBUNAL JUDGE TONY BEARE
MR JULIAN SIMS**

Between

VORTEX ENTERPRISES LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Joshua Carey, instructed by RPC

For the Respondents: Mr Ben Hayhurst and Mr Harry Warner of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This decision relates to an appeal made by the Appellant on 25 May 2018 against a decision by the Respondents contained in a letter dated 17 November 2017 to deny the Appellant the right to deduct value added tax (“VAT”) input tax of £872,918.00 in aggregate in the VAT periods 06/16 and 09/16 - £649,872.00 in respect of the VAT period 06/16 and £223,046.00 in respect of the VAT period 09/16. In consequence of that decision, which was upheld on review in a letter dated 26 April 2018, the Respondents have issued assessments to the Appellant under Section 73 of the Value Added Tax Act 1994 (the “VATA”) of £19,037.93 in respect of the VAT period 06/16 and £52,175.21 in respect of the VAT period 09/16.

2. Part of each such assessment - £6,701.29 in respect of the VAT period 06/16 and £17,426.90 in respect of the VAT period 09/16 – related to VAT input tax denied as a result of the use by the Appellant of incorrect exchange rates. There is no appeal in relation to the Respondents’ refusal to allow the Appellant to deduct that part of the VAT input tax which relates to the use by the Appellant of incorrect exchange rates and the exchange rate issue is not considered further in this decision. Instead, this decision relates solely to the Respondents’ refusal to allow the Appellant to deduct the remaining part of the VAT input tax in question. That refusal is based on the Respondents’ belief that the VAT input tax in question was incurred on purchases which were connected with the fraudulent evasion of VAT and that the Appellant either knew or should have known of that connection - see *Axel Kittel v Belgian State and Belgian State v Recolta Recycling SPRL* (C-439/04 and C-440/04) (“*Kittel*”). The VAT fraud in question is generally referred to, and will be referred to in the rest of this decision, as Missing Trader Intra-Community (or “MTIC”) fraud.

3. The VAT input tax in respect of the VAT period 06/16 the deduction of which has been denied by the Respondents was incurred on the following purchases of hard drives, headphones and games consoles by the Appellant:

Date	Supplier	VAT number	Net (£)	VAT (£)	Gross (£)	Deal No.
07/04/16	Global Legacy Solutions Limited (“GLS”)	GB189199834	286,071.10	57,214.21	343,285.31	1
11/04/16	GLS	GB189199834	178,059.88	35,611.98	213,671.86	2
28/04/16	GLS	GB189199834	224,870.26	44,974.05	269,844.31	3
28/04/16	GLS	GB189199834	243,004.77	48,600.95	291,605.72	4
20/05/16	GLS	GB189199834	157,476.27	31,495.25	188,971.5	5

					2	
25/05/16	GLS	GB189199834	95,886.07	19,177.22	115,063.29	6
10/06/16	GLS	GB189199834	478,571.44	95,714.28	574,285.72	7
29/04/16	XG Concept Limited ("XGC")	GB900445561	378,895.08	75,779.01	454,674.09	8
04/05/16	XGC	GB900445561	290,486.71	58,097.34	348,584.05	8
26/05/16	XGC	GB900445561	211,827.53	42,365.51	254,193.04	9
31/05/16	XGC	GB900445561	211,827.53	42,365.51	254,193.04	10
13/06/16	Devi Communications Limited trading as PLC Communications ("PLC")	GB616637040	194,204.92	38,840.99	233,045.91	11
15/06/16	PLC	GB616637040	194,010.72	38,802.14	232,812.86	11
17/06/16	PLC	GB616637040	95,697.13	20,825.83	116,522.96	11

4. The VAT input tax in respect of the VAT period 09/16 the deduction of which has been denied by the Respondents was incurred on the following purchases of hard drives by the Appellant:

Date	Supplier	VAT number	Net (£)	VAT (£)	Gross (£)	Deal No.
13/07/16	GLS	GB189199834	168,333.33	33,666.67	202,000.00	12
13/07/16	GLS	GB189199834	84,166.67	16,833.33	101,000.00	12
21/07/16	GLS	GB189199834	259,583.34	51,916.66	311,500.00	13
28/07/16	GLS	GB189199834	253,437.42	50,687.48	304,124.90	14

19/07/16	PLC	GB616637040	206,245.00	41,249.00	247,494.00	15
19/07/16	PLC	GB616637040	143,465.83	28,693.17	172,159.00	16

5. In the case of each of the deals in which the Appellant acquired goods from GLS – deals 1 to 7, 12, 13 and 14 - the Appellant sold the goods to ACLM-Tech BV, a company which belonged in the Netherlands for VAT purposes (“ACLM”). In the case of each of the deals in which the Appellant acquired goods from XGC – deals 8, 9 and 10 - the Appellant sold the goods to GECX Group Greece PCC, a company which belonged in Greece for VAT purposes (“GECX”). Finally, in the case of each of the deals in which the Appellant acquired goods from PLC – deals 11, 15 and 16 - the Appellant sold the goods to Inco Mobile BV, trading as Tabletraders, a company which belonged in the Netherlands for VAT purposes (“Inco Mobile”).

THE FACTS

Introduction

6. At the hearing of the appeal, we heard the oral evidence of four witnesses – Mr Mathew Bycraft for the Respondents and Mr Stephen Paddon, Mr Gary Michael Palmer and Mr Elliott Christopher Browne for the Appellant – and were provided with a considerable number of documents, including witness statements from a number of other witnesses for the Respondents who were not called to give oral evidence and be cross-examined.

7. With the exception of certain historic transactions, which we address in paragraphs 109 to 159 below, there is almost no difference between the parties as to the facts in this case. Instead, the dispute between them turns on how the relevant facts should be interpreted in the light of the applicable law. Accordingly, leaving aside for the moment those historic transactions, we set out in paragraphs 11 to 86 below our findings of fact in this case. In so doing, on those occasions where those paragraphs:

- (1) refer to a matter which is in dispute; or
- (2) refer to a matter in relation to which the evidence provided to us was contradictory or unsupported by documentary evidence,

we will describe the dispute and/or the evidence relating to the relevant matter and then set out our finding of fact in relation to that matter.

The witnesses

8. Before setting out the facts, we should make some observations about the witnesses.

9. The evidence of Messrs Paddon and Palmer was of limited assistance to us in these proceedings as, for different reasons, they had very little to do with the deals which are the subject of the appeal. Mr Paddon was in Australia and his role was largely supervisory in nature. He did not have day-to-day involvement in the deals or in the various meetings which were held between the Respondents and the Appellant in the lead-up to the deals. Mr Palmer’s evidence was also of limited assistance to us because, although he was in the UK and attended those meetings, as we note in paragraph 12(4) below, he was largely responsible for the software transactions of the Appellant and had a minimal involvement in the deals which are the subject of the appeal. We have therefore relied primarily on the testimony of Mr Bycraft and Mr Browne in setting out the facts below.

10. In that regard, we considered Mr Bycraft to be a credible and reliable witness. Although there were a few occasions in the course of his cross examination when we felt that

he was a little too anxious to justify the Respondents' conduct in their dealings with the Appellant than he might have been, our overall impression was that his answers in cross-examination were honest, straightforward and helpful.

11. Unfortunately, we did not reach the same conclusion in relation to Mr Browne. Whilst we were prepared to allow some leeway for the fact that:

- (1) Mr Browne was in the witness box for a considerable length of time;
- (2) the deals in question had been implemented a number of years before the hearing; and
- (3) Mr Browne had ceased to work as a consultant for the Appellant in 2016 and had not been given access to the Appellant's records, systems or company books in preparing for the hearing,

we found Mr Browne's evidence to be self-contradictory, often muddled and largely self-serving. Mr Browne sought to justify his repeated failures to carry out even the most rudimentary due diligence ("DD") in relation to the Appellant's counterparties by reference to his being "bad at paperwork" and to the fact that his "ADHD doesn't like forms" but we found those explanations to be unconvincing in the light of the circumstances in which the deals took place and the repeated warnings and advice which he received from the Respondents over a prolonged period in relation to identifying potential MTIC fraud in the Appellant's deal chains. It seemed to us that, for reasons over which we can only speculate, Mr Browne wilfully chose not to carry out the DD which he had been repeatedly advised by the Respondents to carry out and also misled the Officers of the Respondents over a prolonged period of time in relation to the extent of the DD which he was carrying out.

The timeline

12. During the VAT periods to which this decision relates:

- (1) Mr Sherard Kingston and Mr Paddon were the sole shareholders of the Appellant and Mr Robert David Kingston and Mr Paddon were the sole directors of the Appellant;
- (2) both directors of the Appellant were resident in Australia and had minimal involvement in the day-to-day running of the Appellant's business;
- (3) the day-to-day running of the Appellant's business was vested in two external consultants – Mr Palmer and Mr Browne – who carried out their work for the Appellant through personal services companies;
- (4) with very limited exceptions, Mr Palmer was responsible for the software transactions of the Appellant and Mr Browne was responsible for the hardware transactions of the Appellant, of which the transactions that are the subject of the appeal form part;
- (5) there were some significant differences between the software and hardware transactions, as we outline in further detail below;
- (6) the Appellant traded from an office and warehouse unit in Colchester, Essex; and
- (7) the Appellant was registered for VAT as a seller of computer games and accessories.

13. Each of Mr Browne and Mr Palmer had been working in the market in which the Appellant participated for some time and, in the course of carrying out that work, had become aware of the existence and extent of MTIC fraud in the sector.

14. On 5 March 2013, Officer Kim McHenry of the Respondents attended the Appellant's premises and met with Mr Palmer. The note of the meeting records that, inter alia:

- (1) the visit was being made because of the small VAT input tax repayment claim which the Appellant had made in respect of the VAT period 12/12;
- (2) Mr Palmer informed the Officer that:
 - (a) purchases and sales had commenced in January 2013, with the majority of customers located outside the UK;
 - (b) mark-ups fluctuated depending on the product which was being purchased and sold; and
 - (c) due to the overseas sales, there would be a more significant VAT input tax repayment claim in respect of the VAT period 03/13;
- (3) the Officer informed Mr Palmer that a further visit was likely to be made in order to verify the VAT input tax repayment claim in respect of the VAT period 03/13; and
- (4) the Officer approved the VAT input tax repayment claim in respect of the VAT period 12/12.

15. On 9 May 2013, Officer Everett of the Respondents wrote to the Appellant to draw the Appellant's attention to the fact that VAT fraudsters might be attempting to use alternative banking platforms to facilitate those frauds. In annexes to that letter, Officer Everett:

- (1) provided a detailed explanation of MTICs;
- (2) listed some of the factors which the Respondents had identified as being indicative of MTICs and referred the Appellant to the Respondents' Public Notice 726 ("PN 726") which contained further information in that regard;
- (3) stressed that that list of factors was not exhaustive and that it was up to the Appellant to carry out all the necessary DD to ensure that the transactions into which it entered were not connected with VAT fraud; and
- (4) noted that, whilst the Respondents were unable to provide the Appellant with authorisation or advice on whether to trade with any particular counterparty (as that remained a commercial decision for the Appellant), they advised the Appellant not to enter into a transaction with a new counterparty without first verifying the status of that counterparty with the Respondents through the Respondents' office in Wigan. (Although the location of that office changed at various times over the period with which this decision is concerned, we will refer throughout this decision to the check with that office of the Respondents as a "Wigan check").

16. On 23 May 2013, Officer McHenry attended the Appellant's premises and met with Messrs Palmer and Browne. The note of the meeting records that, inter alia:

- (1) the visit was being made because of the VAT input tax repayment claim which the Appellant had made in respect of the VAT period 03/13;
- (2) after making various checks, the Officer concluded that the Appellant's records were well maintained and that there was a good audit trail to supporting documentation; and
- (3) the Officer approved the VAT input tax repayment claim in respect of the VAT period 03/13 but recommended that a further visit be made within the next 18 months due to the nature of the business.

17. On 16 August 2013, Officer Mike Penry of the Respondents wrote to the Appellant, care of its accountant, Mr Simon Wellings of Haines Watts Colchester Limited, to remind the Appellant that MTIC fraudsters continued to pose a threat to public finances and to inform the Appellant that the Respondents were concerned that the Appellant's business could be at risk of involvement in supply chains which were connected with MTIC fraud. In that letter, Officer Penry:

- (1) asked if he might visit the Appellant to discuss the Appellant's business activities and inspect the Appellant's VAT records;
- (2) added that, as the visit alone would not give him enough time fully to review those records, he wanted to set up a regular real-time continuous monitoring arrangement pursuant to which the Appellant would provide the Respondents with its trading records in arrear on a monthly basis;
- (3) reiterated the need for the Appellant to carry out Wigan checks in relation to new or potential suppliers and customers; and
- (4) reminded the Appellant that further information on MTIC fraud could be found on the Respondents' website as well as in PN 726.

18. On 5 September 2013, Officer Penry, accompanied by Officer Max Gazsi, attended the Appellant's premises and met with Messrs Palmer, Browne and Wellings. The note of the meeting records that, inter alia:

- (1) the visit was being undertaken in the course of the continuous monitoring project;
- (2) the Appellant's representatives had informed the Officers that:
 - (a) about 90% of the Appellant's business related to games software and the balance related to games consoles and gaming accessories;
 - (b) no credit was sought from suppliers of goods but credit was sometimes given to customers;
 - (c) software was bought into stock and held in the Appellant's warehouse whereas hardware tended to be bought and sold back-to-back and not bought into stock or held in the warehouse;
 - (d) mark-ups varied dependent on what the market would bear but averaged around 8% at the time;
 - (e) hardware imports and exports always went via one of two freight forwarders – Global Freight Systems Limited (“GFS”) or L&A Freight BV (“L&A”) – who would also hold imports and exports and conduct inspections on behalf of the Appellant when required;
 - (f) stock in the warehouse was insured by the Appellant whereas stock in transit was insured by the relevant carrier or freight forwarder;
 - (g) unique serial numbers of hardware were not recorded;
 - (h) the Appellant's DD consisted of:
 - (i) asking for the counterparty's certificate of incorporation and VAT registration certificate;
 - (ii) checking its counterparty's VAT registration details through the VAT Information Exchange System (“VIES”) on the Europa website. (We will refer throughout this decision to such checks as “VIES checks”); and

- (iii) relying on the personal contacts made by Messrs Palmer and Browne through their prior experience in the market and attendance at trade fairs;
 - (i) the DD did not include credit checks or Wigan checks; and
 - (j) trades did not involve written contracts although this was not a problem in cases of disputes because of the need for traders in the market to maintain their reputation for integrity;
- (3) the Officers emphasised to the Appellant's representatives the benefits of conducting credit checks and doing Wigan checks as part of the DD in relation to each counterparty;
- (4) the Officers talked to the Appellant's representatives about MTIC fraud and handed the Appellant's representatives a number of notices including PN 726 and a booklet entitled "How to spot missing trader fraud"; and
- (5) the Officers concluded that the Appellant was not currently an MTIC trader but that it should be continuously monitored for a number of months due to the high-risk nature of its trade class.
19. On 17 September 2013, Officer Penry wrote to Mr Palmer (copying in, inter alia, Mr Browne) to explain how to go about making a Wigan check and what documents needed to be submitted by the Appellant in order to do so.
20. On 15 November 2013, the Respondents noted in their files that, following confirmation from Officer Penry in the MTIC group in respect of the VAT period 09/13, the Respondents were happy to process the VAT input tax repayment claim in respect of that VAT period subject to one minor adjustment in respect of an import from Australia. In that note, the Respondents noted that PLC had made supplies to the Appellant in the relevant VAT period and that the checks made by the Respondents in relation to PLC's "turnover, name and address etc" were all satisfactory.
21. On 5 December 2013, Officers Penry and Gazsi attended the Appellant's premises and met with Messrs Palmer and Browne. The note of the meeting records that, inter alia:
- (1) the visit was being undertaken in the course of the continuous monitoring project; and
 - (2) Mr Palmer explained that the Appellant put "ex works" on its invoices to its customers, by which it meant that shipping insurance was the customer's responsibility and not the Appellant's. It did not mean that responsibility for all shipping issues, including the transport itself, was the customer's responsibility. Officer Penry explained that the latter could give rise to issues in relation to the zero-rating of the Appellant's exports and Mr Palmer said that he and Mr Browne would review this practice.
22. On 6 February 2014, Mr Palmer asked Officer Penry about current thinking within the Respondents about transactions with traders belonging in Belize and, on 13 February 2014, Officer Penry replied to say that he was unable to comment on any prospective trading relationship and that that was a commercial decision for the Appellant.
23. On 15 May 2014, Officer Penry wrote to the Appellant to say that:
- (1) the Respondents no longer needed continuously to monitor the Appellant on a monthly basis;
 - (2) the Appellant should continue to conduct Wigan checks in relation to new or potential suppliers and customers (although validation should not be seen as a

guarantee by the Respondents of the status of those suppliers and customers and any decision to contract with them was a matter for the Appellant). The Officer then went on to explain the process for conducting Wigan checks and advised that the process should be undertaken for every transaction that the Appellant undertook with each supplier and customer to ensure that verification remained up to date; and

(3) the Appellant's attention was drawn to PN 726 and the booklet on "How to spot missing trader fraud". The Officer directed the Appellant to the places in the Respondents' website where that material could be found.

24. On 11 May 2015, Officer McHenry attended the Appellant's premises and met with Messrs Palmer and Browne. The note of the meeting records that, inter alia:

(1) the visit was being made because of the VAT input tax repayment claim which the Appellant had made in respect of the VAT period 03/15. This had been larger than previous VAT input tax repayment claims;

(2) Mr Browne informed the Officer that the repayment claim was attributable in large part to a purchase of PlayStation 4 consoles from PLC and the sale of those consoles to Advanced Technology Company BV ("ACT"), an entity based in Belgium;

(3) after making various checks, the Officer concluded that the Appellant's records were well-maintained; and

(4) the Officer approved the VAT input tax repayment claim in respect of the VAT period 03/15 but noted that, due to the nature of the business, further repayment claims were likely to be made.

25. On 8 July 2015, Officer Gazsi, along with Officer Paddy Miller, attended the Appellant's premises and met with Messrs Palmer and Browne. The note of the meeting records that, inter alia:

(1) the Appellant's representatives had informed the Officers that:

(a) approximately 70% of the Appellant's business related to software and the balance related to hardware and accessories;

(b) they were fully aware of the risk of a connection with MTIC fraud as a result of the previous visits by representatives of the Respondents and the material which had been given to them;

(c) they now undertook Wigan checks on the Appellant's suppliers and customers. In addition, they:

(i) sent out letters of introduction;

(ii) asked for photographic identification from the directors of, and the utility bills of, the Appellant's suppliers and customers;

(iii) visited the principal place of business of the Appellant's suppliers and customers; and

(iv) also carried out VIES checks in relation to the Appellant's suppliers and customers;

(2) the Officers advised Messrs Palmer and Browne that:

(a) the Europa website was not run by the UK government but that the Respondents did recommend VIES checks in addition to carrying out Wigan checks;

- (b) a positive Wigan check was simply confirmation that a VAT registration was valid at the time of checking and should not be taken as a recommendation or confirmation from the Respondents that it was safe for the Appellant to trade with the relevant supplier or customer;
 - (c) it was important that Messrs Palmer and Browne undertook regular DD checks, even on the Appellant's regular trading partners, because circumstances might change from time to time – for example, a change in the identity of a director could lead to fraud; and
 - (d) it would be better for the Appellant to trade on the basis of written contracts;
- (3) the Officers handed Messrs Palmer and Browne a number of public notices, including a copy of PN 726 and the booklet on “How to spot missing trader fraud”; and
- (4) there was a discussion in relation to two trades into which the Appellant had entered with XGC and Mr Palmer explained that:
- (a) he had met Mr Jason Weeks (the director of XGC) when he was working as a sales manager at Vogue Distribution and Mr Weeks had been working at a company called ETS; and
 - (b) the DD checks which he had conducted in relation to XGC were the Appellant's standard checks as noted in paragraph 25(1)(c) above; and
- (5) notwithstanding the assurances in relation to DD set out in paragraph 25(1)(c) above, Officer Gazsi was concerned about the depth of the Appellant's DD and had expressed those concerns to Messrs Palmer and Brown. Messrs Palmer and Browne had confirmed that, going forward, they would make their DD checks more robust and would insist on written contracts with the Appellant's suppliers and customers.
26. On 14 July 2015, Mr Browne sent an email to Officers Gazsi and Miller attaching the documents which he had on file in relation to Mr Weeks. He explained that:
- (1) he had dealt with Mr Weeks in relation to all of the Appellant's purchases from XGC;
 - (2) he had known Mr Weeks for about 5 years having done business with Mr Weeks when he was at his previous employer; and
 - (3) he had met Mr Weeks a number of times, at his place of work and at a trade fair called CEBIT, in Germany.
27. On 24 May 2016, Officers Miki Cvetkovic and Tracy Thame attended the Appellant's premises and met with Messrs Palmer and Browne. The note of the meeting records that, inter alia:
- (1) as a result of trading partners including monitored traders which were linked to tax losses, it had been decided to recommence continuous monitoring of the Appellant;
 - (2) Messrs Palmer and Browne said that:
 - (a) the mark-up made by the Appellant varied from time to time but, in the relevant year, it was on average 8.8%;
 - (b) they were fully aware of the risk of a connection with MTIC fraud as a result of the previous visits by representatives of the Respondents and the material which had been given to them;

- (c) inspections of goods were carried out by the freight forwarders and goods were released on receipt of cleared funds;
 - (d) goods held at the Appellant's premises were insured by AXA (and a copy of the insurance policy was provided); and
 - (e) the Appellant had recently traded with a company called Crazy Price Limited ("CPL"), acting through Mr Weeks but Mr Weeks had now left CPL and they had not had any further dealings with CPL after that; and
- (3) the Officers handed Messrs Palmer and Browne a further copy of PN 726.
28. On 21 September 2016, Officer Cvetkovic wrote to the Appellant to inform it that:
- (1) following enquiries made by the Respondents into the transaction chains pursuant to which the Appellant had made purchases from CPL in November 2015 and January 2016, those purchases had been found to be connected with MTIC fraud;
 - (2) the recovery of VAT input tax could be denied where the person claiming the repayment of the VAT input tax either knew or should have known of a connection between its transaction and MTIC fraud; and
 - (3) it was the Appellant's responsibility to ensure that it had carried out sufficient DD to satisfy itself of the integrity of its suppliers and its customers and examples of the sort of checks which the Appellant might wish to consider were set out in PN 726, which the Officer enclosed.
29. On 13 October 2016, Officers Adeola Otinwa, Ibronke Akinwunmi and Gerry Dixon attended the Appellant's premises and met with Messrs Palmer and Browne. The note of the meeting records that, inter alia:
- (1) Messrs Palmer and Browne said that:
 - (a) there were no written contracts between the Appellant and its customers;
 - (b) the mark-up in the relevant year was on average 7.9%; and
 - (c) stock in the warehouse was insured by the Appellant whereas stock in transit was insured by the freight forwarder. The Appellant also insured stock in transit itself if the goods were a large quantity; and
 - (2) the Officers handed Messrs Palmer and Browne several public notices, including a copy of PN 726 and the booklet on "How to spot missing trader fraud".
30. On 17 November 2016, Officer Otinwa wrote to the Appellant to inform it that:
- (1) following enquiries made by the Respondents into the transaction chains pursuant to which the Appellant had made:
 - (a) the 7 purchases from GLS in the VAT period 06/16 which are part of the subject of the appeal; and
 - (b) 2 of the purchases from GLS in the VAT period 06/16 in the deal chain for deal 8 which are part of the subject of the appeal,
 those purchases had been found to be connected with MTIC fraud;
 - (2) the recovery of VAT input tax could be denied where the person claiming the repayment of the VAT input tax either knew or should have known of a connection between its transaction and MTIC fraud; and

(3) it was the Appellant's responsibility to ensure that it had carried out sufficient DD to satisfy itself of the integrity of its suppliers and its customers and examples of the sort of checks which the Appellant might wish to consider were set out in PN 726.

31. On 9 February 2017, Officer Dixon, along with Officer Andy Monk, attended the Appellant's premises and met with Mr Paddon (by Skype) and Messrs Palmer and Browne. The note of the meeting, which was prepared by Officer Otinwa (although she is not said in the note to have been present at the meeting), records that, inter alia:

- (1) the visit was being undertaken in the course of the continuous monitoring project;
- (2) the transactions which are the subject of the appeal were discussed and the Officers explained that the Respondents were still mapping the fraudulent schemes and therefore could not provide specific details of the companies involved as a result of the rules in relation to tax confidentiality;
- (3) Mr Paddon explained that:
 - (a) the business model for the Appellant had had to change in recent years as a result of changes in the games market. Digital downloads had replaced physical software. Consequently, the Appellant had expanded its hardware operations; and
 - (b) various features to which the Officers had referred as an indication of MTIC fraud in the supply chain – such as back-to-back transactions in which the goods remained in the possession of the freight forwarder – were also features in transactions in relation to which the Respondents were not alleging MTIC fraud in the supply chain;
- (4) Messrs Palmer and Browne explained that goods which were the subject of the relevant transactions were shipped “on hold”, which meant that title remained with the supplier until they were inspected. The Officers pointed out that some of the invoices provided to the Appellant by the relevant supplier contained a note to the effect that title would be retained by the relevant supplier until payment was received and yet, in some cases, the relevant customer had paid the Appellant before the Appellant had paid the relevant supplier. This meant that the Appellant appeared to be selling goods that it did not yet own; and
- (5) Messrs Palmer and Browne confirmed that the Appellant did not itself insure the goods which were the subject of the relevant transactions as the goods were insured by the freight forwarder.

32. On 17 November 2017, the Respondents issued the Appellant with the denial letter which has led to the appeal.

The deal chains

The deal sheets

33. We were provided with deal sheets for each of the 16 deal chains. These set out certain information in relation to each of the parties in the relevant deal chain and notable features were as follows:

- (1) as noted in paragraph 5 above, on each occasion that the Appellant purchased goods from GLS, it sold the relevant goods on to ACLM, on each occasion that the Appellant purchased goods from XGC, it sold the relevant goods on to GECX and, on each occasion that the Appellant purchased goods from PLC, it sold the relevant goods on to Inco Mobile;

(2) in each of the deal chains, the Appellant purchased the goods from a supplier belonging in the UK (so that it thereby incurred VAT input tax) and then sold the goods to a customer in belonging in a member state of the European Union (the “EU”) other than the UK (so that the relevant VAT input tax was attributable to a zero-rated supply for VAT purposes) and the Appellant sought to recover the VAT input tax in respect of its purchases on that basis;

(3) each deal chain was connected with MTIC fraud and involved an entity commonly termed a “contra-trader” – an entity interposed to create distance between the fraudulent defaulter and the person in the position of the Appellant. It is unnecessary for the purposes of this decision for us to explain how contra-trading operates but there is a helpful explanation of contra-trading in paragraphs [28] to [49] of *CCA Distribution Limited (in administration) v The Commissioners for Her Majesty’s Revenue and Customs* [2020] UKFTT 222 (TC), referring to the Court of Appeal decision in *Fonecomp Limited v The Commissioners for Her Majesty’s Revenue and Customs* [2015] EWCA Civ 39;

(4) in each deal chain, the largest mark-up made by each of the participants by some margin was the mark-up made by the Appellant. The mark-ups made by the Appellant differed from chain to chain. The lowest mark-up made by the Appellant was 2.68% on some of the items in the deal chain for deal 7 and the highest mark-up was 4.86% in the deal chain for each of deals 15 and 16. Although the evidence of Mr Brown was that the Appellant bore the costs of transporting the goods to its customer in each case – see paragraph 60 below – the only evidence of transport costs with which we were provided (which was in relation to deal 1) suggested that the fact that the Appellant bore the cost of transporting the goods to its customer would not alter the fact that the Appellant always made the largest mark-up of all the participants in each deal chain;

(5) in the deal chain for each of deals 9 and 10, the relevant goods moved in a circle, with a company called Polimax Sp ZOO (“Polimax”) at both the start and the end of the relevant chain;

(6) similarly, in the deal chains for each of deals 11, 15 and 16, where the Appellant acquired goods from PLC, the relevant goods started off in a company called Trading Point APS (“Trading Point”) and ended up, after passing through PLC, the Appellant and Inco Mobile, in a company called Tharis Communications Limited (“Tharis”) and each of PLC, Trading Point and Tharis was owned by the same person, a Mr Lal Chhiber;

(7) the identity of each of the parties in the deal chain for deal 12 was exactly the same as the identity of each of the parties in the deal chain for deal 13; and

(8) deals 15 and 16 were essentially a single deal chain in which 1,699 Sony PlayStation 4 consoles were sold by Trading Point to PLC and by Inco Mobile to Tharis but the transactions within the deal chain to which the Appellant was party – the purchase by the Appellant from PLC and the sale by the Appellant to Inco Mobile – were split into two parts.

The documentation for the deal chains

34. At the hearing, we were taken through the documentation in relation to 4 of the deal chains – those for deals 1, 2, 15 and 16.

35. Deal 1 was the first time that the Appellant had contracted with GLS. Notable features of the deal were as follows:

- (1) the purchase order from the Appellant to GLS bore the same date – 1 April 2016 – as each of the purchase order from ACLM to the Appellant and the pro-forma invoice from the Appellant to ACLM;
- (2) after being inspected by GFS on 4 April 2016, the goods were shipped by GFS to ACLM’s representative, DL Freight, in Amsterdam, where they arrived on 5 April 2016 and were inspected by DL Freight on the following day;
- (3) none of the purchase orders, the pro-forma invoice or the two inspection reports contained any provisions in relation to title to the goods;
- (4) the Appellant paid the purchase price for the goods of €430,754.00 in two instalments – £106,692.00 (which equated to €134,431.92) on 6 April 2016 and €296,322.48 on 7 April 2016; and
- (5) the Appellant received the sale price for the goods of €372,636.00 in four instalments – €37,636.00 on 4 April 2016, €100,000.00 on 6 April and then €230,000.00 and a further €5,000.00 on 7 April 2016.

36. Deal 2 was the second time that the Appellant had contracted with GLS. Notable features of the deal were as follows:

- (1) the purchase order from the Appellant to GLS bore the same date – 7 April 2016 – as the purchase order from ACLM to the Appellant;
- (2) after being inspected by GFS on GLS’s behalf on 6 April 2016 and then again by GFS on the Appellant’s behalf on 7 April 2016, the goods were shipped by GFS to ACLM’s representative, L&A, in Amsterdam, where they arrived and were inspected by L&A on 8 April 2016;
- (3) the L&A inspection report made no mention of ACLM but instead referred to GLS as the seller and the Appellant as the purchaser;
- (4) none of the purchase orders or the two inspection reports contained any provisions in relation to title to the goods. However, in an email of 7 April 2016 from GLS to GFS, GLS asked GFS to allow the Appellant to ship the goods “on hold”;
- (5) the Appellant paid the purchase price for the goods of €267,624.00 in one instalment on 11 April 2016; and
- (6) the Appellant received the sale price for the goods of €230,850.00 in two instalments – €23,085.00 on 7 April 2016 and €207,765.00 on 8 April 2016.

37. Deals 15 and 16 were linked deal chains and involved the purchase of two separate tranches of PlayStation 4 consoles from PLC and their onward sale to Inco Mobile. Notable features of the deals were as follows:

- (1) in an email of 11 July 2016 headed “Re: Stock offer – 29/06/2016”, Mr Mahesh Jangra of PLC informed Mr Browne that there were presently 1700 units left and available for allocation at GFS at a price of €247 per unit. Mr Jangra asked Mr Browne to review and advise if he required the stock;
- (2) on 11 July 2016, Inco Mobile sent a purchase order in respect of 1,002 of the 1,700 units to the Appellant;
- (3) on 12 July 2016, the Appellant sent a purchase order in respect of 1,002 of the 1,700 units to PLC and PLC sent a pro-forma invoice in respect of those units to the Appellant. The pro-forma invoice stated that property and title to the units would not

pass to the Appellant until PLC had received payment of the purchase price for the relevant units in full;

(4) in an email of 12 July 2016 headed “Re: VORTEX – PO:1002 X PS4 500gb”, Mr Jangra informed Mr Browne that there were a further 697 units available which he understood from Mr Chhiber the Appellant was also taking. Mr Jangra asked Mr Browne to send him the purchase order for the additional units so that he could make arrangements to allocate those too;

(5) on 12 July 2016, the Appellant sent a purchase order in respect of the 697 units to PLC and PLC sent a pro-forma invoice in respect of those units to the Appellant. The pro-forma invoice stated that property and title to the units would not pass to the Appellant until PLC had received payment of the purchase price for the relevant units in full;

(6) on 12 July 2016, Mr Jangra sent an email to GFS requesting that the 697 units be allocated to the Appellant and then a subsequent email instructing GFS to allow the Appellant to ship the units on hold. The later email of instruction stated that:

(a) the Appellant was required to insure the units during transit to a minimum value of €501,544.80; and

(b) the units were not to be released until PLC issued a release note;

(7) on 12 July 2016, PLC sent a “stock “ship on hold” note” to GFS in respect of all 1,699 units. The note stipulated that:

(a) either the Appellant or GFS was required to insure the units during transit and the Appellant should ensure that the units were adequately insured; and

(b) the units were not to be released until PLC had issued a release note;

(8) on 13 July 2016, Inco Mobile sent a purchase order in respect of the 697 units to the Appellant;

(9) on 13 July 2016, all 1,699 of the units were shipped by GFS to ACLM’s representative, L&A, in Amsterdam, where they arrived and were inspected by L&A on 14 April 2016;

(10) on 14 July 2016, Mr Jangra sent an email to GFS instructing GFS to release 1,002 of the units to the Appellant but to retain the remaining 697 units on hold;

(11) on 19 July 2016, Mr Jangra sent an email to GFS instructing GFS to release the remaining 697 units to the Appellant;

(12) on 19 July 2016, following an inspection by L&A on the previous day, all 1,699 units were released to the Appellant;

(13) none of the purchase orders issued by ACLM to the Appellant or the invoices issued by the Appellant to ACLM contained any provisions in relation to title to the units;

(14) there is no evidence that L&A were ever informed that the goods had been shipped on hold even though they were delivered to L&A on 14 July 2016 and not released by L&A to Inco Mobile until 19 July 2016;

(15) the Appellant paid the purchase price for the 1,002 units of €296,992.00 and the purchase price for the 697 units of €206,590.80 in four instalments – €29,699.82 and then a further €242,400.00 on 13 July 2016, €121,000.00 on 14 July 2016 and €110,484.32 on 19 July 2016; and

(16) the Appellant received the sale price for the 1,002 units of €259,518.00 in two instalments - €25,951.80 on 12 July 2016 and €233,566.20 on 15 July 2016 - and the sale price for the 697 units of €180,523.00 in one instalment on 18 July 2016.

The significance of the deals

38. The VAT input tax incurred by the Appellant on the goods which were the subject of the deals comprised virtually all of the VAT input tax which the Appellant incurred on the purchases of goods for re-sale made by the Appellant in the relevant VAT periods - 98.95% in the VAT period 06/16 and 99.37% in the VAT period 09/16 – although, during the relevant periods, the Appellant:

- (1) also incurred VAT input tax on supplies of services which it received; and
- (2) made significant purchases of goods on which it did not incur VAT input tax.

Insurance

39. There were some notable differences between the hardware transactions, of which the transactions that are the subject of the appeal form part, and the software transactions. As mentioned in paragraphs 18(2)(c) and 27(2)(d), the software acquired by the Appellant was generally taken into stock and held at the Appellant's premises where it was the subject of an insurance policy with AXA that had been taken out by the Appellant. In contrast, the hardware was generally acquired and sold on a back-to-back basis and fell outside the scope of the Appellant's insurance policy referred to above.

40. One of the factual matters which is in dispute between the parties relates to the extent to which the goods which are the subject of the appeal were insured during the period that they were the Appellant's risk. It must be said that the evidence provided by the Appellant's representatives in relation to this question was both confused and contradictory. For instance:

- (1) the note of the meeting held on 5 September 2013 – see paragraph 18 above – records that Messrs Palmer and Browne told the Officers of the Respondents that the goods were insured by the carrier while they were in transit and by the relevant freight forwarder outside that period;
- (2) the note of the meeting held on 13 October 2016 – see paragraph 29 above – records that Messrs Palmer and Browne told the Officers of the Respondents that the freight forwarder was responsible for insuring the goods both when the goods were in transit and outside that period and that the Appellant also purchased supplemental insurance as a top-up if the goods were substantial;
- (3) the note of the meeting held on 9 February 2017 – see paragraph 31 above – records that Messrs Palmer and Browne told the Officers of the Respondents that the freight forwarder was responsible for insuring the goods both when the goods were in transit and outside that period but no mention was made of top-up insurance;
- (4) in his witness statement prior to the hearing, Mr Browne said that, whilst goods were insured when they were in transit, and that the Appellant had occasionally purchased supplemental insurance for larger shipments while they were in transit, “[we] did not need to have separate insurance for goods being held at freight forwarders, as goods held in a separate, independent and secure freight forwarders are obviously not at high risk”;
- (5) at the hearing, Mr Browne said, at one stage, that, contrary to the above assertion in his witness statement, the goods were insured while they were held at the freight forwarder as well as when they were in transit and then, at another stage, that he could not recall whether the goods in every deal were insured at all; and

(6) Mr Paddon was categorical about insurance - stating that it would have amounted to commercial suicide for the Appellant not to have taken steps to ensure that the goods were insured at all times while they were at the Appellant's risk.

41. What emerges from the above evidence is a highly confused picture in which the existence of insurance during the time that the goods were at the Appellant's risk is inevitably cast into doubt. Critically, at no time in the period leading up to the hearing, or at the hearing itself, was any written evidence produced on behalf of the Appellant to demonstrate that the goods were insured at any stage in the process. This was despite the fact that the Appellant was on notice from an early stage in the dispute that the absence of insurance was a significant point in the Respondents' analysis and despite repeated requests from the Respondents for that written evidence to be provided. We were shown an email from Officer Otinwa to Messrs Browne and Palmer dated 14 October 2016 and an email from the same Officer to Mr Browne dated 28 October 2016 which specifically requested documents relating to insurance for the VAT period 06/16. Indeed, despite the fact that, in his oral evidence at the hearing, Mr Paddon was very clear that such written evidence existed and that he would be happy to present it to us, no application belatedly to admit that written evidence was made to us on behalf of the Appellant.

42. It seems to us that, had the goods been insured by the freight forwarders and/or the carriers, as alleged by the Appellant at various times in the period leading up to the hearing and at the hearing itself, it would have been straightforward to contact those entities to ask for that evidence to be produced and to have provided it to the Respondents and to us.

43. Moreover, subject to one minor exception, the written evidence with which we were provided at the hearing contained nothing to suggest that the goods were insured by the freight forwarders or carriers. We were shown:

- (1) invoices from GFS to the Appellant in relation to deals 1, 2 and 4 which were conspicuously silent in relation to the question of insurance;
- (2) an email dated 12 July 2016 from PLC to GFS in relation to deals 15 and 16 which stated that it was up to the Appellant to insure the goods that were the subject of those deals; and
- (3) the Appellant's own insurance policy with AXA, which made it clear that it covered only goods in the Appellant's warehouse and not goods held elsewhere or in transit.

44. The possible minor exception noted in paragraph 43 above is that the "stock "ship on hold" note" which was sent by PLC to GFS on 12 July 2016 in respect of all 1,699 units which were the subject of deals 15 and 16 stipulated that it was up to either GFS or the Appellant (and not just up to the Appellant) to insure the goods – see paragraph 37(7) above. However, as mentioned in paragraph 43(2) above, the email referred to in paragraph 37(6) above which preceded that note suggests that insurance was a matter for the Appellant alone.

45. In relation to this point, we do not agree with Mr Carey's submission that it would have been unreasonable or uncommercial for the Appellant to have asked its freight forwarder for some written evidence that its goods were appropriately insured when they were at the freight forwarder's premises or being transported. In our view, that would have been a perfectly reasonable point for the Appellant to have clarified with a freight forwarder before entrusting its goods to the freight forwarder.

46. We also do not agree with Mr Carey's submission that the onus is on the Respondents to establish that no such insurance existed in this case. Whilst it is true that the burden of proof is on the Respondents in relation to the question of whether the Appellant knew or

should have known of the connection between its purchases and MTIC fraud, the evidential burden in relation to this particular factual question is on the Appellant, given the inconsistencies described in paragraph 40 above and the fact that it was asked repeatedly by the Respondents to provide evidence of insurance and has failed to do so.

47. In the circumstances, despite the fact that we recognise that it would have made commercial sense for the Appellant to have ensured that the goods were adequately insured while the goods were at the Appellant's risk, we are unable to find that, on the balance of probabilities, such insurance existed.

Method of transacting

Deal negotiations

48. Mr Browne explained that:

- (1) he conducted negotiations by way of email, Whatsapp, Skype and the telephone;
- (2) normally, the negotiations were conducted over a very short period – a few days or a week – and he had kept notes of those negotiations although he had subsequently disposed of those notes when he ceased to be engaged by the Appellant in 2018; and
- (3) he would never confirm either his purchase or his sale until he knew that all aspects of both transactions had been agreed. This was in order to ensure that the Appellant did not get stuck with the goods.

49. The Respondents disputed that the transactions implemented by the Appellant as part of the relevant deal chains had been the subject of negotiation. They pointed to the fact that:

- (1) in all 16 of the deal chains, the quantity of goods made available by the relevant supplier always matched exactly the quantity of goods which the Appellant sold to the relevant customer. There was never a need for the Appellant to source the goods which it sold to the relevant customer from two or more separate suppliers or for the Appellant to sell the goods which it acquired from the relevant supplier to two or more separate customers;
- (2) the deal documents were all produced within a very short timeframe – often within the space of a day;
- (3) in deal 11, PLC had offered the goods at a price of €250 in an email of 1 June 2016 and an invoice referring to the sale of the goods at that same price had been issued the following day;
- (4) in deals 15 and 16, PLC had offered the goods at a price of €247 in an email of 11 July 2016 and two purchase orders referring to the sale of the goods at that same price had been issued a day and a week later respectively; and
- (5) it was hard to understand why Mr Brown had disposed of his notebooks when he said he did given that the time when he said he had done so (2018) was after the date when the Respondents had issued their letter to the Appellant denying the recovery of the VAT input tax.

50. In response, Mr Browne pointed out that:

- (1) in relation to the point made in paragraph 49(1) above, the transactions implemented by the Appellant in the deal chain were almost always initiated by the Appellant's supplier and not the Appellant's customer. In other words, the Appellant would be approached by a prospective supplier and asked if it wished to buy a specified number of goods of a specified type and specification at a specified price and the Appellant would then seek to locate a prospective customer to which it might sell the

relevant goods at a profit. It was therefore not the case that the Appellant would happen to be approached at the same time by both a prospective supplier and a prospective customer wishing to transact in the same specified number and specified type and specification of goods; and

(2) in relation to the points made in paragraphs 49(3) and 49(4) above, the mere fact that the price in the invoice was the same as the price in an earlier email did not mean that there had been no oral negotiation in the interim or even before the earlier email was sent. Indeed, in relation to deal 16, the earlier email referred to there having been a prior conversation between Mr Browne and Mr Chhiber – see paragraph 37(4) above. In any event, there would have been occasions when the price offered to the Appellant by the relevant supplier was the best price which the Appellant could hope to achieve and so negotiation would have been futile.

51. In relation to this question, we find it inherently implausible that, in each of the deals which are the subject of the appeal, Mr Browne identified the Appellant's customer, approached that customer with an offer of goods of the same number and specification as the goods that he had been offered by the Appellant's supplier and then negotiated a purchase and sale with each of the supplier and the customer independently. In our view, it is too much of a coincidence that:

(1) there was never any occasion when Mr Browne had to sell the goods acquired from a single supplier to two or more customers or had to source the goods sold to a single customer from two or more suppliers; and

(2) there was always a precise symmetry between the identity of the supplier and the identity of the customer in each deal chain. In other words, on each occasion that Mr Browne was offered goods by GLS, he found a willing customer for all of those goods in ACLM, on each occasion that Mr Browne was offered goods by XGC, he found a willing customer for all of those goods in GECX and, on each occasion that Mr Browne was offered goods by PLC, he found a willing customer for all of those goods in Inco Mobile.

52. We therefore find that, on the balance of probabilities, there was no negotiation in relation to each deal chain and that the identity of the customer, along with the number and specification of the goods, was hard-wired in relation to each purchase by the Appellant from a supplier. By that we mean that:

(1) at the time that it made each purchase, there was no meaningful prospect that the Appellant would sell the goods that it acquired from the relevant supplier to anyone other than the designated customer; and

(2) at the time of each purchase, there was an understanding between Mr Browne, the relevant supplier and the relevant customer that the goods acquired by the Appellant from the relevant supplier would be on-sold to the relevant customer.

53. We should make it clear that, in reaching this conclusion, we are relying solely on the points set out in paragraphs 48 to 50 above and not on the fact that we have not been presented with any written evidence of negotiations. As regards that absence, we agree with Mr Carey's submissions that:

(1) this was never requested by the Respondents in the course of their investigation because, as Mr Bycraft conceded in the course of his oral evidence, the Respondents merely requested the "deal documents" in relation to each supply and the phrase "deal documents" would not naturally include documents evidencing the negotiations leading up to the relevant deal; and

(2) given the nature of the market, it is perfectly plausible that, had any meaningful negotiations occurred, they would largely have taken place on the telephone, as Mr Browne testified.

Contractual position

54. None of deals was the subject of formal written agreements. Despite the assurance provided by Messrs Palmer and Browne to the Officers of the Respondents which was recorded in the note of the meeting held on 8 July 2015 that the practice would change – see paragraph 25(5) above - both Mr Browne and Mr Paddon were adamant in their testimony that it would have been uncommercial and impractical to attempt to transact with counterparties on the basis of formal written agreements because the market was too fast-moving to permit that.

55. In response to the question of how, in the absence of written contracts, the Appellant was able to deal with disputes which might arise with its suppliers or customers, both Mr Paddon and Mr Browne explained that this was a relatively small market in which all of the players were well-known to each other. The ability to transact therefore depended on maintaining a reputation for fair dealing and probity. This meant that all disputes could be resolved swiftly and amicably by agreement when they arose.

56. Although the deals themselves were not preceded by formal written agreements, the Appellant did set out some standard terms and conditions in its account application form which each supplier and customer was required to complete. Although both the Appellant's suppliers and the Appellant's customers were required to complete the relevant form, the terms and conditions in the form were pertinent only to the Appellant's customers. They provided that, inter alia:

- (1) unless otherwise agreed between the parties, the customer was required to pay for the goods within 30 days of the invoice date;
- (2) all goods were sold on an "ex-works basis" and the customer was responsible for insuring the goods once they left the Appellant's premises;
- (3) goods could be returned to the Appellant only if the Appellant agreed or the goods were faulty or damaged; and
- (4) all goods remained the property of the Appellant until full payment was received.

Mark-up

57. The mark-up made by the Appellant across its business as a whole fluctuated from time to time and was highly dependent on the nature of each particular transaction. At the time of the meeting between the Appellant and Respondents on 5 September 2013, the Appellant reported that the average mark-up was 8% - see paragraph 18(2)(d) above. At the time of the meeting between the Appellant and Respondents on 24 May 2016, the Appellant reported that the average mark-up was 8.8% - see paragraph 27(2)(a) above. At the time of the meeting between the Appellant and the Respondents on 13 October 2016, the Appellant reported that the average mark-up was 7.9% - see paragraph 29(1)(b) above. The Respondents have not sought to challenge those figures and we have no reason to doubt them.

58. In his testimony, Mr Browne explained that:

- (1) typically, mark-ups on software tended to be higher than mark-ups on hardware and that the Appellant aimed for an average of 8.5% across the business;

(2) the mark-ups made by the Appellant on the deal chains which were the subject of the appeal - which ranged from 2.68% to 4.86% - were perfectly normal for goods of the type in question; and

(3) he had no visibility in relation to the mark-ups which were made by the other entities in each deal chain, including the Appellant's direct supplier and direct customer in each deal chain.

59. In the circumstances, we have concluded that there is no reason to believe that the mark-ups which were made by the Appellant in relation to the deal chains to which the appeal relates should be regarded as out of the ordinary or remarkable in comparison to the Appellant's other mark-ups.

Transport

60. Mr Browne explained that, despite the fact that the invoices for the deals which the Appellant sent to its customers always said that the goods were being sold on an "ex works" basis, which suggested that it was down to the relevant customer to pay the cost of shipping the goods, the goods were in fact shipped at the Appellant's cost to the foreign freight forwarder and the customer was responsible only for the cost of transporting the goods on from there. We were provided with an invoice from GFS to the Appellant for haulage of £895 excluding VAT in relation to deal 1 which supported Mr Browne's testimony.

Inspections

61. In relation to deal 8, we were provided with:

(1) two inspection reports prepared by Unicorn Shipping Limited ("Unicorn") on two different dates in relation to two separate sets of headphones which were the subject of deal 8 and which used the same serial number to describe both sets of goods in question; and

(2) the documentation in relation to deal 8, which showed that GECX paid the Appellant for the goods on the day before the goods were inspected by Unicorn on the Appellant's behalf and prior to the goods' being allocated to the Appellant's supplier (XGC) by its own supplier (a company called Manhattan Systems Limited ("MSL")).

Title

62. The evidence of Mr Browne as to when the Appellant acquired title to the goods which were sold to it by the relevant supplier in the course of the deal chains was contradictory. At one stage in his evidence, he said that the Appellant acquired title following the inspection of the goods which was made on its behalf by its freight forwarder and, at another, he said that title changed hands only after the goods had been inspected and the Appellant had made payment for the goods. The former view is consistent with the one that he is reported to have told the Respondents' Officers at the meeting of 9 February 2017 – see paragraph 31(4) above – whilst the latter view is consistent with the fact that a number of the supplier invoices said that the relevant supplier retained title to the goods until it had been paid, as did the unsigned standard terms and conditions of XGC referred to in paragraph 79)1)(c) below.

63. There is also an example in deal 1 of there being no provision in relation to title in the documentation.

64. Although it is not entirely clear, we have concluded that, given the terms set out in the supplier invoices mentioned in paragraph 62 above and the unsigned terms and conditions of XGC mentioned in that paragraph, on the balance of probabilities, the Appellant did not acquire title to the goods which were the subject of each deal chain until after it had paid its supplier. It follows that:

(1) in those cases where, before making payment for goods, the Appellant took physical possession of them – such as deal 2, where the Appellant took possession of the goods on 8 April 2016 but did not pay for them until 11 April 2016 – the relevant supplier was taking the risk that the Appellant would not pay for the goods and it would have to enforce its retention of title; and

(2) in those cases where a customer paid the Appellant for goods before the Appellant paid its supplier – such as deal 1, where the goods were shipped on 4 April 2016, the customer (ACLM) paid the Appellant on 6 and 7 April 2016 and the Appellant paid the supplier (GLS) on 7 April 2016 - the customer was paying the Appellant for goods to which the Appellant did not yet have title.

Returns of goods

65. Each of Messrs Paddon, Palmer and Brown said that it was rare for goods to be returned by a customer. Mr Paddon said that, if goods were defective, then of course they could be returned but that this happened rarely. Mr Palmer said that, if goods were damaged, good business practice would be to offer a discount to the customer on the next deal. Mr Palmer also explained that customers did not like to receive boxes which had been stamped by the Respondents and that, if that hadn't been mentioned before the price was agreed, there might be a re-negotiation of the price.

EU specification

66. The goods in a number of the deal chains had an EU specification. By way of example, we were provided with an invoice in relation to the goods that were the subject of deal 11 which referred to the fact that the goods in that case had such a specification but it was common ground that that was the case in many of the deal chains.

Serial numbers

67. At the time of the meeting between the Appellant and the Respondents on 5 September 2013, the Appellant's representatives said that they did not record the unique serial numbers of the hardware in which the Appellant transacted – see paragraph 18(2)(g) above. At the time of the meeting between the Appellant and the Respondents on 9 February 2017, the Appellant's representatives said that they were recording those numbers and would provide the relevant information to the Respondents. However, on 28 February 2017, Mr Paddon forwarded to Officer Monk an email from Mr Browne which said that, whilst the Appellant had recorded certain unique serial numbers:

- (1) those were mainly for the “HDDs and SSDs”;
- (2) it did not have serial numbers for the headphones which were the subject of deal 8 because it was not normal to take serial numbers for that product; and
- (3) as regards the PlayStation 4 consoles, he had photographs showing the serial numbers for the transactions comprising deal 11 which had occurred in June 2016 but not for the transactions comprising deals 15 and 16 which had occurred in July 2016.

68. In fact, Mr Browne conceded at the hearing that the records of serial numbers were somewhat more limited than the email forwarded by Mr Paddon had suggested. There were no serial numbers for the transactions comprising deals 8, 10, 12, 15 and 16, only 9 serial numbers out of 2,500 items for the transactions comprising deal 9 and only 3 serial numbers out of 2,499 items for the transactions comprising deal 11. In addition, such serial numbers as the Appellant had obtained had been provided by the supplier and there was no evidence of Mr Browne's having asked the relevant freight forwarder to check the serial numbers which the Appellant had received from its supplier against the items held by the relevant freight forwarder. Mr Browne said that asking the relevant freight forwarder to do so would have

eaten into the Appellant's margin and so he was quite prepared to accept whatever serial numbers the relevant supplier provided without asking the relevant freight forwarder to check them against the goods in question. Mr Browne suggested that a similar approach was adopted by the Appellant in relation to its software transactions but Mr Palmer testified that, following a helpful suggestion made by Officer Penry of the Respondents during the visit of 5 September 2013, the Appellant did keep the individual scan codes for software products.

69. In addition, Mr Browne said at the hearing that he used to check the serial numbers which he did obtain against a central database which the Appellant maintained so as to ensure that the Appellant was not trading in the same goods twice. However, no evidence of that database was produced to us. On the contrary, we inferred from other evidence provided by Mr Browne that the serial numbers obtained by the Appellant in relation to each deal chain were stored in a separate file relating to that deal chain and that there was no attempt to check the serial numbers obtained in relation to any deal chain against the serial numbers obtained in any other deal chain.

DD

Wigan checks

70. We were provided with a table setting out the details of all of the Wigan checks which the Appellant had conducted over the period from 16 October 2013 to 19 September 2018. In total, some 95 checks had been made, of which roughly half had been made in the period preceding the VAT periods which are the subject of the appeal. The table revealed that none of the suppliers involved in the transactions which are the subject of the appeal and none of the customers to whom the goods which were the subject of those transactions were sold was the subject of a Wigan check.

71. In the course of giving his evidence, Mr Browne accepted that he knew at the time of the transactions that he had been advised by the Respondents' Officers that Wigan checks should be done. However, he went on to say that administration and paperwork were not his strong suits. In addition, he said that, given the Respondents' repeated disclaimers in relation to Wigan checks – to the effect that it was always a matter for each trader to decide whether to transact with a particular counterparty and that a clear Wigan check could not be regarded as a recommendation to do so – and the fact that the Officers of the Respondents had also recommended VIES checks to be done, he had regarded Wigan checks and VIES checks as inter-changeable.

72. Mr Palmer testified that not all of the Wigan checks made on behalf of the Appellant had been carried out by him. Mr Browne had also carried out some of them. He said that he tended to do a Wigan check when he was dealing with someone of whom he had never heard before but otherwise he did a VIES check. He said that, at the time in question, he too had regarded Wigan checks and VIES checks to be inter-changeable. In addition, whereas a VIES check produced an instant result, a Wigan check might take two weeks to complete. That delay could potentially be quite significant because the market was very fluid and it was sometimes necessary to trade quickly.

Credit checks

73. No credit checks were made on any of the suppliers or customers who were party to the transactions which are the subject of the appeal although a bank statement was obtained from GLS after 4 of the deals involving GLS had been implemented – see paragraph 77(1)(f) below.

74. Both Mr Paddon and Mr Browne said that there was no commercial reason for credit checks to be made because the Appellant was not extending credit to any of the relevant entities.

The DD which was carried out

Introduction

75. The transactions which are the subject of the appeal involved 3 suppliers – GLS, XGC and PLC – and 3 customers – ACLM, GECX and Inco Mobile.

GLS

76. The following are the relevant facts in relation to GLS:

(1) on 23 April 2013, GLS was originally incorporated as SYE Limited. On 11 September 2013, the company changed its name from SYE Limited to SS Auto Suppliers Limited, on 17 April 2014, the company changed its name to UK Energy Saving Limited and, on 1 June 2015, the company changed its name to GLS;

(2) on 1 June 2015, Mr Suleiman Ali Mohamed and Mr Saleh Mohamed resigned as directors of the company and Mr Sajid Hussein became a director;

(3) on 22 January 2016, Mr Hussein ceased to be a director of the company and Mr Rehman became a director of the company. Notice of Mr Rehman's appointment as a director was received by Companies House on 8 February 2016 and notice of Mr Hussein's resignation as a director was received by Companies House on 23 February 2016;

(4) on the same date, Mr Hussein transferred all of his shares in the company to Mr Rehman. Notice of this transfer was given to Companies House in the annual return of the company filed on 23 February 2016; and

(5) the annual accounts for GLS in respect of its financial year ending 30 April 2014 stated that the company was dormant. The annual accounts of GLS in respect of its financial year ending 30 April 2015 stated that the company had assets of £391.00 and creditors of £1,419.00, so that its net assets at the end of that financial year were minus £1,028.00;

77. The following are the relevant facts in relation to the DD carried out by the Appellant as regards GLS:

(1) the evidence of Mr Browne was that:

(a) GLS first contacted him in February 2016 and, after he had obtained confirmation from GFS that GFS knew of GLS, he had begun DD in March 2016;

(b) in the course of conducting that DD, he had met:

(i) the director of GLS, Mr Hussein, in person, on multiple occasions both at GLS's office and at the Appellant's premises; and

(ii) a person whom he believed to be Mr Afrahim Rehman, in person at the Appellant's premises;

(c) he had taken photographs of GLS's office as recommended by the Respondents. In view of the fact that Mr Browne was unable to produce those photographs and they were not in the DD information provided to the Respondents and included in the hearing bundle, we find as a fact that, on the balance of probabilities, those photographs were not taken;

- (d) prior to entering into the relevant transactions, he had:
- (i) asked GLS to complete the standard account-opening form and this had been completed by Mr Rehman on 21 March 2016;
 - (ii) carried out a VIES check in relation to GLS on 1 April 2016;
 - (iii) conducted a full company search (including a search of the directors) at Companies House. In view of the fact that the only Companies House material which Mr Browne was able to produce was the certificate of incorporation on the change of name which occurred on 1 June 2015 (as mentioned in paragraph 77(1)(d)(iv)(B) below) and the annual return referred to in paragraph 76(5) above, and that Mr Browne himself said at paragraph 78 of his witness statement that he could not recall whether he had checked at Companies House in relation to the directors of the company, we find as a fact that, on the balance of probabilities, there was no such search and the material referred to above was provided to Mr Browne by Mr Rehman;
 - (iv) obtained:
 - (A) an undated letter of introduction from GLS, signed by Mr Rehman;
 - (B) a certificate of incorporation on change of name which showed that GLS had formerly been named UK Energy Saving Limited and had changed its name to GLS on 29 June 2015; and
 - (C) a copy of Mr Rehman's passport;
- (e) he had obtained no other DD material in relation to GLS prior to entering into the relevant transactions apart from that set out in paragraph 77(1)(d) above;
- (f) after the Appellant had already completed 4 transactions with GLS, following the end of April 2016, he had also obtained an April 2016 bank statement in relation to GLS. He accepted that:
- (i) the timing of his obtaining the statement meant that the Appellant had already purchased some €1.4 million of goods from GLS before obtaining the bank statement; and
 - (ii) the statement showed that, apart from the significant payment which GLS had received from the Appellant, minimal amounts had been paid into the account;
- (g) one of the two referees on the account application form was Accentuate Services Limited ("ASL"), and he thought that he would have called Mr Singh – the designated contact for ASL on the form – to take up the reference but he had no specific recollection of doing so and had kept no written record of any call. In addition, it was not common practice in the industry to take up references. In view of the fact that Mr Browne could not recall whether or not he had called Mr Singh of ASL and that there is no written evidence of his doing so, we find as a fact that, on the balance of probabilities, Mr Browne did not speak to Mr Singh in relation to GLS;
- (h) he did not check to see how many times before the change of name on 1 June 2015 the company had changed its name; and

(i) he could not recall precisely when he had previously dealt with Mr Hussein but he accepted that the Appellant had entered into transactions with a company called Online Stop Shop Limited (“OSSL”) in late 2015 and that the account-opening form for that company with the Appellant had been completed by Mr Hussein on 4 June 2015. However, the fact that Mr Hussein had appeared to be acting for a new supplier so soon after he had been representing OSSL did not excite his suspicion.

XGC

78. The following are the relevant facts in relation to XGC:

(1) the annual return of XGC dated 17 November 2015 and filed with Companies House on 26 January 2016 showed that the only director of the company was Mr Russell David Williams and that Mr Williams had acquired all the shares in the company from Mr Weeks on 30 June 2015;

(2) on 3 February 2016, forms were filed at Companies House recording that Mr Robert Edwards and Mr Mohammed Fadlallah had been appointed as directors of XGC on 1 February 2016; and

(3) in a letter dated 6 February 2014 to Mr Weeks and Mr Russell of XGC, Officer SD Munroe-Birt of the Respondents informed them that:

(a) a VAT Tribunal decision in the public domain involved five supply chains involving fraudulent VAT evasion and that a company named Aston Technology Partners Limited (“ATPL”), of which Mr Weeks was previously a director, had appeared in 3 of those 5 chains;

(b) the evidence available to the Respondents indicated that XGC was now also involved in transactions which were connected with MTIC fraud;

(c) the Respondents had previously notified XGC of their concerns in this regard and yet XGC had made no changes to its business procedures to address those concerns; and

(d) if XGC continued to be involved in transactions connected with MTIC fraud, it might face compulsory de-registration.

79. The following are the relevant facts in relation to the DD carried out by the Appellant as regards XGC:

(1) the email of 14 July 2015 from Mr Browne to Officers Gazsi and Miller referred to in paragraph 26 above attached the following documents which had been obtained in the course of the DD as regards XGC:

(a) a DD questionnaire in which none of the questions had been answered;

(b) an undated letter of introduction signed by Mr Weeks;

(c) unsigned standard terms and conditions. These stipulated that title in the goods supplied by XGC would remain with XGC until payment had been received. Until that time, the goods would be held by the relevant freight handler to XGC’s order and, upon receipt of payment, XGC would instruct the relevant freight handler to hold the goods to the order of the purchaser;

(d) bank account details;

(e) an uncompleted trade form which was for completion by the Appellant as XGC’s customer. (We were provided at the hearing with a completed version of

this form dated 18 December 2014 but that was not included in Mr Browne's email);

(f) a certificate of incorporation dated 17 November 2006; and

(g) an amended VAT registration certificate issued on 4 July 2014 which specified that XGC carried on a "non-specialised wholesale trade";

(2) the evidence of Mr Browne at the hearing was that:

(a) despite saying in his witness statement that he had carried out a VIES check in relation to the company and obtained proof of the company's trading address and the company's annual tax return, he had obtained no other DD material in relation to XGC prior to entering into the relevant transactions with XGC apart from that set out in paragraph 79(1) above. In particular, prior to entering into the relevant transactions with XGC, he had:

(i) not carried out a VIES check in relation to XGC; and

(ii) not obtained a reference for Mr Williams, a copy of Mr Williams's passport details or a utility bill for the company;

(b) he had known Mr Weeks for some years. Mr Weeks was well-known in the industry and a regular attendee at trade shows and he had no reason to think that Mr Weeks was other than a legitimate trading counterparty;

(c) the Appellant had been trading with XGC for approximately 18 months prior to entering into the relevant transactions and he had received no intimation from the Respondents over that period that there were any concerns in relation to the transaction chains in which XGC was involved or of any concerns in relation to Mr Weeks; and

(d) he had thought that it was Mr Weeks with whom he dealt in relation to the relevant transactions but he accepted that, if Mr Weeks had by then ceased to be a director or shareholder of XGC, it was probably Mr Williams.

PLC

80. The following are the relevant facts in relation to PLC:

(1) at the time of the relevant transactions, each of Mr Parshotam Lal Chhiber and Ms Raksha Devi Chhiber owned 50% of the shares in PLC;

(2) the directors of the company were as follows:

(a) Mr Hardev Singh Degan was the director of PLC from 11 November 2010 until 6 November 2013;

(b) Ms Raksha Devi Chhiber was the director of the company from 6 November 2013 until 22 November 2014;

(c) Mr Manu Chadha was the director of the company from 22 November 2014 until 1 January 2016; and

(d) Mr Jetinder Singh Summan was the director of the company from 1 January 2016 until the company entered liquidation in February 2017 and therefore, at the time of the relevant transactions, the only director of the company was Mr Summan;

81. In relation to the DD carried out by the Appellant as regards PLC, the evidence of Mr Browne was that:

- (1) prior to entering into the relevant transactions with PLC:
 - (a) he had obtained:
 - (i) unsigned standard terms and conditions of PLC;
 - (ii) a certificate of incorporation dated 12 October 1992;
 - (iii) an amended VAT registration certificate issued on 10 July 2012 which specified that PLC carried on a trade of “retail mobile telephones”; and
 - (iv) a letter of introduction dated 12 November 2010 signed by Mr Degan in his capacity as director and stating that PLC was a “long standing telecommunications company ... [trading] in mobile phones and accessories”; and
 - (v) a copy of Mr Degan’s passport; and
 - (2) he had not carried out a VIES check in relation to PLC;
 - (3) he had obtained no other DD material in relation to PLC prior to entering into the relevant transactions apart from that set out in paragraph 81(1) above; and
 - (4) he had not dealt with Mr Degan in relation to the transactions but had instead dealt with Mr Chhiber and another man whose name he could not now recall.

ACLM

82. In relation to the DD carried out by the Appellant as regards ACLM, the evidence of Mr Browne was that:

- (1) prior to entering into the relevant transactions with ACLM, he had:
 - (a) asked ACLM to complete the standard account-opening form and this had been completed by Mr Alain Montilla van der Zee. However, the account application form was incomplete and the page which would have set out the names of the referees was missing. Mr Browne did not know whether it had been missing when the completed form was received or had been lost subsequently. In any event, in the absence of any written evidence that Mr Browne spoke to anyone about ACLM, we find as a fact that, on the balance of probabilities, Mr Browne did not take up any references in relation to the company;
 - (b) obtained:
 - (i) an undated letter of introduction from ACLM signed by Mr Montilla van der Zee as director;
 - (ii) an entry from the Dutch companies’ registry;
 - (iii) a VAT registration certificate issued on 12 February 2013;
 - (iv) a bill received by the company; and
 - (v) a copy of Mr Alain Montilla van der Zee’s passport and a copy of Mr César Montilla van der Zee’s passport; and
 - (c) carried out a VIES check in relation to ACLM on 29 July 2015; and
- (2) he had obtained no other DD material in relation to ACLM prior to entering into the relevant transactions apart from that set out in paragraph 82(1) above.

GECX

83. The following are the relevant facts in relation to GECX:

- (1) the director of GECX from the commencement of its activities on 28 May 2013 until 20 August 2015 was Mr Vasileios Totolis and thereafter its director was Mr Mussa Salim Patel; and
- (2) on 27 May 2016, GECX changed its principal place of business and notified Mr Browne of that fact by email on 1 June 2016.

84. In relation to the DD carried out by the Appellant as regards GECX, the evidence of Mr Browne was that:

- (1) prior to entering into the relevant transactions with GECX, he had:
 - (a) asked GECX to complete the standard account-opening form and this had been completed by Mr Totolis on 5 January 2016; and
 - (b) obtained:
 - (i) an unsigned and undated letter of introduction from GECX which stated that it was “an integrated commodities trading company, offering services in the areas of commodities trading, brokerage, logistics and finance” and that “[the] core focus is on metals...and soft commodities.... as well as coal and LPG” and that, as one of its growth strategies, it was entering into the telecommunications market with the aim of becoming “the most reliable worldwide mobile phone distributor”;
 - (ii) a certificate from the Chamber of Commerce and Industry of Thessaloniki dated 5 July 2013 to the effect that GECX was registered as a company in the General Commercial Registry and recording its objects as “[carrying] on the broker’s business in purchases and sales of petroleum products and metals and any kind of cargoes. Mediations in sale and purchase transactions on raw/direct materials. Commercial operations and Agent’s activities”;
 - (iii) a utility bill; and
 - (iv) a VAT registration certificate issued on 28 May 2013; and
 - (c) carried out a VIES check in relation to GECX on 4 September 2015. (He had done another VIES check in relation to the company on 19 January 2016);
- (2) he had obtained no other DD material in relation to GECX prior to entering into the relevant transactions apart from that set out in paragraph 84(1) above. In addition, he had not met or communicated with Mr Totolis and he could not recall whether he had taken up any references. In view of the fact that Mr Browne failed to produce any written evidence of his having taken up references in relation to GECX, we find as a fact that, on the balance of probabilities, Mr Browne did not do so; and
- (3) the fact that he was selling headphones and hard drives to GECX when its activities were as recorded in the letter of introduction and certificate referred to in paragraph 84(1)(b) above had not given him any concerns at the time.

Inco Mobile

85. The following are the relevant facts in relation to the DD carried out by the Appellant as regards Inco Mobile:

- (1) the evidence of Mr Browne was that:

- (a) prior to entering into the relevant transactions with Inco Mobile, he had:
 - (i) asked Inco Mobile to complete the standard account-opening form and this had been completed by Mr Mike Vermin on 14 November 2015; and
 - (ii) carried out a VIES check in relation to Inco Mobile on 11 December 2014;
- (b) he had obtained no other DD material in relation to Inco Mobile prior to entering into the relevant transactions apart from that set out in paragraph 85(1) (a) above. In particular, he could not recall whether he had spoken to Mr Vermin or called either of the two referees set out in the account-opening form. He said that he was likely to have made some enquiries as to whether Mr Vermin was involved with any other companies but he could provide no written evidence of those enquiries. In view of the fact that Mr Browne failed to produce any written evidence of his having spoken to Mr Vermin or anyone else in relation to Inco Mobile, we find as a fact that, on the balance of probabilities, Mr Browne did not speak to Mr Vermin or to anyone else in relation to Inco Mobile; and
- (2) in response to an enquiry made by the Respondents with the Dutch tax authorities in relation to Inco Mobile, the Dutch tax authorities provided the Respondents with a completed questionnaire which Mr Browne had provided to Inco Mobile but which bore the letter head of CPL. Mr Browne could not explain why he had sent the CPL questionnaire to Inco Mobile or why he had replied in the affirmative to the question in that questionnaire “Do you obtain third party advice regarding due diligence”.

The Respondents’ published material

PN 726

86. At the hearing, we were provided with a copy of PN 726, the relevant parts of which were as follows:

- (1) Sections 1.3 and 1.4, which stipulated that the notice was directed at VAT-registered persons involved in the supply of any of the goods described in Section 1.4. (These goods included computers and accessories and electronic equipment for playing games);
- (2) Section 6.1, which set out various factors which might alert a person to the possibility that VAT might go unpaid. These factors were grouped into three – legitimacy of customers or suppliers, the commercial viability of transactions and the viability of the goods described by the supplier. All in all, some 26 factors were mentioned, some of which were:
 - (a) what is your customer’s/supplier’s history in the trade?
 - (b) has a buyer and seller contacted you within a short space of time with offers to buy/sell goods of the same specifications and quantity?
 - (c) has your supplier referred you to a customer who is willing to buy goods of the same quantity and specifications as those being offered by your supplier?
 - (d) does your supplier offer deals that carry no commercial risk for you – for example, no requirement to pay for goods until you have received payment from your customer?
 - (e) are the goods adequately insured?
 - (f) are they high value deals offered with no formal contractual arrangements?

- (g) are they high value deals offered by a newly-established supplier with minimal trading history, low credit rating etc?
 - (h) can a brand new business obtain specified goods cheaper than a long-established one?
 - (i) have the Respondents specifically notified you that previous deals involving your supplier have been traced to a VAT loss?
 - (j) have normal commercial practices been adopted in negotiating prices?
 - (k) are the goods in good condition and not damaged?
 - (l) what recourse is there if the goods are not as described?
- (3) Section 6.2, which gave examples of the sorts of specific checks carried out by businesses involved in the consultation exercise when the rules were introduced. These included:
- (a) obtaining copies of certificates of incorporation and VAT registration certificates;
 - (b) verifying VAT registration details with the Respondents;
 - (c) obtaining signed letters of introduction on headed paper;
 - (d) obtaining some form of written and signed trade references;
 - (e) obtaining credit checks or other background checks from an independent party; and
 - (f) insisting on personal contact with a senior officer of a prospective supplier, making an initial visit to their premises wherever possible; and
- (4) Section 6.3, which stipulated that, in each case, the Respondents would be seeking to identify what actions the relevant trader took in response to any indicators of risk and, in particular, what DD had been undertaken and what actions had been taken in response to the results of the DD.

Booklet entitled “How to spot missing trader fraud”

87. At the hearing, we were provided with a copy of the Respondents’ booklet entitled “How to spot missing trader fraud”. The material in this booklet replicated to a large extent the material in PN 726. However, the booklet was not expressed to be limited to traders in certain specified goods but was expressed more generally and the list of factors which might arouse suspicion of fraud was shorter than in PN 726. Some of the factors which the booklet said should arouse suspicion were:

- (1) a newly-established supplier or customer with no financial or trading history;
- (2) unsolicited approaches from organisations offering an easy profit on high value/low volume deals for no apparent risk;
- (3) repeat deals at the same or lower prices and small or consistent profit;
- (4) individuals with a prior history of the wholesale trade in high value/low volume goods such as computer parts and mobile phones;
- (5) established companies that have recently been bought by new owners who have no previous involvement in your sector; and
- (6) new companies managed by individuals with no prior knowledge of the product who hire specialists from within the sector.

THE LAW

Introduction

88. There is no dispute between the parties in relation to the law which is relevant to this appeal.

Legislation

89. Articles 167 and 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of VAT (the “2006 Directive”) provide as follows:

“Article 167

A right of deduction shall arise at the time the deductible tax becomes chargeable.

Article 168

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

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

90. Article 273 of the 2006 Directive provides that “Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers”.

91. The above provisions are reflected in the UK domestic legislation by Sections 24, 25 and 26 of the VATA, the relevant parts of which provide as follows:

“24 Input tax and output tax

(1) Subject to the following provisions of this section, “input tax”, in relation to a taxable person, means the following tax, that is to say-

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

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

(2) Subject to the following provisions of this section, “output tax”, in relation to a taxable person, means VAT on supplies which he makes...”

25 Payment by reference to accounting periods and credit for input tax against output tax

(1) A taxable person shall-

(a) in respect of supplies made by him...

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

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

26 Input tax allowable under section 25

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

(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business –

(a) taxable supplies...”

92. It follows from the above provisions that the normal application of the VAT legislation is that, where a taxable person has incurred VAT input tax on a supply which is properly attributable to, inter alia, a taxable supply made by that person and holds an invoice complying with the requirements of the relevant regulations in respect of the supply so received, then that person is entitled to set off against its VAT output tax liability in respect of the VAT accounting period in question the VAT input tax on the supply and, to the extent that that VAT input tax exceeds its output tax liability, receive a repayment from the Respondents in respect of the VAT input tax.

Case law

Knowledge or means of knowledge

93. Notwithstanding the legislation set out in paragraphs 89 to 92 above, the European Court of Justice (the “CJEU”) in *Kittel* confirmed that a taxable person who knew or should have known that the supplies in which VAT input tax was incurred were connected with the fraudulent evasion of VAT would not be entitled to claim a credit in respect of that VAT input tax in the manner described above. In particular, at paragraphs [51] and [56] of its decision in *Kittel*, the CJEU, whilst reiterating that “traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud” should not lose their right to a credit for the VAT input tax in relation to supplies associated with fraud, held that “a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the [then applicable directive (which has now been replaced by the 2006 Directive)], be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.”

94. The rationale for the above approach was set out by the CJEU at paragraphs [57] and [58] of its decision, where it noted the following:

“[57] That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.

[58] In addition, such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them.”

95. At paragraph [59] of its decision, the CJEU concluded that “it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and to do so even where the transaction in question meets the objective criteria which form the basis of the concepts of ‘supply of goods effected by a taxable person acting as such’ and ‘economic activity’.”

96. At paragraph [61] of its decision, the CJEU reiterated that, “where it is ascertained, having regard to objective factors, that the supply is to a taxable person who knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, it is for the national court to refuse that taxable person entitlement to the right to deduct.”

97. The issues to which the CJEU decision in *Kittel* gave rise were addressed in the UK context by the Court of Appeal in its decision in *Mobilx Limited (in Liquidation) v The Commissioners for Her Majesty’s Revenue and Customs* [2010] EWCA Civ 517 (“*Mobilx*”). At paragraph [52] of the decision in that case, Moses LJ said as follows in relation to the “should have known” part of the *Kittel* test:

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

Extent of knowledge

98. At paragraphs [53] to [60] of the decision in *Mobilx*, Moses LJ went on to address the question of the extent of knowledge required. He observed that it would offend the principle of legal certainty to deny the VAT input tax credit on the grounds that the relevant taxpayer knew or should have known that it was more likely than not that the supplies in question were connected with fraud. Instead, such denial could be made only if the relevant taxpayer knew or should have known that the supplies in question were connected with fraud. At paragraph [59], Moses LJ observed that:

“The test in *Kittel* is simple and should not be over-refined, it embraces not only those who know of the connection but those who “should have known”. Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraudulent evasion of VAT then he should have known of that fact...” .

Undeployed means of knowledge

99. In the paragraph of the decision in *Mobilx* just cited, Moses LJ went on to say the following:

“A trader who decides to participate in a transaction connected to fraudulent evasion, despite knowledge of that connection, is making an informed choice; he knows where he stands and knows before he enters into the transaction that if found out, he will not be entitled to deduct input tax. The extension of that principle to a taxable person who has the means of knowledge but chooses not to deploy it, similarly, does not infringe that principle. If he has the means of knowledge available and chooses not to deploy it he knows that, if found out, he will not be entitled to deduct. If he chooses to ignore obvious inferences from the facts and circumstances in which he has been trading, he will not be entitled to deduct.”

100. A significant question which arises out of this is whether a person who has carried out no, or an insufficient amount of, DD but who would still have been unable to discover that the transactions in question were connected with fraud even if it had carried out the appropriate level of DD should lose the right to credit the VAT input tax. The general rule in those circumstances is that, if the appropriate level of DD would still not have revealed the fraud, then the right to credit remains. As Lewison J noted in *The Commissioners for Her Majesty's Revenue and Customs v Livewire Telecom Limited* [2009] EWHC 15 (Ch) (“*Livewire*”) at paragraph [88]:

“In my judgment ...if a taxable person has not taken every precaution that could reasonably be expected of him, he will still not forfeit his right to deduct input tax in a case where he would not have discovered the connection with fraud even if he had taken those precautions”.

It stands to reason that that should be the case because it is implicit in the phrase “should have known” that the failure of the relevant person to conduct appropriate DD can be significant in this context only if that DD would have revealed something.

101. On the other hand, it is easy to become too focused on the relevance of DD without taking into account obvious inferences which should be drawn from the circumstances in which the transaction in question is carried out. At paragraph [64] of the decision in *Mobilx*, Moses LJ reiterated that, “[if] it is established that a trader should have known that by his purchase there was no reasonable explanation for the circumstances in which the transaction was undertaken other than that it was connected with fraud then such a trader was directly and knowingly involved in fraudulent evasion of VAT” and, at paragraphs [81] and [82] of the decision in *Mobilx*, Moses LJ noted that the burden of proof in such cases is on the Respondents but made it clear that that “is far from saying that the surrounding circumstances cannot establish sufficient knowledge to treat the trader as a participant ...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 focussing on the question of due diligence is that it may deflect a Tribunal from asking the essential question posed in *Kittel*, namely, whether the trader should have known that by his purchase he was taking part in a transaction connected with fraudulent evasion of VAT. The circumstances may well establish that he was.”

No other reasonable explanation

102. The test outlined in *Mobilx* – to the effect that a taxpayer should be regarded as having constructive knowledge that its transaction was connected with fraud only if the only reasonable explanation for the transaction was that it was connected with fraud – was referred to by Arden LJ in *Davis & Dann & Another v The Commissioners for Her Majesty's Customs and Excise* [2016] EWCA Civ 142 (“*Davis*”) at paragraph [4] as “the no other reasonable explanation standard”. Arden LJ went on to hold that, in applying this standard, a court needs to consider the totality of the evidence and not examine each factor in the transaction in a piecemeal fashion. In other words, a factor which, when viewed in isolation, might be capable of explanation as being unconnected with fraud might still tend to be probative of knowledge to “the no other reasonable explanation standard” once it is viewed in the light of all of the evidence – see paragraphs [60] to [65] in *Davis*.

Summary

103. In our view, the case law described above establishes the following principles of importance in the context of this case:

- (1) the relevant question is not whether the relevant trader has conducted the appropriate level of DD but rather whether the relevant trader knew or should have

known of the connection with the fraud (see Moses LJ in *Mobilx*, as described in paragraphs 100 and 101 above);

(2) this means that, where the relevant trader did not know of the connection with the fraud, the fact that the relevant trader did not do any, or what the relevant court or tribunal considers to be an appropriate amount of, DD will not, in and of itself, mean that the relevant trader should be denied a credit for the input tax if it can be shown that the DD in question would not have revealed the connection with the fraud (see Lewison J in *Livewire*, as described in paragraph 100 above);

(3) on the other hand, if the relevant trader did not know of the connection with the fraud but should have been aware of that connection because it was an obvious inference from the facts and circumstances of the transaction and there was no other reasonable explanation for the circumstances in which the transaction was undertaken, then it should not be entitled to a credit for the input tax regardless of whether or not it has conducted DD (see Moses LJ in *Mobilx*, as described in paragraph 101 above);

(4) as for what the relevant trader knew or should have known, it is not sufficient for the Respondents to show that the relevant trader knew or should have known that, by its purchase:

- (a) it was running the risk that it might be taking part in a transaction connected with fraud; or
- (b) it was taking part in a transaction which was likely to have been connected with fraud.

Instead, the facts must be such that either the relevant trader knew that the transaction was connected with fraud or the only reasonable explanation for the transaction was that it was connected with fraud (see Moses LJ in *Mobilx* as described in paragraph 98 above); and

(5) in approaching the “only reasonable explanation” test:

- (a) the relevant court or tribunal needs to consider the totality of the evidence and not examine each factor in the transaction in a piecemeal fashion (see Arden LJ in *Davis* as described in paragraph 102 above); and
- (b) the facts which must be taken into account are not only those which were actually known to the relevant trader at the time of the transaction but also those which the relevant trader would have known if it had deployed the means of knowledge available to it (see Moses LJ in *Mobilx* as described in paragraph 99 above).

104. From the submissions of the parties at the hearing of the appeal, we believe that they were in agreement with the above statement of the law in this area.

THE SUBSTANTIVE ISSUES

105. It is common ground that the law described above means that the substantive issues which need to be addressed in relation to each purchase by the Appellant which is the subject of the appeal are:

- (1) has there been a loss of VAT?
- (2) has the loss of VAT been caused by fraudulent evasion?
- (3) was the relevant purchase connected with that fraudulent evasion? and

(4) did the Appellant know or should the Appellant have known that the relevant purchase was connected with that fraudulent evasion?

106. It is also common ground that the burden of proof in relation to each of the above is on the Respondents and therefore that it is for the Respondents to prove that each of the above is the case, on the balance of probabilities - see *Mobilx* at paragraphs [81] and [82]. Thus, it is incumbent on the Respondents to establish that the evidence which they have adduced satisfies us that each of the four conditions set out in paragraph 105 above is satisfied in relation to each purchase unless the Appellant accepts that a particular condition is satisfied in relation to that purchase.

107. In this case, the Appellant has accepted that the first three of the conditions set out in paragraph 105 above are met in relation to each purchase which is the subject of the appeal but it does not accept that the fourth condition is satisfied in relation to any such purchase. That is to say that it submits that, even though each purchase which is the subject of the appeal was connected with a loss of VAT caused by fraudulent evasion, it did not know and could not reasonably have known that that was the case.

108. The Respondents submit that these purchases formed part of an overall orchestrated scheme to defraud the Respondents and that the evidence suggests that the Appellant was either complicit in that scheme – which is to say that it knew of the connection between each purchase and the fraudulent evasion of VAT arising as a result of the scheme – or should have been aware from the circumstances of each purchase that the relevant purchase was connected with the fraudulent evasion of VAT.

109. It is common ground that, in identifying what it was that the Appellant knew or should have known, the state of mind of each of Messrs Browne and Palmer should be attributed to the Appellant as a body corporate, even though they were only consultants to, and not employed by, the Appellant – see *The Commissioners for Her Majesty's Revenue and Customs v Greener Solutions Limited* [2012] UKUT 18 (TCC).

THE HISTORIC TRANSACTIONS

Introduction

110. Before turning to the respective arguments of the parties in this case, it is necessary to describe a preliminary matter which arose at the start of the hearing.

111. On 9 September 2022, 11 days before the hearing was due to start, the Respondents served their skeleton argument on the Appellant and the Tribunal. In their skeleton argument, the Respondents alleged for the first time that:

(1) the Appellant had a historic propensity to undertake deals connected with the fraudulent evasion of VAT; and

(2) between 2013 and 2015, at least 73 of the Appellant's deals, amounting to over 60% of the Appellant's VAT input tax over that period, could be traced to 5 suppliers connected with the fraudulent evasion of VAT.

112. In making the above allegations, the Respondents relied on various sections of Officer Bycraft's first witness statement, which had been served on the Appellant in July 2019.

Preliminary procedural issue

113. At 22.01 on Sunday 18 September 2022, less than 48 hours before the hearing was due to start, the Appellant lodged an application under Rules 2 and 15 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") to exclude from the proceedings a substantial part of the evidence set out in Officer Bycraft's first witness

statement, to the effect that a number of the Appellant's historic transactions, which were not themselves the subject of the appeal, were connected with the fraudulent evasion of VAT.

114. The potential significance to the outcome of the appeal of evidence in relation to the Appellant's historic transactions may be seen in paragraphs [108] to [112] of the decision of Christopher Clarke J in *Red Twelve v The Commissioners for Her Majesty's Revenue and Customs* [2009] EWHC 2563 (Ch). In that part of his decision, Christopher Clarke J observed as follows:

“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.”

115. The Appellant's application was heard at the start of the hearing. Mr Carey started by noting that it was a well-established principle of litigation procedure that an allegation of fraud in legal proceedings needed to be both distinctly alleged and sufficiently particularised in the pleadings of the party making the allegation. The party who would be detrimentally affected by the allegation, if proven, was entitled to know from the pleadings both:

- (1) that the allegation of fraud was being made; and
- (2) the primary facts upon which reliance would be placed at trial in order to justify the allegation

– see *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] Ch 250 at 268, *Armitage v Nurse* [1998] Ch 241 (CA) at 256G and *Three Rivers District Council and others v Governor of the Bank of England* [2003] 2 AC 1 at paragraphs [184] to [186].

116. He accepted that this did not mean that every fact on which reliance was to be placed in establishing fraud needed to be included in the pleading. However, it did mean that the primary or principal facts on which reliance was to be placed needed to be so included.

117. Mr Carey submitted that, in this case, with the exception of a reference in paragraph 159ii of the Respondents' statement of case (the “SOC”) to the fact that “previous purchases by [the Appellant] from [PLC] in November and December 2015 [had been] traced to

fraudulent losses”, the SOC was devoid of any reference to there being any fraud in connection with the historic supply chains to which the Appellant had been a party. Thus, not only did the SOC not contain any allegation of fraud in respect of historic purchases made by the Appellant from any supplier other than PLC but, even in relation to the historic purchases from PLC, the SOC set out no facts which, if proven, would establish that such fraud had occurred.

118. In response, Mr Hayhurst accepted that Mr Carey’s summation of the SOC in this respect was correct but submitted that:

(1) the cases to which Mr Carey had referred all related to an allegation of fraud made against a party to the relevant proceedings and not, as in this case, to allegations of fraud made against third parties in connection with transactions which were not themselves the subject of the proceedings. Accordingly, we were not bound to apply the strict rules set out in those cases to the allegations of fraud in this case. It was open to us to exercise our discretion in such a way as to allow the evidence to be adduced despite the shortcomings in the SOC; and

(2) in the alternative, the decisions in *Halifax and others* (Case C-255/02) (“*Halifax*”) and *Kittel* demonstrated that the cause of VAT input tax disallowance in cases such as this was not the existence of fraud per se but more the existence of an abusive practice. As noted in paragraph [63] in *The Commissioners for Her Majesty’s Revenue and Customs v Citibank NA and E Buyer UK Limited* [2017] EWCA 1416 (Civ) (“*Citibank*”), “the underlying EU law principle to be extracted from *Halifax* is that the right of a taxable person to deduct input VAT is precluded where the transactions from which that right derives constitute an abusive practice. As it seems to me, the two limbs of *Kittel* are derived from, and provide a workable approach to, the operation of that underlying principle”. Viewed through that prism, the evidence in relation to the historic transactions whose inclusion was in dispute could be viewed not as evidence pertaining to an allegation of fraud, as such, but simply as evidence pertaining to an allegation of abusive practice by the Appellant - in being involved so often in supply chains which had given rise to tax losses. On that basis, the strict rules pertaining to allegations of fraud were not applicable.

119. Mr Hayhurst said that, if neither of the above arguments found favour with us, then the Respondents wished to make an oral application at the hearing under Rules 2 and 5 of the Tribunal Rules to amend the SOC in such a way as to remedy the deficiencies. He accepted that this application was being made very late but pointed out that:

(1) the SOC had been required to be produced in December 2018, long before Officer Bycraft had prepared his first witness statement, and therefore it had not been possible to include in the SOC all of the matters which were included in that witness statement;

(2) the principle underlying the pleading rules in relation to fraud was that a person who would be detrimentally affected by the allegation of fraud was entitled to be aware in advance of the trial both that the allegation was going to be made and of the primary facts on which reliance was going to be placed in order to prove the allegation. In this case, the Appellant had been aware since it received Officer Bycraft’s first witness statement in July 2019 of the fact that the allegations were going to be made and of the primary facts on which the allegations were based; and

(3) finally, even though the Appellant had known since July 2019 that the SOC did not contain references to the matters the omission of which from the SOC was now the subject of its complaint, it had deliberately chosen to sit on its hands and ambush the Respondents a matter of hours before the start of the hearing when, had it raised the

objection earlier, the Respondents would have been able to amend their SOC at the earlier stage.

120. Mr Carey pointed out that:

(1) the case law in relation to applications for very late amendments – which is to say, amendments proposed after a trial date has been set and which, if allowed, would cause the trial date to be lost - showed that a heavy burden was on the party who was proposing the late amendment to show the strength of the new case and why justice to him, his opponent and other court users required him to be able to pursue it. The risk of losing the trial date might mean that the lateness of the application would itself cause the balance to be loaded heavily against the granting of permission. In each case, in addition to the consequences in relation to the trial date, the nature of the proposed amendment, the quality of the explanation for its timing and an appreciation of the consequences of granting the application in terms of work wasted and consequential work to be done had to be taken into account – see *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm), *CIP Properties (AIPT) v Galliford Try Infrastructure Limited and others* [2015] EWHC 1345 (TCC), *Denley v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKUT 340 (TCC) and *Vilca and others v Xtrata Limited and Xtrata Tintaya A.A* [2017] EWHC 2096 (QB);

(2) in this case, the Appellant had been entitled to proceed on the assumption that the SOC set out the full extent of the allegations which it was facing in the appeal and would suffer prejudice if the scope of those allegations was to be extended at the last minute;

(3) the fact that the Appellant might have made its own application to exclude evidence on the basis of the terms of the SOC was neither here nor there. It was not up to the Appellant to police the conduct by the Respondents of the litigation process, particularly in the case of MTIC appeals. The Respondents had been conducting MTIC litigation for over 10 years and knew very well the rules in relation to pleading fraud. In fact, the Respondents had shown that they were aware of the rules in the present case because, in relation to each of the transactions which were the subject of the appeal, they had both pleaded the existence of fraud in the supply chain and set out in the SOC the primary facts on which the relevant allegation of fraud was being made;

(4) in any event, the revisions to the SOC which were set out in the application did not cure the defect of which the Appellant was complaining. The revisions merely sought to insert into the SOC an allegation that the direct suppliers to the Appellant in relation to the historic transactions “were connected with the fraudulent evasion of VAT”. They did not say expressly which person in each historic supply chain was alleged to be fraudulent or set out the primary facts on which reliance was to be placed in order to establish that fact; and

(5) were we minded to allow the application to amend the SOC, the Appellant would face the invidious choice of proceeding with the substantive hearing immediately without having adequate time to refute the allegations or returning at a subsequent date for the substantive hearing, with consequent delay and increased costs in resolving the appeal.

121. We adjourned the hearing to consider the submissions outlined above in the light of the overriding objective set out in Rule 2 of the Tribunal Rules. Having done so, we concluded as follows:

(1) we did not agree with either of the submissions of Mr Hayhurst set out in paragraph 118 above;

(2) as regards the first of those submissions, we recognised that the authorities to which we had been referred all pertained to an allegation of fraud made against a party to the proceedings, as opposed to an allegation of fraud which was merely detrimental in evidential terms to a party to the proceedings. However, although there was no authority which dealt specifically with allegations of fraud falling within the latter case, it seemed to us that the same principles ought to apply in such a case given the serious nature of the allegation and the adverse consequences for the Appellant if it were to be established. We did not think that it was appropriate for the Respondents breezily to introduce evidence to the effect that there had been fraud in the historic supply chains without including in the SOC both a statement identifying the persons who were alleged to have committed the fraud and the primary facts on which reliance would be placed at trial to establish that that was the case. In that respect, the evidence in relation to fraud in the historic supply chains was no different from the evidence in relation to fraud in the supply chains which were the subject of the proceedings. In both cases, these were serious allegations with potentially damaging implications for the Appellant and evidence in relation to them could not be introduced without being adequately covered in the SOC. The Respondents had implicitly recognised this in the way in which they had dealt in the SOC with the allegations of fraud in the supply chains which were the subject of the proceedings. Those allegations also pertained to third parties and not the Appellant itself and yet the Respondents had taken care to identify the alleged fraudster and the basis for the allegation of fraud in each case. They ought to have done the same in relation to the allegations of fraud in the historic supply chains;

(3) as regards the second submission, we thought that the distinction which Mr Hayhurst was seeking to draw was so fine as to be non-existent. The abusive practice which was being alleged in relation to the historic transactions was the fact that the Appellant had acquired assets through supply chains which involved fraud. It was not simply that the Appellant had acquired assets through supply chains which happened to have involved a tax loss. The Respondents were not simply alleging that there was some unspecified abusive practice in relation to those acquisitions. Instead, they were alleging that those acquisitions formed part of supply chains which involved fraud;

(4) we therefore agreed with Mr Carey that the evidence in question could not be introduced on the basis of the SOC in its current form;

(5) we were, however, sympathetic to Mr Hayhurst's application to amend the SOC despite the late stage at which the application had been made. We considered this to be a finely-balanced point in relation to which neither side emerged with much credit;

(6) we agreed with Mr Carey that, at the point when the relevant witness statement was filed in July 2019, or very soon after that date, the Respondents ought to have known that the SOC was defective. Accordingly, the Respondents ought to have applied to amend the SOC well before the hearing. They were fully aware of the litigation rules and had in fact applied the rules pertaining to pleadings of fraud in dealing with the allegations of fraud to the goods which were the subject of the proceedings;

(7) on the other hand, we agreed with Mr Hayhurst that the Appellant had been on notice of the defects in the SOC from the same date and had deliberately waited until the hearing before raising its objections to the evidence in question. Moreover, this was

not a case where the material to which the Appellant had objected was a small or relatively insignificant part of the evidence upon which the Respondents were seeking to rely. For instance, if the evidence had been set out in a limited number of paragraphs in the witness statement of one of the Respondents' less important witnesses, then it might very easily have been overlooked by the Appellant. In that instance, prior to seeing the Respondents' skeleton argument, the Appellant might reasonably have reached the view that the relevant paragraphs were merely surplus and did not form part of the Respondents' case. However, in this case, the evidence in question was set out at considerable length in a witness statement for the Respondents' chief witness and comprised a significant part of that witness statement. Following its receipt of the witness statement, the Appellant could hardly have reached the view that the evidence in question was merely surplus and was not intended to be a significant part of the Respondents' overall case. And, even if the Appellant had been in any doubt on that score, it could have sought clarification on the point at any point in the intervening 3 years. Instead, it had deliberately chosen to wait until the day before the hearing to make its application to exclude the evidence;

(8) we recognised that allowing the Respondents to amend the SOC at this late stage might give rise to the need to adjourn the hearing of the substantive appeal. Mr Carey had said to us that the Appellant might well require additional time to deal with the implications of the additional evidence and Mr Hayhurst had indicated to us that the Respondents would not oppose any application by the Appellant to adjourn the hearing on that basis. We therefore concluded that, in the event that we were to allow the SOC to be amended, it would be in accordance with the overriding objective to uphold any application for adjournment which might be sought by the Appellant for that reason;

(9) although we recognised that any such adjournment would have costs implications for the parties, we considered that allowing the application to amend the SOC would not mean that any costs which had previously been incurred by either party would be wasted. It would simply be the case that the additional evidence would need to be addressed by the Appellant in making its submissions;

(10) taking all of the above into account, we concluded that, on balance, it would be fair and just to permit the Respondents to amend the SOC at this late stage;

(11) however, we did not think that the amendments which had been proposed by the Respondents in making their application adequately cured all of the defects in the SOC as it stood. This was not surprising as the Respondents had been required to produce the revisions in very short order following their receipt of the Appellant's late application to exclude the relevant evidence. In our view, it was inevitable given those time constraints that the proposed revisions would be inadequate to deal with all of the identified defects in the SOC. That is not to say that the proposed revisions made absolutely no difference to the SOC's coverage of the matters in question and that the Respondents' application to amend the SOC should therefore be rejected on those grounds. The proposed revisions represented a better attempt at covering the matters in question and could therefore be accepted as it was. However, in our view, simply upholding the application and permitting the revisions to be included as they stood would be likely to lead to considerable delays and disputes in the course of hearing the substantive appeal as the parties debated which evidence could be adduced on the basis of the revised SOC and which could not; and

(12) accordingly, recognising that the substantive hearing might well fall to be delayed in any event by our allowing the Respondents' application as it stood, we

concluded that it would be in accordance with the overriding objective of dealing with the appeal fairly and justly to allow the Respondents more time to propose more considered amendments to the SOC. In that way, the likelihood of future disputes in relation to the admissibility of evidence during the hearing of the substantive appeal would be reduced.

122. Upon conveying our decision to the parties, Mr Carey, on instructions, indicated that, even after allowing for the time which we had granted to the Respondents so that they might produce their more considered revisions to the SOC, the Appellant still considered it possible to complete the hearing of the substantive appeal in the time allotted for the hearing and wished to proceed on that basis and the parties agreed a timetable to achieve that.

123. The Respondents served the amended SOC on the Appellant and the Tribunal on 23 September 2022 and the Appellant's response on the same date was that it did not object to the amended SOC but that it put the Respondents to strict proof by reference to the evidence of each and every allegation which the Respondents had made in the amended pleading. The hearing of the substantive appeal then ensued.

The allegations in the amended SOC

124. The allegations in relation to the Appellant's historic transactions in the amended SOC are as follows:

- (1) between VAT periods 06/13 and 03/16, the Appellant undertook at least 72 deals (amounting to over 60% of the Appellant's VAT input tax over that period) which were also connected with MTIC fraud;
- (2) many of the traders involved in those 72 deals (or the key individuals involved in those deals) were also involved in the deals which are the subject of the appeal; and
- (3) the deals in question involved 5 fraudulent suppliers to the Appellant, as follows:
 - (a) Black Cherry Solutions Limited ("BCS");
 - (b) OSSL;
 - (c) CPL;
 - (d) PLC; and
 - (e) XGC.

The parties' submissions in relation to the allegations

125. At the hearing, the Respondents did not take us through any of the 72 historic transactions referred to in paragraph 124 above. However, we were provided with written evidence in relation to them in:

- (1) the first witness statement of Officer Bycraft;
- (2) the witness statement of Officer George Munro Beattie;
- (3) the witness statement of Officer Candida Styles-Coles; and
- (4) the witness statement of Officer Peter Dean.

126. Mr Carey did not seek to challenge any of that evidence in cross-examination. Instead, in making his final submissions at closing, he raised two objections in relation to the allegations as follows:

- (1) in the amended SOC, the Respondents had alleged that each of the participants involved in the historic transaction chains was a fraudulent trader and therefore a failure

on their part to establish that each participant in a particular transaction chain was fraudulent meant that the relevant chain should be disregarded; and

(2) in the alternative, the Respondents had failed in their duty of disclosure as regards the allegations of fraud in the transaction chains and therefore the evidence in relation to the historic transactions should be ignored or treated with extreme caution.

127. Turning to the first objection raised by Mr Carey, the relevant part of the amended SOC – Annex A to the amended SOC - read as follows:

“1. Between VAT periods 06/13 and 03/16 VEL undertook at least 72 deals (over 60% of VEL’s input tax during these periods) that can also be connected to the fraudulent evasion of VAT.

2. These 72 deals were purchased from five fraudulent suppliers:

i. Black Cherry Solutions Limited (“Black Cherry”)

ii. Online Stop Shop Limited (“Stop Shop”)

iii. Crazy Price Limited (“Crazy Price”)

iv. DCL

v. XGC

3. These 72 deals can be traced to fraudulent tax loses [sic] either directly through fraudulent defaulting traders, fraudulent contra or offset traders or on balance of probabilities argument when viewed cumulatively with the 16 deals under appeal and with other transactions entered into by these and surrounding companies as set out below.

4. All the traders above were participants in an overall fraudulent scheme to evade VAT. The evidence below is further relied on to show that the 16 deals subject to the appeal were part of an overall scheme to defraud the revenue....”

128. The Respondents then proceeded in the remaining paragraphs of Annex A to the amended SOC to describe in some detail the facts on which the Respondents sought to rely in supporting the above statements.

129. There are two reasons why do not think that the first objection raised by Mr Carey to the allegations in relation to the historic transactions is well-founded.

130. First, we do not agree with Mr Carey that the language from the opening to Annex A set out above should be read as an allegation that each of the traders involved in each historic transaction chain was a fraudulent trader. Instead, our reading of the relevant drafting is simply that each of the 5 specified suppliers to the Appellant listed in paragraph 2 of Annex A was a participant in a scheme to evade VAT. We think that the reference to “traders above” in paragraph 4 of Annex A is, taken in context, to be regarded as a reference to the 5 specified suppliers to the Appellant listed in paragraph 2 of Annex A and not to the “fraudulent defaulting traders, fraudulent contra or offset traders” referred to in paragraph 3 of Annex A. It follows that we do not read the relevant paragraphs as pleading that each participant in the relevant supply chain was party to the fraudulent scheme. Instead, we read the relevant paragraphs as pleading that each supply chain involved a fraudulent scheme to which the named supplier to the Appellant was party.

131. Secondly, even if we are wrong to construe paragraph 4 of Annex A in that way, in our view it does not follow that, simply because the Respondents are unable to satisfy us in relation to one of their pleadings in Annex A, that precludes them from satisfying us on another. On any analysis, the pleading in paragraphs 1 and 2 in Annex A is that each of the relevant purchases from the 5 specified suppliers was connected with the fraudulent evasion of VAT. If the Respondents are able to show, by reference to the facts which they go on to specify in the Annex as a whole, that that was the case, then it does not matter that the Respondents are not able to satisfy us in relation to the pleading in paragraph 4 of Annex A.

132. Turning then to Mr Carey's second objection to the allegations in relation to the historic transactions, that fell into two parts, as follows:

- (1) first, Mr Carey submitted that, because the evidence pertained to allegations of fraud, the level of disclosure required from the Respondents was not the standard level of disclosure for hearings before the Tribunal set out in Rule 27 of the Tribunal Rules but instead the higher level of disclosure required by the Civil Procedure Rules; and
- (2) secondly, Mr Carey submitted that, even if the level of disclosure required was the level of disclosure required by Rule 27 of the Tribunal Rules, the Respondents had failed to meet the requirements of that rule in relation to the historic transactions.

133. As regards the first part of Mr Carey's objection in relation to disclosure, Rule 27 of the Tribunal Rules provides that, subject to any direction to the contrary, each party must deliver to the Tribunal and the other party a list of the documents on which the first-mentioned party intends to rely or produce in the proceedings and of which the first-mentioned party has possession, the right to possession or the right to take copies. Mr Carey submitted that, because the Respondents were alleging the existence of fraud in the historic transactions, a higher degree of disclosure than that was required in relation to those transactions. In particular, he said that the Respondents should be obliged to disclose documents which they had in their possession or had the right to possess and which undermined their case in the appeal.

134. We can see no basis in the authorities for requiring a higher level of disclosure in relation to the historic transactions than the one required by Rule 27 of the Tribunal Rules. We think that the answer to this question is provided very clearly by the decision of the Court of Appeal in *Citibank*. In order to explain why that is the case, it is helpful to compare and contrast three distinct hypothetical scenarios, as follows:

- (1) Scenario 1 – a case in which the taxpayer is denied input tax recovery on the grounds that it knew of the connection between its transaction and MTIC fraud and acted dishonestly or fraudulently;
- (2) Scenario 2 – a case in which the taxpayer is denied input tax recovery on the grounds that it knew of the connection between its transaction and MTIC fraud but did not act dishonestly or fraudulently;
- (3) Scenario 3 – a case in which the taxpayer is denied input tax recovery on the grounds that it knew of the connection between its transaction and MTIC fraud but did not act dishonestly or fraudulently – which is to say, the same as in scenario 2 – and where, as part of the evidence on which the Respondents seek to rely, the Respondents allege that other transactions implemented by the relevant taxpayer were connected with MTIC fraud.

135. It may be seen that:

(1) all 3 of the scenarios involve an allegation of the existence of fraud by entities which are involved in the deal chain in question but only scenario 1 involves an allegation of the existence of fraud by the taxpayer itself; and

(2) the issue we are presently considering in relation to the historic transactions falls within scenario 3.

136. *Citibank* was a case which addressed the differences between the first 2 of the scenarios. In that case, the Tribunal at first instance in relation to E Buyer UK Limited (“E Buyer”) declined to order disclosure beyond the disclosure required by Rule 27 of the Tribunal Rules on the basis that there was no allegation of fraud or dishonesty against E Buyer itself (see *Citibank* at paragraph [27]). The Court of Appeal agreed, saying that “Judge Walters thought he should apply rule 27 of the 2009 Rules and can hardly be faulted for that”. The Court of Appeal considered that, in the absence of an allegation of fraud or dishonesty against the taxpayer itself, there was no authority for the proposition that a different more onerous disclosure regime should apply and that knowledge of fraud was not the same as direct dishonest participation in a fraud. The Court of Appeal accordingly re-instated the Tribunal’s decision on this point (see *Citibank* at paragraphs [93] to [95]).

137. In our view, if the disclosure required by Rule 27 of the Tribunal Rules is appropriate for cases falling within scenario 2, which involve an allegation of knowledge of fraud elsewhere in the deal chain, then it must follow that the same is true of cases falling within scenario 3 where not only is the alleged fraud elsewhere in the deal chain but it is not even being alleged that the taxpayer had knowledge of the alleged fraud.

138. There is nothing in the other cases to which we were referred by Mr Carey in his closing submission which gainsays this conclusion.

139. We should make it clear that we do not see that there is any inconsistency between this conclusion and the conclusion described in paragraph 121(2) above to the effect that allegations of fraud, whether against a party to the litigation itself or against a third party, need to be properly pleaded and particularised. The same dichotomy exists in every MTIC case, as it did in relation to E Buyer in *Citibank*, in that the Respondents are required to plead and particularise the fraud elsewhere in the deal chain upon which the VAT input tax denial is based and yet do not have to comply with a more onerous disclosure regime in relation to that pleading.

140. Turning then to the second limb of Mr Carey’s objection in relation to disclosure, Mr Carey submitted that various statements of fact made in the witness evidence had not been supported by exhibiting the appropriate documents to the witness statements. He took us to various examples of statements made by a witness which either were unsupported by any exhibit or were supported by an exhibit which fell short of properly supporting the statement made in the relevant witness statement.

141. We think that this objection is also unsustainable. In our view, it does not preclude the admission of the statement made in the relevant witness statement as evidence but merely goes to the weight which we should attach to the relevant statement as evidence. The fact that a witness statement fails to include as an exhibit a document on which the relevant witness is relying in making a particular statement of fact in the witness statement does not involve a breach of Rule 27 of the Tribunal Rules. It merely means that the Respondents cannot adduce the missing document as evidence at the hearing. Instead, in making their case, the Respondents are confined to the witness statement and the exhibits to that witness statement.

142. It follows from the above that, in our view, neither of the objections raised by Mr Carey to the allegations in relation to the historic transactions is correct.

Our views on the evidence

143. Having said that, we should record that, in our view, the manner in which the Respondents have dealt with the allegations in relation to the historic transactions in this case leaves a great deal to be desired. We have already commented in paragraphs 113 to 123 above on their failure properly to deal with the allegations in their pleadings. However, even after we gave permission to the Respondents to amend their pleadings, the Respondents did not, at the evidence stage of the hearing, then go through the specific allegations in the amended SOC and link those allegations to specifically-identified parts of the witness statements which they alleged supported the allegations. Instead, we and the Appellant were left to try to link the facts outlined in the witness statements to the allegations set out in the amended SOC without the benefit of any specific cross references or guidance. This meant that we had to spend a disproportionate amount of time in piecing together the allegations set out in the amended SOC and the facts set out in the witness statements. In our view, this was not an appropriate way of proceeding. We think that, if the Respondents wished to rely on the historic transactions in support of their case in relation to the 16 deals, they owed it to the Appellant and to us to go through each of the historic transactions at the evidence stage of the hearing, explaining the connection with MTIC fraud in each of those transactions and directing us to the location in the witness evidence where support for that proposition could be found.

144. Turning then to the quality of the evidence itself, we agree with Mr Carey that it too left something to be desired in that various statements of fact were not supported by the appropriate exhibits. On the other hand, as we have already observed, Mr Carey did not seek to challenge any of the Respondents' witness evidence in relation to the historic transactions by way of cross-examination. Instead, he waited until he made his closing submissions to point out those deficiencies. Accordingly, whilst we agree that some of the evidence presented to us was not supported by the appropriate exhibits, we are nevertheless left with various statements of fact made by the witnesses which have not been challenged and which, subject to the point made in the paragraph below in relation to one of the historic transactions, we have no reason to doubt.

145. In the course of examining the witness statements in the light of the amended SOC, we identified an error in the amended SOC as it related to one of the historic transactions with XGC. This arose as a result of an error made by Mr Bycraft in paragraph 355 of his first witness statement as to the date when the relevant transaction occurred. Mr Bycraft's error in relation to the date of the transaction meant that the relevant defaulting trader selling to the contra-trader in that chain was alleged in the amended SOC to be a company called Fair Services (UK) Limited ("Fair"), whereas the exhibit to Mr Bycroft's first witness statement and the witness statement from Mr Beaddie showed that the alleged relevant defaulting trader was a company called Jensa Limited.

146. It follows that we are not satisfied from the witness evidence that that particular transaction was connected with MTIC fraud.

147. We are also not satisfied that the evidence we have seen is sufficient to support the conclusion that all 52 of the historic transactions into which the Appellant entered with PLC were connected with MTIC fraud – there is insufficient detail in the witness statements to support that conclusion - although we consider that the witness evidence does support the conclusion that a significant number of those deals were so connected.

148. In summary, although there is much about the quality of the evidence in relation to the 72 transactions which is unsatisfactory, the various statements of fact made by the relevant witnesses were not challenged on cross-examination and we have been given no reason to doubt their veracity. Consequently, on the balance of probabilities, we find as facts the additional facts and related conclusions set out in paragraphs 149 to 160 below.

BCS

149. In relation to the historic transactions with BCS, the facts are as follows:

- (1) BCS entered into 5 deals with the Appellant between 29 October 2014 and 30 December 2014;
- (2) in relation to 4 of the 5 deals, the supplier to BCS of the goods which were sold to the Appellant was Powertalk Mobile & Data Communication Limited (“Powertalk”) and, in relation to the remaining deal, the supplier to BCS of the goods which were sold to the Appellant was Surat Trade Limited (“Surat”); and
- (3) each of Powertalk and Surat fraudulently failed to account to the Respondents for the VAT output tax which arose in respect of each supply to BCS.

150. On the basis of the above, we conclude that, on the balance of probabilities, all 5 of the historic transactions with BCS were connected with MTIC fraud.

OSSL

151. In relation to the historic transactions with OSSL, the facts are as follows:

- (1) OSSL entered into 7 deals with the Appellant between 12 October 2015 and 1 December 2015;
- (2) in respect of each of those deals, the goods supplied to the Appellant by OSSL were connected with MTIC fraud through ASL, the supplier to OSSL;
- (3) in the VAT period of ASL in which ASL supplied the goods to OSSL, OSSL was the only declared customer of ASL. ASL was a party to the deal chain relating to several of the deals which are the subject of the appeal and, in each case, the Appellant has accepted that the relevant deal was connected with MTIC fraud;
- (4) ASL set off its VAT output tax liability in respect of the supplies to OSSL against VAT input tax in respect of goods acquired from a company called White Diamond Limited (“WDL”), which in turn set off its VAT output tax liability in respect of its supplies to ASL against VAT input tax in respect of the same goods acquired from companies called Fast Away Services Limited (“Fast Away”) and 4 Ways Wholesale Limited (“4 Ways”);
- (5) on 13 October 2015, WDL was compulsorily de-registered for VAT due to its apparent links to the fraudulent evasion of VAT. Despite its de-registration for VAT, WDL continued to make supplies to ASL after that which were purported to be taxable supplies and, on 24 March 2016, WDL was assessed to VAT output tax in respect of those supplies of £1,220,862.97. That VAT output tax was never paid. In addition, on 25 January 2016, WDL was denied £2,397,827.07 of VAT input tax on the basis that it knew or should have known that the relevant purchases were connected with the fraudulent evasion of VAT;
- (6) at a meeting with Officers of the Respondents on 13 November 2015, the sole director and shareholder of WDL told the Respondents that WDL’s only suppliers were Fast Away and 4 Ways;

(7) Fast Away was registered for VAT with effect from 30 November 2012 but submitted nil quarterly VAT returns until it was compulsorily de-registered for VAT on 27 July 2015, some months before the transactions in question. Following its de-registration for VAT, Fast Away was assessed to undeclared VAT output tax of £1,010,499.00;

(8) 4 Ways was registered for VAT with effect from 5 August 2009 in the business area of motor repair. In August and September 2014, the name, registered address and business area of the company were changed and it became apparent to the Respondents that the VAT registration number of the company had been hi-jacked and that 4 Ways was being used as a fraudulent entity. The taxable person purporting to be 4 Ways was assessed to undeclared VAT output tax of £215,282.00;

(9) in respect of each of the deals with OSSL, the goods acquired by the Appellant from OSSL were in each case sold by the Appellant to ACLM, which was the entity which acquired all of the goods sold to the Appellant by GLS in the deals which are the subject of the appeal and which the Appellant accepts were connected with MTIC fraud;

(10) at the material time, the director and sole shareholder of OSSL was Mr Sajid Hussein. Mr Hussein was later involved in GLS, as outlined in paragraph 76 above. GLS was a supplier to the Appellant in 10 of the deals which are the subject of the appeal and, in each case, the Appellant has accepted that the relevant deal was connected with MTIC fraud. On 7 June 2018, Mr Hussein was disqualified as a director for 11 years for causing OSSL to engage in MTIC fraud; and

(11) on 4 December 2015, at around the time of some of the historic transactions involving the Appellant, OSSL was:

- (a) denied £488,858.94 of VAT input tax in respect of transactions implemented in the VAT period 09/14; and
- (b) compulsorily de-registered from VAT.

152. On the basis of the above, we conclude that, on the balance of probabilities, all 7 of the historic transactions with OSSL were connected with MTIC fraud.

CPL

153. In relation to the historic transactions with CPL, the facts are as follows:

(1) CPL entered into 4 deals with the Appellant between 8 November 2015 and 27 January 2016;

(2) in all 4 deals, the goods supplied to the Appellant by CPL were connected with MTIC fraud through a company called Askos Wolt LLP (“AWL”);

(3) in relation to 2 of the deals, CPL acquired the goods from 3A Distribution Limited (“3A”), which in turn acquired the goods from AWL. AWL set off its VAT output tax liability in respect of the supplies to 3A against VAT input tax in respect of goods acquired from a company called ATFX Systems Limited (“ATFX”);

(4) ATFX was a fraudulent trader – it failed to submit any VAT returns after January 2015 and was de-registered for VAT as a missing trader on 17 December 2015. On 28 September 2016, ATFX was assessed to undeclared VAT output tax of £1,661,437.00 in respect of the VAT period 10/15 and its final VAT period, corresponding to the period in which it traded with AWL, and that sum was never paid;

(5) in relation to the other 2 deals, CPL acquired the goods from MSL, which in turn acquired the goods from AWL. AWL set off its VAT output tax liability in respect of the supplies to MSL against VAT input tax in respect of goods acquired from Fair;

(6) Fair was a fraudulent trader – it failed to submit any VAT returns at all and was de-registered for VAT as a missing trader on 2 March 2016. On 16 December 2016, Fair was assessed to undeclared VAT output tax of £2,238, 802.00 in respect of the VAT period 01/16, corresponding to the period in which it traded with AWL, and that sum was never paid; and

(7) CPL engaged the services of Mr Weeks between August 2015 and March 2016, following the resignation of Mr Weeks as a director of XGC. XGC was a supplier to the Appellant in several of the deals which are the subject of the appeal and, in each case, the Appellant has accepted that the relevant deal was connected with MTIC fraud. In addition, Mr Weeks was involved in 3 of the historic transactions between XGC and the Appellant which are alleged by the Respondents to be connected with MTIC fraud – see paragraph 158 below. Prior to his engagements with XGC and CPL, Mr Weeks had also been engaged by another company, ATPL, in relation to transactions connected with the fraudulent evasion of VAT – see the letter described in paragraph 78(3) above.

154. On the basis of the above, we conclude that, on the balance of probabilities, all 4 of the historic transactions with CPL were connected with MTIC fraud.

PLC

155. In relation to the historic transactions with PLC, the facts are as follows:

(1) PLC entered into 52 deals with the Appellant between May 2013 and July 2016;

(2) in respect of those deals, PLC set off the VAT output tax due in respect of its supply of goods to the Appellant either against VAT input tax on the purchase of goods which could be traced back to the fraudulent evasion of VAT or against VAT input tax on purchases of goods which it had fraudulently purported to make but which in fact had not occurred. In particular:

(a) in VAT period 08/13:

(i) PLC entered into 3 deals with the Appellant where, once one converts the purchase and sale prices of the relevant goods into the same currency, PLC made a loss. Moreover, in one of the deals, the goods in question went from L&A in the Netherlands – which held the goods on behalf of PLC’s supplier – to GFS in the UK – who held the goods on behalf of PLC and then the Appellant – before being moved back to L&A to hold on behalf of the Appellant’s customer all in approximately 24 hours; and

(ii) PLC claimed to set off the VAT output tax due in respect of the above supplies to the Appellant against VAT input tax on a purchase of goods from Renderworks Animation Limited (“Renderworks”) which PLC had fraudulently purported to make but which in fact did not occur;

(b) in VAT period 11/13:

(i) PLC again made a loss on 4 of the 7 deals into which it entered with the Appellant in that VAT period;

(ii) some the goods which were the subject of those deals moved from L&A to GFS and were in GFS for less than 6 hours before being moved

back to L&A. In addition, the Appellant paid the full purchase price for some of the goods to PLC while the goods were still held in L&A on behalf of PLC's supplier and had yet to be inspected;

(iii) within a matter of days, the Appellant sold 800 PlayStation 3 consoles which it had acquired from PLC to its customer ATC and ATC sold consoles of the same specification to PLC so that the goods moved in a circle in a short time frame; and

(iv) in 2 of the deals, the goods supplied to the Appellant by PLC were acquired by PLC from a company called Renderworks Animation Pace to Pace Limited ("Render"), the successor company to Renderworks. Render was a fraudulent trader. It was de-registered for VAT on 8 October 2013. Despite its de-registration for VAT, Render continued to make supplies to PLC after that which were purported to be taxable supplies. Render submitted 3 nil VAT returns prior to its final VAT period, when it declared a VAT output tax liability of £23,105.00 and failed to account for the VAT output tax in question;

(c) in each of VAT periods 02/15, 05/15 and 08/15, PLC claimed to set off the VAT output tax due in respect of its supply to the Appellant against VAT input tax on a purchase of goods from CMC Global Trading Limited which PLC had fraudulently purported to make but which did not actually occur;

(d) on numerous occasions, PLC claimed to set off the VAT output tax due in respect of its supply to the Appellant against VAT input tax on a purported purchase of goods which would then be the subject of a credit note in the following month due to the non-arrival of the goods; and

(e) the deals often bore the hallmarks of contrivance in that, inter alia, on various occasions:

(i) PLC, or another company in the deal chain which was also owned by Mr Chhiber, sold the goods at a significant loss;

(ii) the goods were in the UK for only a matter of hours and sent back to the freight company from which they had originated;

(iii) the Appellant paid for the goods before they were in the UK or had been inspected by the Appellant;

(iv) there were inconsistencies in the deal paperwork;

(v) there were deal chains where companies associated with Mr Chhiber traded with one another; and

(vi) PLC purported to make a VAT input tax-bearing purchase from a trader notwithstanding that it had been told that the trader had been de-registered for VAT;

(3) PLC regularly entered into transactions which were connected with MTIC fraud. For example:

(a) between 2006 and 2012, the Respondents issued 5 letters to PLC warning it of the fraudulent evasion of VAT in its deal chains;

(b) in *Devi Communications Limited v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKFTT 216 (TC), the First-tier Tribunal held that the Respondents were right to deny PLC the right to deduct £321,402.00 of VAT

input tax in the VAT period 05/07 on the basis that PLC knew that the relevant purchase was connected with MTIC fraud;

(c) in *Option NTC Limited v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 768 (TC), it was common ground that PLC had acted as a contra-trader in a fraudulent deal chain in each of VAT periods 06/06 and 07/06;

(d) in *GSM Export (UK) Limited (in administration) and another v The Commissioners for Her Majesty's Revenue and Customs* [2012] UKFTT 744 (TC), it was common ground that purchases made by the appellant from PLC in May and July 2006 were connected with MTIC fraud; and

(e) in *Digital International Solutions Limited v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKFTT 111 (TC), the First-tier Tribunal held that a company of which Mr Chhiber was at one stage company secretary and which was run by members of his family had entered into 30 deals with PLC in the VAT period 06/06, 07/06 and 08/06 which were connected with MTIC fraud. In the course of its decision, the First-tier Tribunal held that Mr Chhiber was aware of the fact that the business of PLC was connected with MTIC fraud and that Mr Chhiber had attempted to deceive the Tribunal in the course of giving his evidence (see paragraphs [154] to [156]);

(4) in respect of the VAT periods 11/05, 08/13, 02/15 and 08/15, and again in relation to the deal chains which are the subject of the appeal, PLC was denied the right to deduct VAT input tax on the basis that goods which it had purportedly purchased had not been supplied and, in the case of the assessments in respect of the denied VAT input tax in respect of the VAT periods 08/13, 02/15 and 08/15, those assessments remain unpaid;

(5) in respect of the VAT periods 11/13, 02/14 and 05/14, PLC was assessed to VAT output tax for providing insufficient evidence of purported exports and those assessments remain unpaid;

(6) on 8 June 2010, Mr Chhiber was disqualified as a director for 4 years in respect of his actions as a director of another company, IC Distributions Limited, in failing to provide sufficient evidence of purported exports; and

(7) the Appellant has accepted that, in relation to the deal chains which are the subject of the appeal, the purchases which it made from PLC were connected with MTIC fraud.

156. On the basis of the above, although the evidence with which we have been provided has been presented in a form which means that we are unable to reach the conclusion urged on us by the Respondents to the effect that all 52 of the historic transactions with PLC were connected with MTIC fraud, we consider that, on the balance of probabilities, a significant number of the 52 historic transactions with PLC were so connected.

157. In passing, we would note that, in the light of the matters described in paragraph 155(3) above, we find it surprising, to say the least, that the note prepared by the Respondents of their meeting with the Appellant on 15 November 2013 records that the Respondents had conducted VAT verification of PLC on the previous day and that all was "satisfactory". Whilst the only relevant issue in relation to the historic transactions is whether or not they were connected with MTIC fraud, as opposed to whether or not the Appellant knew or should have known of that fact, it appears to us that, as at 15 November 2013, the Respondents must have had ample evidence that the VAT position of PLC was far from "satisfactory".

XGC

158. In relation to the historic transactions with XGC, the facts are as follows:

- (1) XGC entered into 4 deals with the Appellant between 19 December 2014 and 27 January 2016;
- (2) in relation to 1 of the 4 deals, as we have already stated in paragraphs 145 and 146 above, due to the misidentification of the relevant defaulting trader in the amended SOC as a consequence of an error in the first witness statement of Mr Bycroft, the Respondents have not satisfied us that the relevant deal was connected with MTIC fraud;
- (3) in relation to the second of the 4 deals, the goods were acquired by XGC from:
 - (a) a company called Infinity Direct UK Limited, which in turn acquired the goods from a company called BLM Distributors Limited (“BLM”). BLM was a fraudulent trader – it fraudulently failed to account for the VAT output tax in respect of those sales; and
 - (b) a company called Global SFX Limited (“SFX”), which in turn acquired the goods from a company called Presence Networks Limited (“PNL”), which in turn acquired the goods from a company called TLP Networks Limited (“TLP”). Given that the VAT output tax which Fast Away failed to declare – see paragraph 151(7) above – included VAT output tax in respect of sales to TLP - we consider that, on the balance of probabilities, the purchase by the Appellant of the goods which XGC acquired by way of SFX, PNL and TLP were connected with the fraudulent evasion of VAT; and
- (4) in relation to the other 2 deals, although the entities above XGC in the deal chains have not been traced, given:
 - (a) that the Appellant has accepted that, in relation to the deal chains which are the subject of the appeal, the purchases which it made from XGC were connected with MTIC fraud;
 - (b) the engagement of Mr Weeks by both XGC and CPL;
 - (c) the terms of the letter described in paragraph 78(3) above, in which Mr Weeks was involved in acting for another company, ATPL, in relation to transactions connected with MTIC fraud;
 - (d) that, between December 2014 and September 2016, XGC was issued with 14 letters relating to a connection with MTIC fraud in its deal chains and the VAT losses in those deal chains amounted to £3,059,000.00; and
 - (e) XGC was compulsorily de-registered for VAT,

we consider that, on the balance of probabilities, those 2 deals were also connected with MTIC fraud.

159. On the basis of the above, we conclude that, on the balance of probabilities, 3 of the 4 historic transactions with XGC were connected with MTIC fraud.

Conclusion in relation to the historic transactions

160. In the light of the evidence set out above, we have concluded that the connection with MTIC fraud which the Appellant accepts existed in relation to the deals which are the subject of the appeal also existed in relation to a significant number of the 72 historic transactions

into which the Appellant entered in VAT periods preceding the VAT periods to which the appeal relates.

THE PARTIES' SUBMISSIONS

The Respondents' submissions

161. Mr Hayhurst submitted that, in the light of the facts set out above, the only conceivable explanation was that the Appellant knew that all 16 of the deals which are the subject of the appeal were part of an orchestrated scheme to defraud them. He said that that was the case given:

- (1) the number of deals implemented by the Appellant which were connected with MTIC fraud. It was implausible that the Appellant could have entered into so many deals which were connected with the fraudulent evasion of VAT – the 16 deals which were the subject of the appeal and the historic transactions – and yet remained unaware of that fact;
- (2) that, if the Appellant were to have been an innocent dupe, then, in order for the scheme to work, both the Appellant's supplier and the Appellant's customer would have needed to approach the Appellant at the same time about the same numbers and specifications of goods. Indeed, given that Mr Browne's evidence was that he had approached the customers as opposed to being approached by the customers, it was even more implausible that the Appellant could be seen as an innocent dupe;
- (3) the Appellant's significant role in the deal chains, which meant that it would have made no sense for the organisers of the fraud to have kept the Appellant in the dark about the fraud. The fraud could continue only if the Respondents made the VAT input tax repayment. If the Appellant were to be a free agent, then:
 - (a) it might well have been able to frustrate the scheme by seeking to source the goods from an alternative supplier or seeking to sell the goods to an alternative customer; or
 - (b) it might well have found out about the fraud or become suspicious that there was a fraud and, in either case, alerted the authorities.

There was no reason why the organisers of the fraud would have taken a chance on using an innocent conduit to play the Appellant's role when there were so many other entities in the chain which clearly knew about the fraud and could have done so;

(4) the fact that the Appellant always made the largest mark-up of any of the entities involved in the deal chains, which was consistent with the fact that it knew that its role in the deal chain – as broker and therefore responsible for obtaining the repayment of the VAT input tax – carried the highest risk commercially. The size of the mark-up made by the Appellant in each deal chain, relative to the mark-ups made by the other entities in the relevant deal chain, suggested that the entities above the Appellant in each deal chain were repeatedly failing to identify the best price at which they could source the goods or the best price at which they could realise the goods. That was implausible. In addition, Mr Hayhurst pointed to two historic transactions in consoles in November 2013 in which the Appellant's mark-up was only 1.73%. He said that, in those deals, which involved the Appellant's selling to a counterparty belonging in the UK – so that the Appellant was acting as a buffer and not as a broker in the transaction chain – the Appellant's different (and less risky) role had been reflected in the lower mark-up which it made;

(5) the speed at which the transactions comprising each deal chain took place;

(6) the fact that, on every occasion that the Appellant acquired goods from GLS, it sold those goods to ACLM, on every occasion that the Appellant acquired goods from XGC, it sold those goods to GECX, and, on every occasion that the Appellant acquired goods from PLC, it sold those goods to Inco Mobile;

(7) the fact that individuals involved in the deals such as Mr Weeks, Mr Hussain and Mr Chhiber were associated with previous MTIC fraud chains;

(8) the trading model, which was not consistent with rational commerce. For example:

(a) in each of the deal chains, the quantity and specification of the goods which the Appellant's supplier made available to the Appellant always matched exactly the quantity and specification of the goods which the Appellant's customer wished to acquire. The Appellant never had to buy from more than one supplier to satisfy a customer or to sell the goods which it had acquired from a supplier to more than one customer;

(b) the deals always involved back-to-back transactions – it was never the case that goods were purchased and held and then sold on demand;

(c) the deal chains involved customers in the EU repeatedly sourcing goods with an EU specification from the Appellant in the UK;

(d) the parties to the deal chains repeatedly used the same freight handlers – GFS in the UK and L&A and DL Freight in the Netherlands;

(e) the deal documentation was raised in the space of the same day;

(f) the deal documentation was inadequate. For example:

(i) there were never any written contracts;

(ii) the Appellant's standard trading terms and conditions were relevant only to its relationship with its customers and not to its relationship with its suppliers; and

(iii) the purchase orders, pro forma invoices and sales invoices did not deal adequately, or at all, with key commercial terms such as:

(A) when title to the goods passed;

(B) the precise specification of the goods (such as whether the goods were new or used, whether the goods had an EU or UK specification, the colour of the goods etc);

(C) the terms of payment;

(D) whether the goods were insured when the Appellant was on risk in relation to them;

(E) who was responsible for the cost of transporting the goods; and

(F) when the goods could be returned;

(g) the reality of the deal specifics often did not match the terms of the purchase orders, pro forma invoices and sales invoices. For example, the invoices of both XGC and PLC provided that the relevant goods remained the supplier's property until the Appellant had paid in full for the goods but the Appellant routinely shipped the goods to its customer outside the UK before making payment to the relevant supplier;

- (h) the Appellant had no insurance for the goods at the times when the Appellant was on risk in relation to them;
- (i) the Appellant had taken insufficient care over inspecting the goods;
- (j) none of the goods was ever returned and there were no reports of damaged, missing or misdescribed goods;
- (k) the Appellant added no value to the goods. Instead, it simply purchased and sold the goods on a back-to-back basis, often without seeing the goods or coming into possession of the goods;
- (l) on a number of occasions:
 - (i) the Appellant paid for goods before the goods had been inspected on behalf of the Appellant; and
 - (ii) the Appellant was allowed by its supplier to ship goods to the Appellant's customer outside the UK before the Appellant had paid the supplier for the goods,

and that sort of unregulated trust was commercially irrational, particularly given that, in some cases, the relationship between the Appellant and its supplier was not of long-standing;

(m) on a number of occasions, the Appellant's customer was prepared to pay for the goods in their entirety before the goods had been inspected on behalf of the customer and therefore before the customer had obtained title to the goods and that sort of unregulated trust was commercially irrational, particularly given that, in some cases, the relationship between the Appellant and its customer was not of long-standing;

(n) none of the Appellant's suppliers was a manufacturer and none of the Appellant's customers was a retailer, which meant that, even if the Appellant had no knowledge of the identities of the entities in each deal chain apart from its own supplier and its own customer, it must have known that there were at least 5 parties to each deal chain. Whilst a deal chain of that length might occur accidentally as a result of market failure, here it was occurring systematically in each of the 16 deal chains and the historic transactions; and

- (o) there was no evidence that the Appellant:
 - (i) had sought to source the goods for its customer directly from another EU member state; or
 - (ii) had approached its supplier to transport the goods directly from the EU source warehouse to its customer's EU destination warehouse,

so as to avoid the need for the goods to transit through the UK;

(9) the significant proportion which the VAT input tax incurred in the deals constituted of the aggregate VAT input tax incurred by the Appellant in the relevant VAT periods on purchases of goods for re-sale - 98.95% in the VAT period 06/16 and 99.37% in the VAT period 09/16; and

(10) that Messrs Browne and Palmer were well aware of the risk of MTIC fraud in the sector - both as a result of their past experiences in working for other market players and through their numerous interactions with the Respondents while working for the Appellant - and yet, despite being so aware, had failed to take adequate steps to

minimise the prospects of their becoming involved in deals connected with MTIC fraud.

162. Mr Hayhurst went on to submit that, even if, contrary to his primary submission, we were to determine that the Appellant (through its representatives) did not know that the deals in question were connected with MTIC fraud, then that was something which it should have known. Applying the principles set out in our summary of the relevant case law in paragraph 103 above, on the basis of the facts and circumstances which were known to the Appellant's representatives or which would have been known to the Appellant's representatives if they had conducted the appropriate DD, the only reasonable explanation for the circumstances in which the relevant purchases were made was that the relevant purchases were so connected.

163. Mr Hayhurst elaborated on that submission as follows:

- (1) a reasonable trader in the position of the Appellant and operating in the market in question would have wanted to take rigorous steps to satisfy itself that:
 - (a) its suppliers were entities of substance which would be able to satisfy the orders placed with the Appellant by its customers;
 - (b) its customers were entities of substance which would be able to pay for the goods which they were ordering;
 - (c) both its suppliers and its customers were legitimate companies operating in the market for commercial reasons;
 - (d) its freight handlers were legitimate companies operating in the market for commercial reasons and viable and reliable concerns; and
 - (e) it knew the serial numbers of the goods in which it was trading; and
- (2) the Appellant's DD fell well short of that standard in that:
 - (a) little or no attempt had been made to verify the credit-standing of the Appellant's counterparties or to obtain financial or accounting information on them despite the clear recommendations to that effect made by the Respondents' Officers to Messrs Browne and Palmer at their regular meetings;
 - (b) negative indicators in the information provided by a counterparty (or the non-availability of information) were routinely ignored;
 - (c) despite being repeatedly advised to do so, the Appellant had not done Wigan checks on any of the counterparties in the 16 deals (although it did do Wigan checks on some of its other counterparties). As noted by Mr Bycroft:
 - (i) a VIES check merely confirmed that the relevant trader's VAT registration number was as the relevant trader had asserted it to be whereas a Wigan check involving the submission of a letter of introduction signed by a director of the trader, a copy of the trader's VAT certificate and certificate of incorporation and a headed letter with the trader's address on it and, if any of that information was found to differ from the Respondents' records, then the Respondents would inform the person carrying out the check that that was the case; and
 - (ii) in addition, if a Wigan check was carried out and the trader which was the subject of the check was subsequently de-registered, then the Respondents would inform the person who had carried out the check that that was the case.

A Wigan check was therefore a much more comprehensive check and that was why the Respondents had repeatedly recommended its use to the Appellant;

(d) some of the counterparties had not provided the names of any referees and there was no evidence of the Appellant's taking up references from any referees to whom it was directed by a counterparty;

(e) there was no evidence of the Appellant's doing searches at Companies House in relation to its counterparties or seeking updated information in relation to the business activities of its counterparties or the identities of their directors;

(f) there was no evidence of the Appellant's having conducted its own research into whether or not its counterparties had previously been involved in transactions connected with MTIC fraud. Had it done so, it would have discovered that PLC had featured in a number of prior Tribunal decisions in that regard;

(g) there was no clear audit trail to show when information which had been obtained by the Appellant in relation to its counterparties had first been provided. Many of the DD documents were undated and the GLS bank statement provided to the Appellant had been obtained only after the Appellant had concluded 4 of the deals which were the subject of the appeal;

(h) there was no evidence that the Appellant had asked its freight forwarders for information which might have alerted it to the possibility of MTIC fraud in the deal chains – for example, how many times the goods had changed hands while held at the freight forwarder or whether the goods had been received by the freight forwarder from an EU supplier; and

(i) the Appellant had taken insufficient care over checking the serial numbers of the goods in which it was trading. Knowledge of the serial numbers in each case would have been helpful commercially in terms of making an insurance claim or dealing with any returns but it was also important from the DD perspective because it would have enabled the Appellant to check the validity of the goods with the manufacturer or to discover whether it had previously dealt in the relevant goods and therefore enabled the Appellant to identify possible fraud.

The Appellant's submissions

164. In reply, Mr Carey made the following points:

(1) the Respondents' case in relation to the trading model for the relevant transactions was based on the views of Officer Bycraft, who had no experience of trading in the relevant market and was therefore poorly-placed to comment on the extent to which the deals in question had been conducted on a commercial basis;

(2) the evidence of all three representatives of the Appellant – who were highly experienced in the relevant market - was that a number of the features on which the Respondents were relying to support their proposition that the deals had not been conducted on a commercial basis did not reflect market practice. In particular:

(a) the three representatives had testified that the market was fast-moving and that any attempt to document a deal with written contracts would have been doomed to failure. The relevant counterparty would simply have gone elsewhere. Moreover, the evidence provided had shown that the market involved a relatively small number of players and that, reputationally, it made commercial sense for each party to abide by the terms of any oral agreement which it had reached in relation to a trade;

(b) the Appellant's witnesses had explained the commercial reasons for the shift in emphasis of the Appellant's business – the prevalence of digital downloading had meant that a change was required in the nature of the assets in which the Appellant dealt;

(c) the mark-ups made by the Appellant in relation to the deal chains which were the subject of the appeal were not excessive. They were well within the range of mark-ups which the Appellant made across its business as a whole. Moreover, the Appellant was not aware of the mark-ups made by the other entities which were party to each deal chain. In relation to each deal chain, it knew only its own supplier and its own customer and, even in relation to those entities, it had no visibility in relation to the mark ups which they were making;

(d) there was no reason why the Appellant needed somehow to alter the goods in order to justify its existence in the supply chain. That was not how the wholesale market operated. A participant in a deal chain could justify its profit in a number of ways – for example, because it had high-quality relationships with potential customers and suppliers, because it had access to good market information or because it provided swift and efficient service in terms of quality of products and logistics;

(e) the use of freight forwarders to hold goods instead of taking the goods into the Appellant's own warehouse was perfectly normal in the industry. For example, it enabled a trader to leave the goods in which it was dealing outside the UK instead of bringing the goods into the UK and then sending the goods out again. In addition, in the present case, it made sense for the hardware in question not to be held in the Appellant's own warehouse because, unlike the software in which the Appellant dealt, it was bulky and would take up space. Thus, the fact that the Appellant held the software in which it dealt in its own warehouse but held the hardware in which it dealt in a freight forwarder was not an indication of fraud;

(f) the existence of back-to-back transactions and “ship on hold” in a dealing chain were perfectly orthodox and were also not indications of fraud. They enabled a trader to make a profit out of dealing in goods without running the risk of being stuck with items which it could not sell and without expending significant amounts of capital;

(g) those cases where goods had been released to the Appellant's customer before the Appellant had paid its supplier and therefore before title had left the Appellant's supplier could be explained by reference to the point made in paragraph 164(2)(a) above. In other words, the representatives of each entity participating in the market either had a long-standing commercial relationship or knew that they could rely on the relevant counterparty to do what the counterparty had promised to do because it would have been commercial suicide to act in any other way. This explained why the Appellant's supplier in some cases would have been prepared to allow the Appellant to ship goods before the Appellant had paid for them;

(h) a similar point could be made in relation to those cases where the Appellant's customer had been prepared to pay for goods before inspecting them or even before the Appellant had acquired title to the goods in question. Mr Browne had explained in the course of providing his oral testimony that it was not uncommon for parties in the market to pay for goods before delivery and Mr

Palmer had agreed, saying that it was not unusual for a trader to be paid by its customer before it paid its supplier and for a customer to pay for goods before its supplier had title to the goods. Mr Paddon had said the same thing in an email of 28 February 2017 to Officer Monk. In that email, Mr Paddon had noted that pre-payment by a customer was not unusual and was “dependent on several factors like the value of the transaction and the customer and risk involved”;

(i) it was common practice for a UK trader to buy EU-specification goods in the UK and then sell those goods to an EU customer. Mr Browne had said that he did not regard the fact that the goods in a number of the deal chains had an EU specification or that prospective customers belonging in the EU were looking to source EU specification goods from the UK were grounds for suspicion. In the first place, the fact that goods had an EU specification did not of itself mean that the goods had previously been imported to the UK from the EU by an entity which was higher up the deal chain. For instance, in many cases, goods imported into the UK from Dubai commonly had an EU specification. More significantly, he did not think that it was at all uncommon in the market for goods to move from the EU into the UK and then back out to the EU;

(j) the goods were adequately insured to the extent commercially necessary – which is to say that they were insured by the relevant freight forwarder whilst in transit and did not need to be insured whilst they were held safely and securely at the freight forwarder’s premises. In any event, it was unclear how the presence or absence of insurance was relevant to the question of whether or not the Appellant knew or should have known of the connection between the relevant purchases and MTIC fraud;

(k) there was no reason why goods could not be the subject of legitimate commercial transactions between two wholesalers – there was no requirement for a wholesaler either to purchase the relevant goods from a manufacturer or to sell the relevant goods to a retailer; and

(l) as regards serial numbers:

(i) from the commercial perspective, there was no reason why the Appellant should not have relied on serial numbers provided by its suppliers (as opposed to getting the serial numbers checked by its freight forwarder); and

(ii) in relation to those transactions where the Appellant had failed to obtain serial numbers, the Respondents had not shown that obtaining the serial numbers would have enabled the Appellant to identify the existence of MTIC fraud in the supply chain;

(3) in short, the Respondents were guilty of simply applying what they perceived to be objective indicators that the Appellant knew or should have known of the connection with fraud and applying them slavishly without regard to commercial reality;

(4) in the light of the evidence in relation to the market provided by the Appellant’s 3 witnesses, we should draw an adverse inference from the fact that the Respondents had failed to adduce any expert evidence in relation to the operation of the market – see *Prest v Prest* [2013] 2 AC 415 at paragraph [44] and *Wisniewski v Central Manchester Health Authority* [1998] PIQR at 324. The Appellant had provided witnesses who had testified as to the operation of the market and we should draw an adverse inference

from the fact that the Respondents had not produced their own witnesses to testify to the contrary or provided a satisfactory explanation as to why they had not done so;

(5) the Appellant had been subject to the Respondents' continuous monitoring project between August 2013 and May 2014 and the Respondents had not raised any concerns with the Appellant over that period in relation to the Appellant's counterparties or the manner in which the Appellant was carrying out the DD in relation to them. The fact that the Appellant was removed from the continuous monitoring project provided comfort to the Appellant that it was acting appropriately in relation to the transactions into which it entered and the DD which it was carrying out in relation to its counterparties;

(6) the blame for the failure by the Appellant to be aware of the connection between its transactions and MTIC fraud was instead to be laid at the Respondents' door. The Respondents should have alerted the Appellant to their concerns at a much earlier stage. Instead, they had allowed the Appellant to believe that its deal chains were clean. For instance, although the Respondents were now alleging that PLC had been a fraudster since 2005, they had signed off on deal chains involving PLC both at the end of 2013 and then again in May 2015 and allowed the Appellant to reclaim VAT input tax incurred in those deal chains. In short, as Mr Paddon had said in his oral testimony:

(a) he saw the relationship between the Appellant and the Respondents as one of partnership in which the Respondents were there to help the Appellant to protect its business and the Appellant could help to protect tax revenues. They were partners in the fight against fraud, in much the same way as Batman and Robin;

(b) in that regard, the Respondents had access to considerably more information than did the Appellant and the Appellant was entitled to rely on the Respondents to keep it informed if it appeared to be entering into transactions with the wrong people; and

(c) given that that was the case, the Respondents in this case had failed in their duty of care to provide the Appellant with information which might have enabled the Appellant to avoid entering into the transactions in question;

(7) there was no reason why the Appellant should have been aware that PLC was a contra-trader or a fraudulent defaulter. Mr Browne had known Mr Chhiber for approximately 6 years by the time of the transactions which were the subject of the appeal and had visited PLC's premises when trading commenced between the Appellant and PLC. Moreover, the Respondents had been provided with the DD undertaken by Mr Browne prior to the Appellant's entering into the transactions with PLC which were the subject of the appeal and had not expressed any criticism of that DD;

(8) as for GLS, before entering into any transactions with GLS, Mr Browne had contacted GFS to confirm the legitimacy of GLS, had met GLS's director on many occasions (including at GLS's premises) and had obtained the appropriate DD documentation;

(9) in relation to XGC, Mr Browne had known Mr Weeks for a number of years, meeting Mr Weeks at CEBIT conferences while Mr Weeks still worked for Vogue Distribution. Mr Browne's evidence was that he recalled speaking to an employee of XGC who was responsible for DD, had obtained various DD documents and had conducted a VIES check on the company. Moreover, the Appellant had been dealing

with XGC for approximately 18 months prior to the VAT periods to which the appeal related and had submitted DD documentation to the Respondents in that time and the Respondents had not raised any queries with the Appellant in relation to the company;

(10) in relation to each of ACLM, GECX and Inco Mobile, before entering into transactions with the relevant company, Mr Browne had met the principal individual associated with the company – Mr Montilla van der Zee in the case of ACLM, Mr Totolis in the case of GECX and Mr Vermin in the case of Inco Mobile - at a CEBIT conference and had built on the relationship thereafter by way of emails and Skype. He had also obtained the appropriate DD documentation;

(11) there was no reason why the Appellant should have conducted credit checks on its counterparties because there was no reason for credit checks from the commercial perspective and, as Mr Paddon had pointed out, doing a credit check would not have identified the existence of MTIC fraud in the relevant deal chain in any event. A credit check merely informed the person carrying out the check about the creditworthiness of its counterparty at a particular moment in time. It did not inform the person carrying out the check whether its counterparty – or entities elsewhere in the supply chain – were participating in fraud. Mr Browne had agreed, saying that a lack of funds revealed in a counterparty's bank statement would not cause him any concerns because:

(a) it was very common for companies to have more than one bank account; and

(b) in any event, the main reason for asking for a copy of a bank statement was to confirm the identity of the person to which the statement related and not that person's creditworthiness. Indeed, it was not uncommon for a person providing a bank statement to redact the entries in the statement before doing so.

As regards the GLS bank statement in particular, Mr Paddon had said that it covered only a small moment in time and was no guide as to GLS's level of revenues outside the period covered by the statement;

(12) there was no reason why Messrs Browne and Palmer should have deduced from what was said to them at the relevant time by the Respondents' Officers that Wigan checks were any better than VIES checks in terms of detecting a connection with MTIC fraud in the deal chain. Indeed, at the meeting between the parties on 8 July 2015, the Respondents' Officers had recommended that VIES checks be carried out in addition to Wigan checks and had explained that Wigan checks merely confirmed whether a counterparty's VAT registration number was valid. In addition, the Respondents had advanced no cogent reason at the hearing why a VIES check was not as good as a Wigan check in terms of detecting a connection with MTIC fraud in the deal chain. Finally, the evidence showed that the Respondents' Officers frequently used VIES checks themselves instead of carrying out Wigan checks;

(13) it would have made no commercial sense for the Appellant to enter into deals which it knew were connected with MTIC fraud because that would have entailed its running the risk of having its claim for the repayment of VAT input tax denied. Indeed, on those occasions where the Appellant suspected that a purchase might be so connected, it did not enter into the relevant purchase;

(14) although ASL had been cited as a referee by GLS on its account-opening form with the Appellant and ASL was the contra-trader which supplied GLS in the deal chains pursuant to which the Appellant had purchased from GLS, there was no reason

why Mr Browne should have known either that ASL was a contra-trader or that ASL was the supplier to GLS in the relevant deal chain;

(15) in terms of the percentage which the deals that were the subject of the appeal represented of the deals done by the Appellant in the relevant VAT periods, it was misleading to consider the deals separately from those purchases of goods made by the Appellant which did not give rise to VAT input tax. So far as the Appellant was concerned, it was trading in goods in the market and did not distinguish between purchases of goods which were subject to VAT input tax and purchases of goods which were not; and

(16) even if there was an overall orchestrated scheme to defraud the Respondents, there was no reason why the Appellant needed to be a knowing participant in that scheme. Indeed, it would have been better for the participants in the scheme if the Appellant were to be ignorant of the scheme's existence. In arguing that there was an overall scheme to defraud in this case, the Respondents had made much of the fact that, in the deal chains involving PLC as supplier to the Appellant, not only had the goods in question been acquired by PLC from Trading Point, owned by Mr Chhiber (the owner of PLC), but also that the goods in question had been sold by the Appellant's customer, Inco Mobile, to Tharis, another company owned by Mr Chhiber. Thus, the same goods had passed through three companies owned by Mr Chhiber within the relevant deal chain. However, if the Appellant had been party to the overall scheme to defraud, then it would not have been necessary for Inco Mobile to have been inserted between the Appellant and Tharis in the relevant deal chain. The Appellant would simply have sold directly to Tharis. Thus, if there was such an overall scheme to defraud, the Appellant was an innocent dupe despite the steps which it had taken to avoid participating in deals which were connected with MTIC fraud.

The Respondents' reply

165. In relation to the point made by Mr Carey in paragraph 164(4) above, Mr Hayhurst referred us to the decision of Judge Berner in the Upper Tribunal in an application for permission to appeal by the taxpayer in *Advent Worldwide Distribution Limited (in Administration) v The Commissioners for Her Majesty's Revenue and Customs* PTA/597/2014 ("*Advent*"). In *Advent*, at paragraphs [26] and [27], Judge Berner, referring to the decision of the Supreme Court in *Healthcare at Home Limited v Common Services Agency* [2014] 4 All ER 210 at paragraphs [1] to [4] and the decision of the Upper Tribunal in *S&I Electrical Plc v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 0162 (TCC) ("*S&I*") at paragraphs [52] and [60] to [65] held that, in a case where the First-tier Tribunal was considering whether a taxpayer should have known that its transactions were connected with MTIC fraud, there was no need for it to consider evidence of the normal characteristics of legitimate trade in the market in question. Instead, it was merely necessary for the relevant First-tier Tribunal to consider whether a reasonable businessman, in the knowledge of the facts which the First-tier Tribunal had found on the basis of the evidence presented to it, would have concluded that the taxpayer ought to have known of that connection. As the Upper Tribunal put it in *S&I* at paragraph [65]:

"in our judgment a reasonable businessman with ordinary competence is not so egregious or specialist a variant of the anthropomorphic conception of justice that the FTT needed evidence of the normal characteristics of legitimate trade in the grey mobile phone market, or any other expert evidence, in order fairly and justly to apply the required impersonal standard."

166. Mr Carey responded that, whilst he accepted that it was unnecessary for the Respondents to have to adduce evidence of the normal characteristics of legitimate trade in

the market in question in every case, it was necessary in this case because of the cogency of the evidence provided by the Appellant in relation to normal market practice.

167. In relation to the points made in paragraphs 164(5) and 164(6) above, Mr Hayhurst pointed out that, if the Appellant's representatives had taken comfort from the fact that the Appellant was removed from continuous monitoring in May 2014, then they presumably ought to have been concerned when the Appellant was put back onto continuous monitoring in May 2016, roughly mid-way through the deals which were the subject of the appeal. That should have caused them to consider whether their approach to DD was adequate. In any event, that was to miss the point. In every case, the onus was on the Appellant's representatives to satisfy themselves as to the DD process. They had been warned about the risks of potential MTIC fraud in the sector in which they were dealing and had been given advice and recommendations as to how they might avoid entering into deals which were connected with MTIC fraud. It was therefore not appropriate for the Appellant's representatives to allege that the Respondents should have done more to warn them about specific counterparties when they had done so little themselves.

168. In relation to the point made in paragraph 164(16) above, Mr Hayhurst pointed out that the involvement of Inco Mobile in the relevant chain had the benefit of disguising from the Respondents the extent to which Mr Chhiber's companies were involved in the relevant chain. That was a perfectly logical explanation for the inter-position of Inco Mobile in the deal chains. It therefore did not say anything about the state of the Appellant's knowledge of the overall scheme to defraud.

DISCUSSION

Did the Appellant know?

169. We agree with the Respondents that, on the balance of probabilities, Mr Browne knew that each of the 16 purchases which are the subject of the appeal were connected with MTIC fraud. We have reached that conclusion for the following reasons:

(1) we agree with the Respondents that the circumstances in which the deals occurred indicate the existence of an orchestrated VAT fraud. The fact that 2 of the deal chains – deals 9 and 10 – involved goods moving in a circle starting and ending with Polimax and that 3 of the deal chains – deals 11, 15 and 16 – involved the goods passing through 3 companies under the control of Mr Chhiber is indicative of that fact, as is the involvement of the same cast of characters in the various deals such as Mr Hussein, Mr Chhiber and Mr Weeks;

(2) we think that it stretches credulity to believe that it was unfortunate coincidence that the Appellant could have been involved in so many deal chains which were connected with MTIC fraud and which involved so many of the same players without being aware that that was the case;

(3) the Appellant played a critical role in the fraud given that, as broker, it was responsible for securing the repayment of VAT input tax which enabled the fraud to continue. That critical role was reflected in the mark-ups which the Appellant obtained in each deal chain relative to the mark-ups made by the other participants in the deal chain. In that regard, we see no relevance in the fact that the Appellant's mark-up in each of the deals which are the subject of the appeal was not excessive when considered in relation to the mark-ups made by the Appellant elsewhere in its business. That point is relevant only in relation to the question of whether the Appellant should have known of the connection with MTIC fraud in the event that it did not actually know. It is of no relevance to the question of whether the Appellant actually knew of that connection. In our view, of greater relevance to the question of whether it actually knew is the fact that

its mark-up was always the highest of the mark-ups made by the participants in each deal chain and the fact that, in the 2 historic transactions in consoles in November 2013 in which the Appellant was acting as a buffer and not as a broker, its mark-up was much lower than the mark-ups in the deals which we are presently considering;

(4) we agree with the Respondents that, given the pivotal role which was being played by the Appellant in the fraudulent deal chains, it would have made no sense for the orchestrators of the fraud to keep the Appellant in the dark about the fraud. If the Appellant were merely an innocent dupe, as it alleges, it might have discovered the existence of the scheme and alerted the authorities. Alternatively, it might innocently have frustrated the scheme by sourcing the relevant goods from an alternative supplier or selling the relevant goods to an alternative customer. We think that it is implausible that the orchestrators of the scheme would have been prepared to take that risk, particularly when there were so many other entities in the deal chain which were plainly aware of the fraud and could have played the role of broker. In this respect, we do not agree with Mr Carey that the inter-position of Inco Mobile between the Appellant and Tharis in the 3 deal chains in which the Appellant acquired from PLC suggests that the participants in the scheme wished to disguise the scheme from Appellant. On the contrary, we think that it shows only that the participants in the scheme wished to disguise the scheme from the Respondents. The fraud in question would have been obvious if, in each case, the Appellant had bought and sold the relevant goods from entities controlled by Mr Chhiber;

(5) the point made in paragraph 169(4) above about an innocent frustration of the fraudulent scheme by the Appellant leads on to what we consider to be the most significant point in the context of this question, which is why it is that, for each of the 16 deals, there was always the same matching customer for each supplier to the Appellant and why that matching customer bought precisely the same number and specification of goods as had been acquired by the Appellant from the relevant supplier. As we have already noted in our finding of fact in paragraph 52 above, we emphatically reject the explanation provided by Mr Browne that, on each occasion that he was offered goods by a particular supplier, he was able in a very short time frame to identify a customer and then negotiate and conclude a deal to offload precisely the same number and specification of goods onto that customer. In the first place, it is implausible that, in each case, Mr Browne happened to approach a customer who was willing to purchase all that Mr Browne was able to obtain. We think that it is much more likely that the customer in question was identified simultaneously with the related purchase. More significantly, any doubts that there might be on that score evaporate when one considers that, on each occasion that goods were purchased from GLS, the goods were sold to ACLM, on each occasion that goods were purchased from XGC, the goods were sold to GECX and, on each occasion that goods were purchased from PLC, the goods were sold to Inco Mobile. That recurring pattern, particularly when coupled with the fact that the goods in 5 of the deal chains moved in a circular fashion and that it would have been critical to that circularity for the Appellant to sell to the “right” customer, is utterly inconsistent with the proposition that Mr Browne acted freely and at his own initiative in locating prospective customers for the goods that he acquired from each supplier;

(6) the fact that the deals constituted such a significant portion of the VAT input tax-bearing purchases of goods made by the Appellant in the relevant VAT periods is also an indication of the Appellant’s knowledge of the connection with MTIC fraud. The VAT input tax incurred under the deals constituted 98.95% of the VAT input tax

incurred on purchases of goods made by the Appellant in the VAT period 06/16 and that figure rose to 99.37% in the VAT period 09/16. We are not persuaded by Mr Carey's submission that it is wrong to separate out the VAT input tax-bearing purchases from the non-VAT input tax-bearing purchases for that purpose on the basis that the Appellant would have seen no meaningful distinction between the different types of purchases in carrying on its trade. Instead, we think that it is significant that nearly all of the VAT input tax incurred by the Appellant on purchases of goods in the relevant VAT periods was incurred in deals which were connected with MTIC fraud; and

(7) we are also persuaded that the fact that no Wigan checks were carried out in relation to any of the counterparties in these deal chains is of some relevance in this regard. We say that because it is not as if the Appellant did not carry out any Wigan checks on other counterparties of the Appellant or even that Mr Browne himself did not carry out any of those checks. We think that the fact that no Wigan checks were carried out in relation to these counterparties tends to support the view that Mr Browne was aware of the connection between the Appellant's transactions with these counterparties and MTIC fraud. We accept that this point on its own is not a sufficient basis on which to found our conclusion that Mr Browne knew of the connection but it is certainly consistent with, and supportive of, that conclusion.

170. For the above reasons, we have concluded that the Appellant knew that each of the 16 purchases was connected with MTIC fraud and the appeal fails.

171. The conclusion which we have reached above is supported by a number of uncommercial features in the way in which the deal chains occurred.

172. In dealing with this subject, we should say at the outset that we accept that certain of the uncommercial features on which the Respondents seek to rely – such as the fact that the goods had an EU specification, the absence of formal written contracts and the way in which the deal documentation either did not deal with key commercial terms or did so in a way which was manifestly inconsistent with the actual deal specifics – are not evidence that the Appellant knew that its deals were connected with MTIC fraud.

173. As regards the EU specification of the goods, we are not convinced that this is in any way remarkable, given the nature of the market in which the Appellant was operating within the global economy and the size of the EU market within the global economy.

174. As regards the absence of formal written contracts, we entirely accept that, when it comes to dealing in goods of this nature in a fast-moving market, it makes no sense to ask for formal written contracts before entering into a deal. That would be utterly uncommercial.

175. Similarly, as regards the deal terms, we are inclined to accept that parties dealing in the market in question are unlikely to worry about the absence from the transaction documentation of provisions which deal with the key commercial terms of the deal or whether those provisions that have been written down accurately reflect the terms which have been orally agreed between the parties. As each of the Appellant's witnesses was at pains to explain, this is a small market where a participant's reputation is critical and therefore we can understand that, once the terms of a deal have been agreed orally, that will generally be the end of the matter even if there is nothing in writing to record that fact or the written terms contradict that which has orally been agreed. The fact that the market is small is also a perfectly reasonable explanation for why it operates on the basis of personal contacts and there is no need for a trader to advertise.

176. Having said that, even allowing for the degree of leeway which is suggested by the importance to each participant in the market of its reputation, there were some oddities in the deal chains which seem to us to be highly uncommercial. For instance:

(1) in deal 1, which was the first transaction which the Appellant had ever done with GLS, GLS agreed to allow the Appellant to ship goods worth €430,000.00 out of the UK to ACLM on 4 April 2016 without any written contractual provision as to title. The goods were released to ACLM and sold by ACLM to its customer on 6 April 2016 and yet ACLM did not complete payment to the Appellant and the Appellant did not complete payment to GLS until 7 April 2016;

(2) similarly, in deal 2, the Appellant did not pay GLS until 11 April 2016 but GLS allowed the Appellant to ship goods worth €267,624.00 out of the UK on 7 April 2016 and the goods to be released to the Appellant on 8 April 2016 and yet the Appellant did not complete payment to GLS until 11 April 2016;

(3) also in deal 2, ACLM paid €230,850.00 for the goods in full before any inspection had been carried out on its behalf – the inspection by L&A on 8 April 2016 was expressed to be conducted on behalf of the Appellant and not ACLM;

(4) in deals 15 and 16:

(a) Inco Mobile paid in full for all the goods by 18 July 2016 but none of the goods was released to Inco Mobile until 19 July 2016. Indeed, it was not until 19 July 2016 that GFS was instructed by PLC to release 697 of the units to the Appellant; and

(b) there is no evidence that L&A was aware that title to all the units remained with PLC during the period that L&A held the units from 14 July 2016 until it released the units to Inco Mobile on 19 July 2016;

(5) no attention was paid to the question of whether or not the goods in each deal were properly insured during the period that they were held at the Appellant's risk and we have found as a fact that they were not properly insured over that period;

(6) in many of the deals, no serial numbers were provided to the Appellant and those that were provided came from the relevant supplier and were not checked by the relevant freight forwarder on behalf of the Appellant. In addition, the Appellant did not maintain a master database so that it could ensure that the goods passing in any particular deal had not been the subject of a previous deal; and

(7) it was noticeable to us that, whereas Mr Browne testified that he would never seek to cut the Appellant's supplier out of a deal chain because "[if] we had made it our practice to undercut our potential trading partners ... we would have soon found ourselves blacklisted from the industry", Mr Palmer testified that "it would be commercial suicide to inform trading partners of who our customers and suppliers were. They would just start trading with them directly, cutting us out of the process completely". The only logical way to resolve that inconsistency is to conclude that, whereas Messrs Browne and Palmer might be sure that they would not themselves seek to bypass a supplier by going to that supplier's own supplier, they would not necessarily have the same degree of confidence that their own customers would always act in the same way. That would be a perfectly natural standpoint for any trader in the market in question and one which a reasonable businessman might well adopt.

So, if that is how the Appellant's representatives approached the issue of undercutting the Appellant's suppliers, one might expect the same approach to the issue to be

adopted by GLS. In other words, even if GLS itself would have considered that going behind one of its suppliers would be commercially inappropriate behaviour, one would expect GLS to be wary of revealing the name of its supplier to its customer. And yet GLS did not adopt that approach in this case. Instead, GLS chose to name ASL - the supplier to GLS in each of the first 7 deals which it did with the Appellant in the VAT period 06/16 - as one of its 2 referees in its account-opening form with the Appellant.

177. Whilst none of the points made in paragraph 176 above is sufficient in and of itself to reach the conclusion that the Appellant knew that the relevant deals were connected with MTIC fraud, they do tend to support that conclusion.

178. Finally in this regard, we should make it clear that the conclusion which we have reached on this issue is based solely on the matters described in paragraphs 169 to 176 above and before taking into account the connection with MTIC fraud in any of the historic transactions whose inclusion in the evidence for the hearing was the subject of such intense dispute between the parties. We decided to admit the evidence in relation to the historic transactions for the reasons noted in paragraphs 110 to 142 above and concluded, based on the evidence so admitted, that most, if not all, of the 72 historic transactions were also connected with MTIC fraud. The fact that so many transactions to which the Appellant was party were connected with MTIC fraud is also supportive of the conclusion which we have reached in relation to the 16 deals. It seems to us that the likelihood that the Appellant could have been unwittingly involved in so many transactions which were connected with MTIC fraud is vanishingly small.

Should the Appellant have known

Introduction

179. The conclusion we have reached in paragraphs 169 to 178 above is sufficient to dispose of the appeal.

180. However, for the sake of completeness, we have considered whether, on the assumption that the Appellant did not know that its purchases were connected with MTIC fraud, the Appellant should have known that that was the case.

181. The answer to that question is not as straightforward as the answer to the first question because of the high bar which has been laid down by the case law in this area. By that we mean that the prior case law requires that it is not sufficient that the facts and circumstances which were known to the Appellant (or which would have been known to the Appellant had it carried out the appropriate DD) should have suggested to the Appellant that, by each purchase:

- (1) it was running the risk that it might be taking part in a transaction connected with MTIC fraud; or
- (2) it was taking part in a transaction which was likely to have been connected with MTIC fraud.

182. Instead, those facts must be such that the only reasonable explanation for the circumstances in which each purchase was made was that it was connected with MTIC fraud (see paragraphs 103(4) and 103(5) above).

183. In seeking to answer this question in relation to the transactions which are the subject of the appeal, we would make the following preliminary general observations:

- (1) first, as we have already noted in paragraph 103(5) above, in approaching this question in the case of each purchase, we need to examine the totality of the evidence in relation to that purchase and not examine each factor in a piecemeal fashion. An item

of information which might not arouse suspicion when viewed in isolation might very well do so when considered in the light of other available items of information;

(2) secondly, and again as we have already noted in paragraph 103(5) above, in approaching this question in the case of each purchase, we need to take into account not only the facts and circumstances which were actually known to the Appellant but also the facts and circumstances which the Appellant would have known if it had deployed the means of knowledge which were available to it;

(3) thirdly, the standard to be applied in determining whether the Appellant should have known of the connection with MTIC fraud is that of the reasonable businessman with ordinary competence – see *Advent* and *S&I* (as mentioned in paragraph 165 above);

(4) fourthly, it follows from the above that the approach which we need to adopt in relation to this test is to consider in relation to each purchase what facts and circumstances Mr Browne, as the relevant representative of the Appellant, would have known or discovered had he acted as a reasonable businessman with ordinary competence. In that context, we think that a reasonable businessman with ordinary competence would have:

- (a) taken into account the warning signs described in the Respondents' published material and by the Respondents' Officers at the regular meetings which were held between the parties;
- (b) carried out the appropriate DD in relation to each counterparty;
- (c) taken all reasonable steps to follow up on the matters which emerged from that DD; and
- (d) considered all of the facts and circumstances in which the transactions took place.

In our view, the approach adopted by Mr Browne in this regard was woefully inadequate. Not only did he ignore the existence of the warning signs that were apparent – warning signs which he acknowledged at the hearing would now lead him to make further enquiries. He also failed to make the most basic of enquiries in relation to the Appellant's counterparties. In addition, there was not one occasion when Mr Browne, when confronted with information in relation to a purchase or a counterparty which ought to have persuaded him to make further enquiry into the position, went on to do so. This would have been surprising in and of itself in any event but, given that the Appellant was put back onto continuous monitoring during the VAT periods in question – which was surely an indication that the Respondents had concerns about the Appellant's supply chains – it is inexplicable. In short, based on our impression of Mr Browne as a witness in the proceedings, we do not think that he can fairly be said to have attained the standard of a reasonable businessman with ordinary competence in the manner in which he carried out the relevant deals;

(5) fifthly, despite Mr Carey's valiant attempt to persuade us to the contrary, we consider that the Respondents made it very clear to the Appellant's representatives that Wigan checks were a preferable form of DD to VIES checks. Consequently, if the Appellant's representatives formed the view that the two forms of checks were simply alternatives and of equal value in DD terms, we believe that that was not a reasonable conclusion for them to have reached. We say that because:

- (a) the notes of the meeting between the Appellant's representatives and Officers Penry and Gazsi on 5 September 2013 record that, after the Appellant's representatives had informed the Respondents' Officers that it checked its counterparties VAT registration details by making VIES checks, the Officers emphasized to the Appellant's representatives that they should in all cases do Wigan checks;
- (b) on 17 September 2013, Officer Penry wrote to the Appellant's representatives to explain how to go about making a Wigan check;
- (c) on 15 May 2014, Officer Penry wrote to the Appellant to say, inter alia, that the Appellant should continue to carry out Wigan checks and again described the process for making those checks;
- (d) the fact that the Appellant's representatives realised that Wigan checks were pre-eminent may be seen in the notes of the meeting between the Appellant's representatives and Officers Gazsi and Miller on 8 July 2015, which record that the Appellant's representatives said that they were undertaking Wigan checks on all suppliers and customers; and
- (e) Mr Browne accepted in giving his evidence at the hearing that the Appellant's representatives had been advised by the Respondents that Wigan checks should be made in all cases.

In the circumstances, the fact that the notes of the meeting on 8 July 2015 also record that the Respondents recommended doing VIES checks in addition to Wigan checks and reminded the Appellant's representatives of the limitations of Wigan checks is neither here nor there. We think that, if Mr Brown and Mr Palmer reached the view that the two types of check were inter-changeable, then that conclusion will have been reached in the face of the clear advice to the contrary which they had received from the Respondents.

Having said that, we agree with Mr Carey that the failure to carry out Wigan checks is of limited relevance to the "should have known" question because, with the exception of PLC (see paragraph 188(1) below), the Respondents have not established in relation to any of the supplies how a Wigan check would have revealed to the Appellant that there was a connection between the relevant supply and MTIC fraud. Apart from in relation to PLC, the most that can be said about its relevance to the "should have known" question is that it is indicative of the general approach which the Appellant adopted to DD in general. The failure to carry out Wigan checks is of greater relevance to the "actually knew" question, for the reason outlined in paragraph 169(7) above; and

(6) finally, we need to deal with the "Batman and Robin" point – the allegation which was made constantly by Mr Carey and the Appellant's witnesses throughout the hearing to the effect that the Respondents were in some way culpable for the failure of the Appellant to discover that the relevant purchases were connected with MTIC fraud.

We consider that this allegation has absolutely no bearing on the questions which we have to address in this case. It is self-evidently irrelevant in relation to the "knew" question because, if the Appellant knew of the connection with MTIC fraud, there could be no need for the Respondents to inform it of that connection.

As regards the "should have known" question, we should start by saying that, as a general matter, the conduct of the Respondents is not something which we have the jurisdiction to address. Any challenge to that conduct by the Appellant is solely a matter for judicial review. It is perfectly possible that, with the benefit of hindsight, the

Respondents might have handled certain matters a little differently – for example, the Respondents might have extended their verification in relation to claims for VAT input tax recovery on the earlier transactions with PLC and thereby alerted the Appellant to potential problems in deal chains involving PLC. However, as a general matter, whether or not the Respondents could and should have handled matters differently is outside the jurisdiction of this tribunal.

The only sense in which the Respondents' conduct is relevant to the "should have known" question is whether the alleged failure by the Respondents to do more than they did to alert the Appellant to the existence of MTIC fraud in the Appellant's deal chains is somehow relevant to the question of whether the Appellant should have known of that existence. This would be based on the proposition that the Appellant was entitled to rely on the Respondents' failure to alert it to the existence of MTIC fraud in its deal chains as an indication that all was well in those deal chains.

We reject that proposition.

We say that for essentially two reasons:

- (a) first, even if the Respondents could have done more to alert the Appellant to the existence of MTIC fraud in the Appellant's deal chains, there can be no doubt that they did provide significant assistance to the Appellant's representatives in relation to that endeavour. They handed over countless copies of PN 726 and the booklet entitled "How to spot missing trader fraud" – which set out at great length the potential warning signs in any particular case and what the Appellant's representatives should be looking for - and they repeatedly provided helpful information to the Appellant's representatives about what checks they should make and what the warning signs of connection with MTIC fraud might be. The Appellant signally failed to follow the guidance which the Respondents so provided; and
- (b) secondly, and perhaps more importantly, in relation to each purchase, the onus was on the Appellant to act in the manner of a reasonable businessman with ordinary competence in determining whether or not to trade with any particular counterparty – in other words, to carry out the DD in relation to the relevant counterparty which a reasonable businessman would have carried out in the light of the advice and information with which it was being provided by the Respondents and to consider all of the facts and circumstances in relation to the relevant counterparty and transaction in the round. The Appellant's representatives were told repeatedly that they needed to do this and that whether or not to enter into transactions with any particular counterparty was a decision for the Appellant after taking all the relevant facts and circumstances into account. The Appellant's representatives could not reasonably have been under any other impression. Thus, if the Appellant's representatives took the view that the absence of any concerns raised by the Respondents was a substitute for doing their own DD and considering all the facts and circumstances in relation to a particular counterparty and transaction themselves, that was not a view which it was reasonable of them to take.

In the circumstances, we think that the question of whether or not the Respondents could have done more to assist the Appellant in the identification of MTIC fraud in its deal chains is irrelevant to the question of whether the Appellant should have known of that MTIC fraud and we propose to say nothing further about this allegation in the paragraphs which follow.

Purchases from GLS

184. Starting with the 10 transactions in which the Appellant purchased goods from GLS and sold those goods to ACLM, when all the facts and circumstances which Mr Browne knew or would have discovered upon making reasonable enquiries are taken into account, we think that the only reasonable explanation for the circumstances in which the purchases from GLS were made was that those purchases were connected with MTIC fraud.

185. In explaining how we have reached that conclusion, we would start by observing that there were several reasons why Mr Browne, as the representative of the Appellant, should have formed the view that it was likely that the transactions in question were connected with MTIC fraud. For instance:

(1) if he had carried out the appropriate DD in relation to GLS, he would have discovered that:

(a) on 11 September 2013, the company had changed its name from SYE Limited to SS Auto Suppliers Limited, on 17 April 2014, the company had changed its name to UK Energy Saving Limited and, on 29 June 2015, the company had changed its name to GLS;

(b) on 1 June 2015, Mr Suleiman Ali Mohamed and Mr Saleh Mohamed had resigned as directors of the company and Mr Hussein had become a director;

(c) on 22 January 2016, Mr Hussein had ceased to be a director of the company and Mr Rehman had become a director of the company;

(d) on the same date, Mr Hussein had transferred all of his shares in the company to Mr Rehman; and

(e) in its financial year ending 30 April 2015, the company had assets of £391.00 and liabilities of £1,028.00;

(2) there were therefore a number of recent changes of directors, changes in ownership and changes in name – all factors which ought to have led him to make further enquiries into the nature of its supplier and the deal chain. Each of those factors was set out in the Respondents' published material as grounds for suspicion of a connection with MTIC fraud. Moreover, leaving aside for the moment the fact that those factors were mentioned in the Respondents' published material, those factors were, in our view, grounds for suspicion of a connection with MTIC fraud, when viewed cumulatively and not in a piecemeal fashion. Mr Carey quite rightly pointed out in his closing submissions that a company changing its name lawfully, properly and on a publicly-searchable register is not an indicator of VAT fraud but, in our view, this fails to take into account the significance of regular company name changes over a relatively short period and the increased risk profile suggested by changes in the identity of a company's shareholder and directors in addition to the changes in company name. We consider that the combination of factors described in paragraph 184(1) above should have led Mr Browne to have made further enquiries into GLS and the deal chain;

(3) in addition, had Mr Browne obtained the bank statement which he obtained only after doing several of the deals with GLS, and considered the entries on that bank statement along with the details from the annual return referred to in paragraph 76(5) above, and conducted the credit checks that he was advised to carry out by the Respondents, he would surely have had grounds to question the ability of the company to enter into transactions of the magnitude of the transactions into which the Appellant was entering with GLS. It is true that the bank statement related only to one account

and further enquiries might well have revealed the existence of other accounts with more substantial revenue entries but the critical point is that it should have led to those further enquiries. Similarly, if Mr Browne had obtained the financial information in the annual return, as he should have done, it would have been apparent to him that the company was in poor financial health and that should have led to further enquiries as to how the company was able to enter into transactions of the size in question;

(4) another cause for suspecting the credibility of GLS was the fact that Mr Browne had been dealing with Mr Hussein as the representative of OSSL in transactions with the Appellant as recently as December 2015. The fact that, just a few months later, the same man was holding himself out as representing GLS even though the Companies House records which Mr Browne had the means of obtaining showed that he was no longer a shareholder or director of GLS should also have given rise to further questions; and

(5) Mr Browne might also have thought to enquire why it was that, in deal 2, ACLM was willing to pay €230,850.00 in full before any inspection had been carried out on its behalf – the inspection by L&A on 8 April 2016 in that case was expressed to be conducted on behalf of the Appellant and not ACLM.

186. We are inclined to think that the facts and circumstances described above, together with the results of the enquiries which those facts and circumstances would have led the reasonable businessman with ordinary competence to make, would have alerted that reasonable businessman to the conclusion that the transactions in question were highly likely to be connected with MTIC fraud. However, we are not convinced that, on the balance of probabilities, those facts and circumstances and those enquiry results would have led that reasonable businessman to conclude that the only reasonable explanation for the circumstances in which the purchases from GLS were made was that the purchases were connected with MTIC fraud. The accumulation of facts and circumstances would certainly cause the reasonable businessman to have considerable grounds for suspicion but the Respondents have not shown us how those facts and circumstances are sufficient to satisfy the high bar which is represented by the “only reasonable explanation” test on the balance of probabilities.

187. The additional matter which, in our view, does mean that the “only reasonable explanation” test is satisfied on the balance of probabilities is the fact that, on each occasion that the Appellant acquired goods from GLS, there was an understanding between Mr Browne, GLS and ACLM that all of the relevant goods would be sold to ACLM – see paragraphs 51 and 52 above. We have already said in this decision that we reject the evidence of Mr Browne to the effect that he was responsible for identifying, and then initiating the approach to, the customer in the case of each deal chain and that we have concluded that he knew that, on each occasion that he acquired goods from GLS, he needed to sell the goods to ACLM. We think that this fact is critical in considering whether the “only reasonable explanation” test is satisfied in relation to the transactions in question. Even if we are wrong in concluding that the Appellant knew of the connection between each relevant purchase and MTIC fraud, and the Appellant was simply the innocent dupe in an orchestrated fraud, the only reasonable explanation for the fact that, in the case of each purchase from GLS, Mr Browne understood that the Appellant was to on-sell the goods to ACLM was that the relevant purchase was connected with MTIC fraud, even before taking into account any of the other facts and circumstances set out above. And, once those other facts and circumstances are taken into account as well, the case becomes overwhelming.

188. For the above reasons, we consider that the Appellant should have known that the purchases from GLS were connected with MTIC fraud.

Purchases from XGC

189. Turning then to the 3 transactions in which the Appellant purchased goods from XGC and sold those goods to GECX, when all the facts and circumstances which Mr Browne knew or would have discovered upon making reasonable enquiries are taken into account, we think that the only reasonable explanation for the circumstances in which the purchases from XGC were made was that those purchases were connected with MTIC fraud.

190. In explaining how we have reached that conclusion, we would start by observing that there were several reasons why Mr Browne, as the representative of the Appellant, should have formed the view that it was likely that the transactions in question were connected with MTIC fraud. For instance:

(1) if Mr Browne had carried out the appropriate DD in relation to XGC, he would have discovered that Mr Weeks, whom he assumed to be the representative of XGC at the time of the purchases, had ceased to be a director of the company on 15 June 2015 and ceased to be a shareholder of the company on 30 June 2015 and that, at the time of the relevant transactions, Mr Williams was the sole shareholder of the company and Messrs Williams, Edwards and Fadlallah were the sole directors of the company and had only recently been appointed. This should then have led him to ask why it was that Mr Weeks was apparently representing the company and to obtain some further information about Messrs Williams, Edwards and Fadlallah. A recent change in director was one of the matters specifically highlighted in the Respondents' published material as being potentially indicative of a connection with MTIC fraud and, in our view, it should have led Mr Browne to make further enquiries in relation to the company;

(2) if Mr Browne had carried out the appropriate DD in relation to GECX, he would have discovered that Mr Totolis – the person who had completed the account-opening form for GECX on 5 January 2016 – had ceased to be a director of the company on 20 August 2015 and that the sole director at the time of the transactions with GECX was Mr Patel. This should have led him to obtain some further information in relation to Mr Patel. A recent change in director was one of the matters specifically highlighted in the Respondents' published material as being potentially indicative of a connection with MTIC fraud and, in our view, it should have led Mr Browne to make further enquiries in relation to the company; and

(3) if Mr Browne had carried out the appropriate DD in relation to GECX, he would have noticed that the description of the company's activities in the letter of introduction and certificate referred to in paragraph 84(1)(b) above were related to trading in commodities, with a core focus on metals, soft commodities, coal and LPG – all some distance away from dealing in the goods which were the subject of the transactions with GECX. Those descriptions of the activities of GECX in comparison to the transactions in question should have led him to make further enquiries as to why GECX was proposing to enter into the relevant transactions with the Appellant. A difference between the activities specified in registration documents and the activities represented by the transactions in question was specifically mentioned in the Respondents' published material in relation to identifying deal chains connected with MTIC fraud and it ought to have led Mr Browne to enquire why GECX was entering into the transactions.

191. We are inclined to think that the facts and circumstances described above, together with the results of the enquiries which those facts and circumstances would have led the reasonable businessman with ordinary competence to make, would have alerted that reasonable businessman to the conclusion that the transactions in question were highly likely to be connected with MTIC fraud. However, we are not convinced that, on the balance of probabilities, those facts and circumstances and those enquiry results would have led that reasonable businessman to conclude that the only reasonable explanation for the circumstances in which the purchases from XGC were made was that the purchases were connected with MTIC fraud. The accumulation of facts and circumstances would certainly cause the reasonable businessman to have considerable grounds for suspicion but the Respondents have not shown us how those facts and circumstances are sufficient to satisfy the high bar which is represented by the “only reasonable explanation” test on the balance of probabilities.

192. The additional matter which, in our view, does mean that the “only reasonable explanation” test is satisfied on the balance of probabilities is the fact that, on each occasion that the Appellant acquired goods from XGC, there was an understanding between Mr Browne, XGC and GECX that all of the relevant goods would be sold to GECX – see paragraphs 51 and 52 above. We have already said in this decision that we reject the evidence of Mr Browne to the effect that he was responsible for identifying, and then initiating the approach to, the customer in the case of each deal chain and that we have concluded that he knew that, on each occasion that he acquired goods from XGC, he needed to sell the goods to GECX. We think that this fact is critical in considering whether the “only reasonable explanation” test is satisfied in relation to the transactions in question. Even if we are wrong in concluding that the Appellant knew of the connection between each relevant purchase and MTIC fraud, and the Appellant was simply the innocent dupe in an orchestrated fraud, the only reasonable explanation for the fact that, in the case of each purchase from XGC, Mr Browne understood that the Appellant was to on-sell the goods to GECX was that the relevant purchase was connected with MTIC fraud, even before taking into account any of the other facts and circumstances set out above. And, once those other facts and circumstances are taken into account as well, the case becomes overwhelming.

193. For the above reasons, we consider that the Appellant should have known that the purchases from XGC were connected with MTIC fraud.

Purchases from PLC

194. Finally, as regards the 3 transactions in which the Appellant purchased goods from PLC and sold those goods to Inco Mobile, when all the facts and circumstances which Mr Browne knew or would have discovered upon making reasonable enquiries are taken into account, we think that the only reasonable explanation for the circumstances in which the purchases from PLC were made was that those purchases were connected with MTIC fraud.

195. In explaining how we have reached that conclusion, we would start by observing that there were several reasons why Mr Browne, as the representative of the Appellant, should have formed the view that it was likely that the transactions in question were connected with MTIC fraud. For instance:

- (1) if Mr Browne had carried out the appropriate DD in relation to PLC, and, in particular, if he had carried out a Wigan check in relation to PLC as he had been advised by the Respondents to do, he would have discovered that Mr Chhiber, with whom he dealt in relation to the purchases, was not a director of the company and that Mr Degan, whose passport he was given by PLC, had ceased to be a director on 6 November 2013. He would also have discovered that the directors of the company had

changed on 1 January 2016 and that the only director of the company at the time of the relevant purchases was Mr Summam. This should then have led him to make further enquiries in relation to Mr Summam. A recent change in director was one of the matters specifically highlighted in the Respondents' published material as being potentially indicative of a connection with MTIC fraud and it ought to have triggered further enquiries; and

(2) in addition, if Mr Browne had carried out the appropriate DD in relation to PLC, he would have noticed that the letter of introduction was dated 12 November 2010, some three years prior to the Appellant's first starting to deal with PLC, was signed by Mr Degan, who had ceased to be a director of the company on 6 November 2013, and described the company's activities as being "a long standing telecommunications company ... [trading] in mobile phones and accessories" - some distance away from dealing in the goods which were the subject of the relevant transactions with PLC. The same description of the company's activities could be seen in the company's amended VAT registration certificate of 10 July 2012, which referred to the company as carrying on a trade of "retail mobile telephones". Those descriptions of the activities of PLC in comparison to the transactions in question should have led him to make further enquiries as to why PLC was proposing to enter into the relevant transactions with the Appellant. A difference between the activities specified in registration documents and the activities represented by the transactions in question was specifically mentioned in the Respondents' published material in relation to identifying deal chains connected with MTIC fraud and it ought to have led Mr Browne to enquire why PLC was entering into the transactions.

196. We are inclined to think that the facts and circumstances described above, together with the results of the enquiries which those facts and circumstances would have led the reasonable businessman with ordinary competence to make, would have alerted that reasonable businessman to the conclusion that the transactions in question were highly likely to be connected with MTIC fraud. However, we are not convinced that, on the balance of probabilities, those facts and circumstances and those enquiry results would have led that reasonable businessman to conclude that the only reasonable explanation for the circumstances in which the purchases from PLC were made was that the purchases were connected with MTIC fraud. The accumulation of facts and circumstances would certainly cause the reasonable businessman to have considerable grounds for suspicion but the Respondents have not shown us how those facts and circumstances are sufficient to satisfy the high bar which is represented by the "only reasonable explanation" test on the balance of probabilities.

197. The additional matter which, in our view, does mean that the "only reasonable explanation" test is satisfied on the balance of probabilities is the fact that, on each occasion that the Appellant acquired goods from PLC, there was an understanding between Mr Browne, PLC and Inco Mobile that all of the relevant goods would be sold to Inco Mobile – see paragraphs 51 and 52 above. We have already said in this decision that we reject the evidence of Mr Browne to the effect that he was responsible for identifying, and then initiating the approach to, the customer in the case of each deal chain and that we have concluded that he knew that, on each occasion that he acquired goods from PLC, he needed to sell the goods to Inco Mobile. We think that this fact is critical in considering whether the "only reasonable explanation" test is satisfied in relation to the transactions in question. Even if we are wrong in concluding that the Appellant knew of the connection between each relevant purchase and MTIC fraud, and the Appellant was simply the innocent dupe in an orchestrated fraud, the only reasonable explanation for the fact that, in the case of each

purchase from PLC, Mr Browne understood that the Appellant was to on-sell the goods to Inco Mobile was that the relevant purchase was connected with MTIC fraud, even before taking into account any of the other facts and circumstances set out above. And, once those other facts and circumstances are taken into account as well, the case becomes overwhelming.

198. For the above reasons, we consider that the Appellant should have known that the purchases from PLC were connected with MTIC fraud.

DISPOSITION

199. For the reasons set out in paragraphs 169 to 198 above, we have concluded that:

- (1) the Appellant knew that the purchases which are the subject of the appeal were connected with MTIC fraud; and
- (2) if that conclusion is not correct, the Appellant should have known that the purchases which are the subject of the appeal were connected with MTIC fraud.

200. Accordingly, the appeal fails.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

201. 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 Rules. 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.

**TONY BEARE
TRIBUNAL JUDGE**

Release Date: 21st DECEMBER 2022